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COURT OF APPEALS
REPORTS

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253 N.C. APP.

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

BOONE FORD, INC. D/B/A BOONE FORD LINCOLN MERCURY, INC.,
A DELAWARE CORPORATION, PLAINTIFF
V.
IME SCHEDULER, INC., A NEW YORK CORPORATION, DEFENDANT

AND

CASH FOR CRASH, LLC, A NEW JERSEY LIMITED LIABILITY COMPANY, PLAINTIFF
V.
BOONE FORD, INC. D/B/A BOONE FORD LINCOLN MERCURY, INC.,
A DELAWARE CORPORATION, DEFENDANT

No. COA16-750

Filed 18 April 2017

**Trials—motion to consolidate cases—exclusive authority of pre-
siding trial judge**

Judge Hunt erred in a case arising from the unsuccessful sale of a 2013 Ford pickup truck by granting plaintiff Boone Ford’s motion to consolidate cases. Judge Coward, who presided over the trial, had the exclusive authority to consolidate the actions. The order of consolidation was vacated and remanded to the superior court.

Judge DILLON dissenting.

Appeal by defendant IME Scheduler, Inc. and plaintiff Cash for Crash, LLC from judgment entered 1 March 2016 by Judge William H. Coward in Watauga County Superior Court. Heard in the Court of Appeals 25 January 2017.

Miller & Johnson, PLLC, by Nathan A. Miller, for defendant-appellant IME Scheduler, Inc. and plaintiff-appellant Cash for Crash, LLC.

BOONE FORD, INC. v. IME SCHEDULER, INC.

[253 N.C. App. 1 (2017)]

Walker DiVenere Wright, by Anné C. Wright, for appellee Boone Ford, Inc.

ELMORE, Judge.

This appeal involves a challenge to the consolidation of two actions for trial in superior court. Boone Ford, Inc. filed a complaint against IME Scheduler, Inc. alleging several claims arising from the unsuccessful sale of a 2013 Ford SVT Raptor pickup truck. IME Scheduler counter-claimed and its affiliate, Cash for Crash, LLC, filed a separate complaint against Boone Ford after the dealership refused to immediately return a \$206,596.00 wire transfer on suspicion of money laundering.

Upon Boone Ford's motion, Judge Jeff Hunt entered an order consolidating the two cases for trial, which was held at the 1 February 2016 session of the Watauga County Superior Court, Judge William H. Coward presiding. The jury denied all claims raised by IME Scheduler and Cash for Crash and returned a verdict in favor of Boone Ford. IME Scheduler and Cash for Crash appeal, arguing, *inter alia*, that Judge Hunt lacked authority to consolidate the cases. Because that authority is reserved for the judge presiding over the trial, we vacate the order of consolidation and remand to the superior court.

I. Background

In October 2013, IME Scheduler contacted Boone Ford to purchase a 2013 Ford SVT Raptor pickup truck. At the time, Boone Ford did not have the truck in stock. In exchange for a newer model, Boone Ford acquired a 2013 SVT Raptor from a dealership in West Virginia to consummate the sale with IME Scheduler.

As alleged in the pleadings, Boone Ford believed that it was selling the 2013 SVT Raptor it had acquired from West Virginia, which had a VIN ending in -66435 and an 800A options package, for \$49,385.50. On or about 6 November 2013, Boone Ford faxed to IME Scheduler a window sticker of the Raptor and a bill of sale for the same. After receiving the fax, IME Scheduler issued a \$9,000.00 down payment via American Express credit card and, on 12 November 2013, wired the remaining balance of \$40,385.50 to Boone Ford.

A dispute arose two days later when IME Scheduler requested another copy of the window sticker via e-mail. When the sticker described a Raptor 800A, IME Scheduler insisted that Boone Ford had sold the wrong truck. IME Scheduler believed it was purchasing a 2013

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[253 N.C. App. 1 (2017)]

SVT Raptor with a VIN ending in -97953 and an 801A options package for \$49,385.50. It also alleged that Boone Ford had previously faxed a window sticker of the Raptor 801A. Unable to resolve the conflict, IME Scheduler canceled the \$9,000.00 down payment. Boone Ford refused to refund the \$40,385.50 and, sometime later, sold the Raptor 800A to another party.

On 19 February 2014, Boone Ford received an unexpected wire of \$206,596.00 into its account. The wire originated from Cash for Crash. Alfred Glover, the owner of Boone Ford, learned that Cash for Crash was affiliated with IME Scheduler and that the organizations were located in New Jersey and New York, respectively. Concerned that they were trying to launder money through his dealership or involve him in illegal activity, Glover contacted the Boone Police Department, Attorneys General, FBI, CIA, and Department of Homeland Security. Cash for Crash insisted that the wire was a result of human error and demanded the money be returned, but Glover refused to do so until an investigation was complete. Approximately two months later, Glover returned the \$206,596.00 at the direction of the Boone Police Department which had found no connection to money laundering.

Boone Ford filed a complaint against IME Scheduler alleging breach of contract, fraud, negligent misrepresentation, unfair and deceptive trade practices (UDTP), and punitive damages arising out of the failed Raptor transaction. IME Scheduler filed a counterclaim alleging the same claims against Boone Ford. Cash for Crash also filed a complaint against Boone Ford, alleging conversion, UDTP, fraud, and punitive damages arising out of the \$206,596.00 wire transfer.

Upon Boone Ford's motion, Judge Hunt consolidated the cases and they were tried together before Judge Coward in Watauga County Superior Court. The jury found for Boone Ford on its breach of contract, fraud, and UDTP claims against IME Scheduler, awarding \$20,000.00 in compensatory damages and \$50,000.00 in punitive damages. IME Scheduler and Cash for Crash appeal.

II. Discussion

Appellants argue that Judge Hunt erred in granting Boone Ford's motion to consolidate because Judge Coward, who presided over the trial, had the exclusive authority to consolidate the actions.

Rule 42(a) of the North Carolina Rules of Civil Procedure provides the trial court with authority to consolidate pending "actions involving a common question of law or fact." N.C. Gen. Stat. § 1A-1, Rule 42(a)

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(2015). Whether two or more cases should be consolidated for trial is a decision left to the sound discretion of the judge who will preside over the trial. *Pickard v. Burlington Belt Corp.*, 2 N.C. App. 97, 103, 162 S.E.2d 601, 604–05 (1968). “[A] consolidation cannot be imposed upon the judge presiding at the trial by the preliminary [o]rder of another trial judge.” *Id.*

In *Oxendine v. Catawba County Department of Social Services*, 303 N.C. 699, 703–04, 281 S.E.2d 370, 373 (1981), the North Carolina Supreme Court affirmed our decision to vacate a consolidation order entered by a judge who was not scheduled to preside over the trial. The plaintiffs had filed a complaint in district court seeking permanent custody of their foster child. *Id.* at 701, 281 S.E.2d at 372. Several weeks later, they filed a petition in superior court for the adoption of the same child. *Id.* Upon the defendant’s motion, Judge Forrest A. Ferrell entered an order consolidating the custody action and adoption proceedings for a joint trial in superior court. *Id.* at 701–02, 281 S.E.2d at 372. The plaintiffs petitioned for writ of certiorari before the trial date, arguing that Judge Ferrell erred in granting the defendant’s motion to consolidate. *Id.* at 702, 281 S.E.2d at 372.

Although the custody action and petition for adoption involved “related issues of fact and law,” the North Carolina Supreme Court held that, procedurally, the consolidation was in error: “[T]he discretionary ruling of one superior court judge to consolidate claims for trial may not be forced upon another superior court judge who is to preside at that trial.” *Id.* at 703–04, 281 S.E.2d at 373. Judge Ferrell had entered the consolidation order “out of term and out of session.” *Id.* at 704, 281 S.E.2d at 373. And because “[t]here was no indication that he was scheduled to preside at the session of court during which he set the consolidated cases to be presented for trial,” the Court concluded that “Judge Ferrell’s order of consolidation must be vacated.” *Id.*

At the hearing on Boone Ford’s motion to consolidate, appellants urged Judge Hunt that, pursuant to *Oxendine*, he did not have the authority to consolidate the two actions. That authority, appellants argued, was reserved for the judge presiding over the trial. Judge Hunt acknowledged that he did not know which trial judge would be assigned to the cases but nevertheless entered an order granting Boone Ford’s motion to consolidate. The cases were ultimately tried together at the 1 February 2016 session of the Watauga County Superior Court before Judge Coward. Because Judge Hunt was not the judge who presided over the trial, he did not have authority to consolidate the actions.

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Boone Ford nevertheless contends that appellants waived their right to object to the consolidation, directing our attention to the following stipulations in the signed pretrial order:

1. It is stipulated that all parties are properly before the Court, and that the Court has jurisdiction over the parties and the subject matter.
2. It is stipulated that all parties have been correctly designated and there is no issue as to misjoinder or non-joinder of parties.

Boone Ford argues that these stipulations are judicial admissions, the effect of which is to remove any controversy regarding the propriety of the consolidation.

We see no language within the pretrial stipulations that indicates a “definite and certain” assent to a consolidation of the claims, and we are not convinced that appellants intended for the stipulations to operate as a waiver to their challenge raised first in the trial court and now on appeal. *See State v. Hurt*, 361 N.C. 325, 329, 643 S.E.2d 915, 918 (2007) (“A stipulation must be ‘definite and certain in order to afford a basis for judicial decision.’” (citations omitted)). If Judge Hunt lacked authority to consolidate the actions, moreover, any stipulation by the parties to the contrary would be “invalid and ineffective.” *See State v. Prevette*, 39 N.C. App. 470, 472, 250 S.E.2d 682, 683 (1979) (“Stipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts, either trial or appellate.” (citations omitted)).

In the alternative, Boone Ford maintains that even if Judge Hunt improperly entered the order of consolidation, the judicial action does not constitute reversible error. Relying on *In re Moore*, 11 N.C. App. 320, 181 S.E.2d 118 (1971), Boone Ford asserts that “when the consolidation of actions for the purpose of trial is assigned as error, the appellant must show injury or prejudice arising therefrom.” *Id.* at 322, 181 S.E.2d at 120 (citations omitted). And in this case, Boone Ford contends, appellants have failed to demonstrate any resulting prejudice from the consolidation.

As with the other cases cited by Boone Ford, *In re Moore* involved a slightly different issue than the one before us. Generally, where an appellant challenges the decision to consolidate actions for trial, the appellant must show that the trial court abused its discretion and the appellant was prejudiced therefrom. *Barrier Geotechnical Contractors, Inc. v. Radford Quarries of Boone, Inc.*, 184 N.C. App. 741, 744, 646

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[253 N.C. App. 1 (2017)]

S.E.2d 840, 841–42 (2007); *Markham v. Nationwide Mut. Fire Ins. Co.*, 125 N.C. App. 443, 448, 481 S.E.2d 349, 353 (1997); *Greenville City Bd. of Educ. v. Evans*, 21 N.C. App. 493, 495–96, 204 S.E.2d 899, 901 (1974); *In re Moore*, 11 N.C. App. at 322, 181 S.E.2d at 120. The issue in this case, however, is not whether consolidation was proper in light of the criteria set forth under Rule 42(a) but whether Judge Hunt, who was not assigned to preside over the trial, had *authority* to consolidate the two actions. See *Oxendine*, 303 N.C. at 703, 281 S.E.2d at 373 (concluding that consolidation order was “procedurally in error” even though the two actions involved “related issues of fact and law, and therefore could be properly consolidated under Rule 42(a)”). As *Oxendine* indicates, the latter does not demand an inquiry into prejudice. *Id.* at 704, 281 S.E.2d at 373 (vacating consolidation order without any requisite showing of prejudice); see also *Maness v. Bullins*, 27 N.C. App. 214, 217, 218 S.E.2d 507, 509–10 (1975) (reversing, without discussing prejudice, order granting separate trials on claims first tried jointly as corollary to rule that “consolidation of claims cannot be thrust upon a presiding judge by edict of another judge”). Rather, “[w]hen the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to arrest judgment or vacate any order entered without authority.” *Ferguson v. Ferguson*, 238 N.C. App. 257, 267, 768 S.E.2d 30, 37 (2014) (quoting *State v. Felmet*, 302 N.C. 173, 176, 273 S.E.2d 708, 711 (1981)).

III. Conclusion

Absent the requisite authority, Judge Hunt erred in consolidating the cases for trial. We vacate the consolidation order and remand the cases to superior court. Our holding and disposition render moot the other issues raised on appeal.

VACATED AND REMANDED.

Judge ZACHARY concurs.

Judge DILLON dissents by separate opinion.

DILLON, Judge, dissenting.

I respectfully dissent.

This appeal involves two pending civil actions. Boone Ford, who is a party to both actions, moved to consolidate the two actions for trial.

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Boone Ford's motion was granted by Judge Hunt. Sometime later, the "consolidated" matter came on for trial before Judge Coward. None of the parties asked Judge Coward to sever the matter. A jury was empaneled and returned verdicts in favor of Boone Ford.

I agree with the majority and with the appellants that Judge Hunt's consolidation order had no binding effect on Judge Coward. Thus, it was within Judge Coward's discretion whether to sever the matter into two trials, notwithstanding Judge Hunt's prior order.

I disagree, however, that the appellants are entitled to have the jury verdicts set aside and the judgments vacated. When the matters came before Judge Coward for the "consolidated" trial, no party made any motion to sever. Had the appellants wanted the matter severed, they could have simply made a motion before Judge Coward requesting that the trial judge enter an order to do so. He had the authority, since Judge Hunt's order was reviewable by the judge presiding at trial. However, the appellants did not make a severance motion. Rather, *they stipulated to Judge Coward's jurisdiction* and proceeded with the trial. They picked a jury. The jury returned a verdict that the appellants did not like. There was no reversible error at trial. Therefore, I conclude that the appellants are not entitled to a new trial based on Judge Hunt's pre-trial consolidation order, which they failed to ask Judge Coward to revisit. To allow such relief would allow appellants two bites at the proverbial apple.

Our Supreme Court has oft stated that "one superior court judge ordinarily may not overrule a prior judgment of another superior judge in the same case on the same issue." *State v. Duvall*, 304 N.C. 557, 561, 284 S.E.2d 495, 498 (1981). Our Supreme Court has held that "[t]his rule does not apply, however, to *interlocutory* orders given during the progress of an action which affect the procedure and conduct of the trial." *State v. Stokes*, 308 N.C. 634, 642, 304 S.E.2d 184, 189 (1983). Relevant to the present appeal, our Supreme Court has held that "a pre-trial ruling by a superior court judge consolidating claims for trial was not binding on the superior court judge who tried the case." *Id.* at 642, 304 S.E.2d at 190 (citing *Oxendine v. Dept. of Social Services*, 303 N.C. 699, 281 S.E.2d 370 (1981)).

Based on *Oxendine*, as the majority and the appellants stress, Judge Hunt's consolidation order in this matter had no binding effect on Judge Coward. However, I do not believe that *Oxendine* compels that we set aside the jury verdicts, vacate the judgments, and remand the matters for separate trials. In *Oxendine*, the posture of the case was totally different. No trial had yet occurred when the appeal was taken.

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[253 N.C. App. 8 (2017)]

Rather, in *Oxendine*, a judge's consolidation order was appealed immediately. The Supreme Court vacated the consolidated order, holding that the order had no effect on the ability of the judge who would preside at trial to exercise discretion as to whether to consolidate the matters.

Here, however, the appellants did *not* immediately appeal Judge Hunt's consolidation order. And when the matter came on for trial, they *never* made any motion asking Judge Coward to sever the matter, though it was totally within Judge Coward's authority to consider such a motion, notwithstanding Judge Hunt's prior order. Rather, they rolled the dice and proceeded with the consolidated trial, *even stipulating that the matters were properly before Judge Coward's court*. They are only now complaining after the jury verdict did not go their way. To allow them a new trial would be totally unfair to Boone Ford.

I conclude that by failing to ask Judge Coward to sever the matter, the appellants failed to preserve their argument concerning Judge Hunt's order. I also conclude that there was no reversible error with respect to appellants' other arguments on appeal. Accordingly, my vote is no error.

SCOTTY CHASTAIN, PLAINTIFF

v.

JAMES D. ARNDT *a/k/a* JIMMY ARNDT, IN HIS OFFICIAL AND INDIVIDUAL CAPACITY, GASTON COLLEGE AND GASTON COLLEGE BOARD OF TRUSTEES, DEFENDANTS

No. COA16-1151

Filed 18 April 2017

1. Jurisdiction—action against a law enforcement instructor—official capacity

A claim against a Basic Law Enforcement Training firearms instructor in his official capacity was required to be asserted in the Industrial Commission under the Tort Claims Act. Such actions are within the exclusive and original jurisdiction of the Industrial Commission, not the Superior Court. The purchase of liability insurance by the community college at which the course was held had no bearing on the exclusive jurisdiction of the Industrial Commission.

2. Immunity—law enforcement training officer—public official

A community college Basic Law Enforcement Training firearms instructor was sufficiently exercising the sovereign's power and his

CHASTAIN v. ARNDT

[253 N.C. App. 8 (2017)]

own experience, judgment, and discretion to be a public official in an action arising from an accident during firearms training.

3. Immunity—piercing the veil—firearms training accident—malice—constructive intent

In an action against a community college Basic Law Enforcement Training (BLET) firearms instructor that arose from an accident during firearms training, plaintiff's pleadings were sufficient to pierce defendant's public official immunity to allow suit to proceed against him in his individual capacity. Plaintiff alleged that that defendant, an experienced law enforcement officer and a certified BLET firearms instructor, pulled the trigger of a loaded deadly weapon while it was pointed at a student's abdomen.

Appeal by defendant from order entered 1 September 2016 by Judge Timothy S. Kincaid in Gaston County Superior Court. Heard in the Court of Appeals 22 March 2017.

Roberts Law Firm, P.A., by Scott W. Roberts, for plaintiff-appellee.

Dean and Gibson, PLLC, by Jeremy S. Foster, for defendant-appellant Arndt.

TYSON, Judge.

James D. Arndt a/k/a Jimmy Arndt ("Defendant") appeals from the trial court's denial of his motion for summary judgment. We affirm in part, reverse in part, and remand.

I. Background

Gaston County Sheriff's Deputy Scotty Chastain ("Plaintiff") was enrolled in the Basic Law Enforcement Training ("BLET") course at Gaston College, a two-year community college operating under the North Carolina Board of Community Colleges. Gaston College provides BLET to Gaston County law enforcement officers. Defendant, a certified Specialized Firearms Instructor and an active Gastonia police officer, was employed by Gaston College to instruct the firearms portion of BLET.

On 22 March 2013, Plaintiff's BLET class was training on the firing range located at Gaston College. At the conclusion of the shooting portion of the class, the students were instructed to return to the building to break down and clean their firearms. Plaintiff alleges all of the BLET instructors present, including Defendant, failed to ensure all of

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the students' weapons had been unloaded and cleared of ammunition before leaving the shooting range.

Another BLET student in Plaintiff's class failed to empty her weapon prior to returning to the building and experienced difficulty in breaking down her weapon. Defendant assisted the student to break down her weapon. Plaintiff alleges Defendant pulled the trigger of the firearm while assisting the other student to break down her weapon. The firearm discharged. Plaintiff was wounded by the discharge, but survived a bullet wound to his abdomen.

On 21 January 2016, Plaintiff filed suit against Defendant, in both his official and individual capacities, Gaston College, and Gaston College Board of Trustees ("the Board of Trustees") in superior court. Plaintiff alleged negligence, gross negligence, and negligent infliction of emotional distress. He alleged Gaston College and the Board of Trustees were negligent for torts committed by Defendant under the doctrine of *respondet superior*.

Plaintiff has dismissed all his claims against Gaston College and the Board of Trustees, with prejudice. Both parties assert in their briefs that Plaintiff brought those dismissed claims before the Industrial Commission under the Tort Claims Act, and the action in the Industrial Commission has been stayed pending resolution of the superior court action.

Defendant filed a Rule 12 motion to dismiss Plaintiff's claims. Defendant asserts the superior court lacks personal jurisdiction (Rule 12(b)(1)) and subject matter jurisdiction (Rule 12(b)(2)), and Plaintiff also fails to state a claim under Rule 12(b)(6), because Plaintiff's claims must be brought before the North Carolina Industrial Commission under the Tort Claims Act. Defendant also asserts Plaintiff improperly alleges claims against him in his individual capacity, and all Defendants are entitled to sovereign immunity. On 26 August 2016, the trial court denied Defendant's motion. Defendant appeals.

II. Appellate Jurisdiction

"Typically, the denial of a motion to dismiss is not immediately appealable to this Court because it is interlocutory in nature." *Reid v. Cole*, 187 N.C. App. 261, 263, 652 S.E.2d 718, 719 (2007) (citation omitted). "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Britt v. Cusick*, 231 N.C. App. 528, 530-31, 753 S.E.2d 351,

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353-54 (2014) (quoting *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950)).

Defendant contends, however, that this appeal is properly before the Court because his motion to dismiss is grounded on sovereign immunity and affects a substantial right that would be lost in the absence of an immediate appeal. *See* N.C. Gen. Stat. § 1-277(a) (2015) (authorizing interlocutory appeal of order that “affects a substantial right”); N.C. Gen. Stat. § 7A-27(b)(3) (2015) (providing for an appeal of right from an interlocutory order which “affects a substantial right”).

“This Court has held that a denial of a Rule 12(b)(6) motion to dismiss on the basis of sovereign immunity affects a substantial right and is immediately appealable.” *Green v. Kearney*, 203 N.C. App. 260, 266, 690 S.E.2d 755, 761 (2010) (citation omitted), *aff’d per curiam*, 367 N.C. 113, 748 S.E.2d 143 (2013). Furthermore, “this Court has held that an appeal of a motion to dismiss based on sovereign immunity presents a question of personal jurisdiction rather than subject matter jurisdiction, and is therefore immediately appealable.” *Data Gen. Corp. v. Cty. of Durham*, 143 N.C. App. 97, 100, 545 S.E.2d 243, 245-46 (2001) (citations omitted). Also, rulings “denying dispositive motions based on [a] public official’s immunity affect a substantial right and are immediately appealable.” *Summey v. Barker*, 142 N.C. App. 688, 689, 544 S.E.2d 262, 264 (2001) (citation omitted), *aff’d in part and modified in part*, 357 N.C. 492, 586 S.E.2d 247 (2003). This appeal is properly before us.

III. Standard of Review

A. Ruling on 12(b)(6)

This Court reviews the trial court’s denial of a motion to dismiss *de novo*. *White v. Trew*, 366 N.C. 360, 363, 736 S.E.2d 166, 168 (2013). “When applying *de novo* review, we consider the case anew and may freely substitute our own ruling for the lower court’s decision.” *Lanvale Props., LLC v. Cty. of Cabarrus*, 366 N.C. 142, 149, 731 S.E.2d 800, 806-07 (2012) (citation and quotation marks omitted).

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) (citation omitted). “The complaint must be liberally construed, and the

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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 (2016) (citation omitted).

B. Ruling on 12(b)(2)

“[W]hen neither party submits evidence [in support or opposition of the 12(b)(2) motion], the allegations of the complaint must disclose jurisdiction although the particulars of jurisdiction need not be alleged.” *Banc of Am. Secs. LLC v. Evergreen Int’l Aviation, Inc.*, 169 N.C. App. 690, 693, 611 S.E.2d 179, 182 (2005) (citation and quotation marks omitted). “The trial judge must decide whether the complaint contains allegations that, if taken as true, set forth a sufficient basis for the court’s exercise of personal jurisdiction.” *Id.*

“When this Court reviews a decision as to personal jurisdiction, it considers only whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the trial court.” *Id.* at 694, 611 S.E.2d at 183 (citation and quotation marks omitted).

IV. Official Capacity Claims against Defendant

[1] Plaintiff sued Defendant in both his individual and official capacities. Defendant argues he is entitled to sovereign immunity on any claim asserted against him in his “official capacity,” and Plaintiff’s claim must be asserted in the Industrial Commission under the Tort Claims Act. We agree.

“It is a fundamental rule of law that the State is immune from suit unless it expressly consents to be sued.” *Zimmer v. North Carolina Dep’t of Transp.*, 87 N.C. App. 132, 134, 360 S.E.2d 115, 117 (1987) (citation omitted). “By enactment of the Tort Claims Act, N.C.G.S. § 143-291, *et seq.*, the General Assembly partially waived the sovereign immunity of the State to the extent that it consented that the State could be sued for injuries proximately caused by the negligence of a State employee acting within the scope of his employment.” *Id.*

“The State may be sued in tort only as authorized in the Tort Claims Act.” *Guthrie v. State Ports Auth.*, 307 N.C. 522, 535, 299 S.E.2d 618, 625 (1983) (citation omitted). The Tort Claims Act provides “[t]he North Carolina Industrial Commission is . . . a court for the purpose of hearing and passing upon tort claims against the State Board of Education, the Board of Transportation, and all other departments, institutions

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and agencies of the State.” N.C. Gen. Stat. § 143-291(a) (2015). If the Commission finds there was actionable “negligence on the part of an officer, employee, involuntary servant or agent of the State while acting within the scope of his . . . employment,” the Commission shall determine the amount of damages the claimant is to be paid. *Id.* The statute specifically states “[c]ommunity colleges and technical colleges shall be deemed State agencies for purposes of this Article.” *Id.*

“Because an action in tort against the State and its departments, institutions, and agencies is within the exclusive and original jurisdiction of the Industrial Commission, a tort action against the State is not within the jurisdiction of the Superior Court.” *Guthrie*, 307 N.C. at 539-40, 299 S.E.2d at 628. It is undisputed that the North Carolina Industrial Commission has exclusive jurisdiction over Plaintiff’s claims against Gaston College and its Board of Trustees. *See id.*

The trial court’s order does not refer to the official or individual capacity of Defendant. “A suit against a defendant in his individual capacity means that the plaintiff seeks recovery from the defendant directly; a suit against a defendant in his official capacity means that the plaintiff seeks recovery from the entity of which the public servant defendant is an agent.” *Meyer v. Walls*, 347 N.C. 97, 110, 489 S.E.2d 880, 887 (1997) (citing Anita R. Brown-Graham & Jeffrey S. Koeze, *Immunity from Personal Liability under State Law for Public Officials and Employees: An Update*, Loc. Gov’t L. Bull. 67, at 7 (Inst. of Gov’t, Univ. of N.C. at Chapel Hill), Apr. 1995). A suit in an official capacity is “another way of pleading an action against the governmental entity.” *Mullis v. Sechrest*, 347 N.C. 548, 554-55, 495 S.E.2d 721, 725 (1998).

“[I]n a suit against a public employee in his official capacity, the law entitles the employee to the same protection as that of the entity.” *Reid v. Town of Madison*, 137 N.C. App. 168, 171, 527 S.E.2d 87, 89 (2000) (citing *Warren v. Guilford Cty.*, 129 N.C. App. 836, 838, 500 S.E.2d 470, 472, *disc. review denied*, 349 N.C. 241, 516 S.E.2d 610 (1998)). “*Official capacity* is not synonymous with *official duties*; the phrase is a legal term of art with a narrow meaning – the suit is in effect one against the entity.” *Meyer*, 347 N.C. at 111, 489 S.E.2d at 888 (citation and internal quotation marks omitted) (emphases supplied).

Plaintiff’s complaint alleges Gaston College and its Board of Trustees waived sovereign immunity by the purchase of liability insurance. Plaintiff argues his claim against Defendant in his official capacity is properly before the superior court pursuant to this waiver of sovereign immunity.

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The Tort Claims Act provides:

(b) If a State agency, otherwise authorized to purchase insurance, purchases a policy of commercial liability insurance providing coverage in an amount at least equal to the limits of the State Tort Claims Act, such insurance coverage shall be in lieu of the State's obligation for payment under this Article.

N.C. Gen. Stat. § 143-291(b) (2015). N.C. Gen. Stat. § 115D-24 permits community colleges to waive sovereign immunity by the purchase of liability insurance. The statute provides:

The board of trustees of any [community college], by obtaining liability insurance as provided in G.S. 115D-53, is authorized to waive its governmental immunity from liability for . . . injury of person . . . by the negligence or tort of any agent or employee of the board of trustees Governmental immunity shall be deemed to have been waived by the act of obtaining liability insurance, but only to the extent that the board is indemnified for the negligence or torts of its agents and employees[.]

N.C. Gen. Stat. § 115D-24 (2015).

The interplay between the Tort Claims Act and statutes permitting state agencies to waive immunity was examined by this Court in *Wood v. N.C. State Univ.*, 147 N.C. App. 336, 556 S.E.2d 38 (2001), *disc. review denied*, 355 N.C. 292, 561 S.E.2d 887 (2002). The Court determined, “the phrase ‘such insurance coverage shall be in lieu of the State’s obligation for payment under this Article,’ N.C.G.S. § 143-291(b), is more consistent with a designation of the source of payment than with a designation of the forum for adjudication.” *Id.* at 343, 556 S.E. 2d at 43. Although various statutes, such as N.C. Gen. Stat. § 115D-24 at issue here, permit State agencies to waive immunity through the purchase of insurance, it is settled that “jurisdiction over tort claims against the State and its agencies remains exclusively with the Industrial Commission.” *Id.*

When sued in his official capacity, Defendant is entitled to the same sovereign immunity as Gaston College and its governing body. *Id.* A claim against Defendant in his official capacity is a claim against the entity and “is subject to the same jurisdictional rulings” as the suit against Gaston College and its Board of Trustees. *Meyer*, 347 N.C. at 111, 489 S.E.2d at 888. The allegation that Gaston College purchased liability insurance and waived sovereign immunity of Defendant in his official

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capacity has no bearing on the exclusive jurisdiction of the Industrial Commission to adjudicate Plaintiff's claims against Gaston College, the Board of Trustees, and against Defendant in his official capacity. The trial court's denial of Defendant's motion to dismiss the suit against him in his official capacity is error and is reversed.

V. Individual Capacity Claims against Defendant and Defendant's
assertion of Public Official Immunity

[2] Defendant argues the trial court erred by denying his motion to dismiss, because he is a public official and immune to suit, and Plaintiff's allegations were insufficient to pierce his immunity. We agree in part.

A. Individual Liability

Plaintiff may bring a State Tort Claims action against Gaston College before the Industrial Commission, and also bring a separate common law action in the superior court against Defendant individually. Our Supreme Court has explained:

The only claim authorized by the Tort Claims Act is a claim against the State agency. True, recovery, if any, must be based upon the actionable negligence of an employee of such agency while acting within the scope of his employment. However, recovery, if any, against the alleged negligent employee must be by common law action. Plaintiffs could obtain no relief against [the defendant] under the Tort Claims Act.

Wirth v. Bracey, 258 N.C. 505, 507-08, 128 S.E.2d 810, 813 (1963).

[T]he fact that the Tort Claims Act provides for subject matter jurisdiction in the Industrial Commission over a negligence claim against the State does not preclude a claim against defendants in Superior Court. A plaintiff may maintain both a suit against a state agency in the Industrial Commission under the Tort Claims Act and a suit against the negligent agent or employee in the General Court of Justice for common-law negligence.

Meyer, 347 N.C. at 108, 489 S.E.2d at 886. "Of course, [P]laintiff[] may not recover from all sources an amount in excess of the damages [he] sustained." *Wirth*, 258 N.C. at 509, 128 S.E.2d at 814; *see also Meyer*, 347 N.C. at 108, 489 S.E.2d at 886 ("Although a plaintiff may not receive a double recovery, he may seek a judgment against the agent or the principal or both.").

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B. Public Official versus Public Employee

Defendant asserts he was acting in the capacity of a public official at the time Plaintiff's injury occurred and is immune from suit. "The doctrine of public official immunity is a derivative form of governmental immunity." *Hart v. Brienza*, __ N.C. App. __, __, 784 S.E.2d 211, 215 (2016) (citation and internal quotation marks omitted). "[A] public official, engaged in the performance of governmental duties involving the exercise of judgment and discretion, may not be held personally liable for mere negligence in respect thereto. However, a public employee may be held individually liable." *Isenhour v. Hutto*, 350 N.C. 601, 609-10, 517 S.E.2d 121, 127 (1999) (citation and quotation marks omitted).

In distinguishing between a public official and a public employee, our courts have held that (1) a public office is a position created by the constitution or statutes; (2) a public official exercises a portion of the sovereign power; and (3) a public official exercises discretion, while public employees perform ministerial duties. Additionally, an officer is generally required to take an oath of office while an agent or employee is not required to do so.

Fraleay v. Griffin, 217 N.C. App. 624, 627, 720 S.E.2d 694, 696 (2011) (citation, quotation marks, and brackets omitted).

Plaintiff's complaint alleges Defendant is a "sergeant with the City of Gastonia Police Department" who was "employed by [Gaston College] as a basic law enforcement trainer." It is well settled that police officers are public officials. *Mills v. Duke Univ.*, 234 N.C. App. 380, 384, 759 S.E.2d 341, 344 (2014).

BLET instructors are not required to be either active duty or certified police officers. Citizens may also serve as BLET instructors, if they have acquired four years of practical experience as an "administrator or specialist in a field directly related to the criminal justice system." 12 N.C.A.C. 09B. 0302. While Defendant was employed as an active duty police officer for the City of Gastonia, he was clearly acting in the capacity of a BLET instructor, and was employed and compensated by Gaston College, when the incident occurred. We are guided by the factors set forth in *Fraleay*, 217 N.C. App. at 627, 720 S.E.2d at 696, *supra*, to determine whether a BLET instructor is a public official or a public employee.

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1. Position Created by Statute and the Exercise of the Sovereign's Power

Defendant first contends that the position of BLET instructor is created by statute and is regulated by the State. “This Court has noted that cases which have recognized the existence of a public officer did so when either the officer’s position had ‘a clear statutory basis’ or the officer had been ‘delegated a statutory duty by a person or organization created by statute.’” *Fraleley*, 217 N.C. App. at 627, 720 S.E.2d at 696 (quoting *Farrell v. Transylvania Cty. Bd. of Educ.*, 199 N.C. App. 173, 177-79, 682 S.E.2d 224, 228-29 (2009)).

“It is in the public interest that . . . education and training be made available to persons who seek to become criminal justice officers.” N.C. Gen. Stat. § 17C-1 (2015). Chapter 17C of our General Statutes establishes the North Carolina Criminal Justice Education and Training Standards Commission (“the Commission”). The Commission has the power to “[e]stablish minimum educational and training standards that must be met in order to qualify for entry level employment and retention as a criminal justice officer[.]” N.C. Gen. Stat. § 17C-6(a)(2) (2015).

The Commission also has the authority to “[e]stablish minimum standards for the certification of criminal justice training schools and programs or courses of instruction that are required by [Chapter 17C],” and “[e]stablish minimum standards and levels of education and experience for all criminal justice instructors[.]” N.C. Gen. Stat. § 17C-6(a)(4) and (a)(6). The Commission may “[c]ertify and recertify, suspend, revoke, or deny . . . criminal justice instructors and school directors who participate in programs or courses of instruction that are required by [Chapter 17C].” N.C. Gen. Stat. § 17C-6(a)(7).

The North Carolina Criminal Justice Education and Training System is statutorily created under the Commission, and is “a cooperative arrangement among criminal justice agencies, both State and local, and criminal justice education and training schools, both public and private, to provide education and training to the officers and employees of the criminal justice agencies of the State of North Carolina and its local governments.” N.C. Gen. Stat. § 17C-8 (2015). These statutes demonstrate the General Assembly’s determination and directive that “the administration of criminal justice is of statewide concern, and that proper administration is important to the health, safety and welfare of the people of the State and is of such nature as to require education and training of a professional nature” for law enforcement officers. N.C. Gen. Stat. § 17C-1. We find Defendant, in his role as a BLET firearms instructor,

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was “delegated a statutory duty by a person or organization created by statute.” *Fraleley*, 217 N.C. App. at 627, 720 S.E.2d at 696.

“An essential difference between a public office and mere employment is the fact that the duties of the incumbent of an office shall involve the exercise of some portion of the sovereign power.” *State v. Hord*, 264 N.C. 149, 155, 141 S.E.2d 241, 245 (1965) (citation omitted). The State possesses both the power and obligation to train, educate, regulate, and maintain all North Carolina law enforcement officers. We hold that Defendant was engaged in the “exercise of some portion of the sovereign power” in training officers to properly discharge their duties and to administer criminal justice. *Id.*

2. Exercise of Discretion

Our Supreme Court has explained that “[d]iscretionary acts are those requiring personal deliberation, decision and judgment. Ministerial duties, on the other hand, are absolute and involve merely execution of a specific duty arising from fixed and designated facts.” *Isenhour*, 350 N.C. at 610, 517 S.E.2d at 127 (internal quotations and citations omitted). In *Baker v. Smith*, 224 N.C. App 432, 737 S.E.2d 144 (2012), this Court held an assistant jailer exercised sufficient discretion for public official immunity to apply. This Court explained, “we do not consider just one duty or one aspect of the assistant jailer’s duties in deciding whether she exercises discretion. Rather, we must consider her duties as a whole.” *Id.* at 431, 737 S.E.2d at 150.

Here, Defendant was tasked with educating and instructing law enforcement trainees in the proper use of firearms. The trainees were permitted to handle, load, fire, unload, breakdown and clean their weapons in close proximity to each other. Proper firearm training and safety is a serious undertaking and encompasses severe risks and hazards, as here. We hold Defendant’s position as a public community college BLET instructor involved sufficient exercise of the sovereign’s power and the exercise of his own experience, judgment and discretion to consider Defendant to be a public official.

C. Allegations Sufficient to Pierce Immunity

[3] Defendant argues Plaintiff failed to plead allegations sufficient to pierce Defendant’s public official immunity to allow suit to proceed against him in his individual capacity. We disagree.

Plaintiff’s complaint alleges Defendant failed to ensure all of the BLET trainees’ weapons were unloaded before they left the firing range.

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When another student in the class with Plaintiff experienced trouble in breaking down her weapon, Defendant took the weapon from her and began to manipulate its moving parts. Defendant pulled the trigger while the weapon was pointed at Plaintiff's abdomen. The still loaded weapon discharged and Plaintiff was shot at point blank range. Plaintiff alleges Defendant's actions amounted to gross negligence and willful and wanton conduct.

"[A] public official is immune from suit unless the challenged action was (1) outside the scope of official authority, (2) done with malice, or (3) corrupt." *Wilcox v. City of Asheville*, 222 N.C. App. 285, 288, 730 S.E.2d 226, 230 (2012).

A defendant acts with malice when he wantonly does that which a man of reasonable intelligence would know to be contrary to his duty and which he intends to be prejudicial or injurious to another. Thus, elementally, a malicious act is an act (1) done wantonly, (2) contrary to the actor's duty, and (3) intended to be injurious to another.

Id. at 289, 730 S.E.2d at 230.

"[T]he intention to inflict injury may be constructive as well as actual' and . . . constructive intent to injure exists where the actor's conduct 'is so reckless or so manifestly indifferent to the consequences, where the safety of life or limb is involved, as to justify a finding of [willfulness] and wantonness equivalent in spirit to an actual intent.'" *Id.* at 289, 730 S.E.2d at 231 (quoting *Foster v. Hyman*, 197 N.C. 189, 192, 148 S.E. 36, 38 (1929)).

"[A] showing of mere reckless indifference is insufficient, and a plaintiff seeking to prove malice based on constructive intent to injure must show that the level of recklessness of the officer's action was so great as to warrant a finding equivalent in spirit to actual intent." *Id.* at 292, 730 S.E.2d at 230. Plaintiff's allegation that Defendant, an experienced law enforcement officer and a certified BLET firearms instructor, pulled the trigger of a loaded deadly weapon while it was pointed at a student's abdomen, is sufficient to withstand Defendant's Rule 12(b)(6) motion to dismiss under this test. *Id.*

VI. Conclusion

When sued in his official capacity, Defendant is entitled to the same sovereign immunity as Gaston College and its Board of Trustees. The North Carolina Industrial Commission possesses exclusive personal

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jurisdiction over the claim against Defendant in his official capacity. The trial court erred to the extent it denied Defendant's motion to dismiss the suit against him in his official capacity.

The Defendant meets the criteria for a public official, as opposed to a public employee, which would ordinarily entitle him to immunity from a negligence suit. However, liberally construing Plaintiff's allegations on the face of the complaint as we are bound to do on a motion to dismiss, we determine Plaintiff's complaint sufficiently alleges facts to pierce Defendant's public official immunity. The trial court did not err by denying Defendant's Rule 12(b)(6) motion to dismiss Plaintiff's claims against Defendant in his individual capacity. The trial court's order is affirmed in part, reversed in part, and is remanded to the trial court for further proceedings consistent with this opinion. *It is so ordered.*

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judges ELMORE and DIETZ concur.

DEPARTMENT OF TRANSPORTATION, PLAINTIFF

v.

JOSEPH P. RIDDLE, III, AND WIFE, TRINA T. RIDDLE, DEFENDANTS

No. COA16-445

Filed 18 April 2017

1. Appeal and Error—interlocutory orders and appeals—substantial right—pretrial order—partial taking—land affected by taking

An appeal from an interlocutory pretrial order involving land affected by a partial taking affected a substantial right and was immediately appealable.

2. Condemnation—partial taking—entire tract—unity of use

Although the trial court did not err in a partial taking case by concluding that several lots were not part of the "entire tract," it erred by concluding that another lot was part of the "entire tract." The portions of two other lots were not reasonably or substantially necessary to defendant landowners' ability to use and enjoy any of the other lots.

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Appeal by Defendants and cross-appeal by Plaintiff from order entered 24 November 2015 by Judge Mary Ann Tally in Cumberland County Superior Court. Heard in the Court of Appeals 18 October 2016.¹

Attorney General Joshua H. Stein, by Alvin W. Keller, Jr., Elizabeth N. Strickland and Shawn R. Evans, for the Plaintiff-Appellant.

The Law Offices of Lonnie M. Player, Jr. PLLC, by Lonnie M. Player, Jr., and Jennifer L. Malone, for the Defendants.

DILLON, Judge.

This matter involves a *partial* taking by Plaintiff, the Department of Transportation (“DOT”), of land owned by Defendants (the “Riddles”) as part of DOT’s plan to re-route a section of NC Highway 24 in Cumberland County. This appeal is from an interlocutory order in which the trial court determined *how much* of the Riddles’ entire land holdings in the relevant area constitute the “entire tract” for purposes of determining just compensation.

I. Factual Background

In 2002, Joseph Riddle acquired 26 acres of land on the northeast corner of two state roads. The land was bounded on the south by NC Highway 24 (a major east-west thoroughfare) and bounded on the west by Maxwell Road. Mr. Riddle acquired the land in order to develop a shopping center facing NC Highway 24 and to develop outparcels fronting NC Highway 24 and an outparcel fronting Maxwell Road.

Shortly after the purchase, Mr. Riddle subdivided the 26-acre parcel into seven (7) separate lots, referred to herein as Lots 1-7. In 2005, Mr. Riddle sold one of the outparcels fronting NC Highway 24 (Lot 5) to a fast-food restaurant developer. Mr. Riddle still controls the other six lots.

Lot 1 is the largest of the seven lots at over 9 acres, and is where Mr. Riddle has since developed the shopping center.² The shopping center is anchored by a Food Lion grocery store and a Family Dollar retail store.

1. This opinion replaces the opinion filed on 30 December 2016 which was subsequently withdrawn by order of this Court.

2. Mr. Riddle transferred title to Lot 1 to an entity which he owns and controls.

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Lot 2 is an undeveloped outparcel which fronts Maxwell Road to the west of the shopping center. Lots 3, 4 and 6 are undeveloped outparcels fronting NC Highway 24 in front of the shopping center.

Lot 7 is an undeveloped lot, shaped like an upside-down “L,” fronting both NC Highway 24 and Maxwell Road. The main portion of this lot fronts NC Highway 24, just east of the shopping center lot, and runs behind the shopping center lot (Lot 1) and along the north side of Lot 2 where it fronts Maxwell Road.

Years ago, DOT adopted a plan to re-route the traffic flow of NC Highway 24 from the front of the shopping center and most of the outparcels to behind the shopping center. The DOT plan called for the portion of NC Highway 24 being replaced to remain as a secondary access road.

II. Procedural Background

In 2012, as part of its plan to re-route NC Highway 24, DOT commenced this action³ by filing a complaint and declaration of taking for portions of Lot 2 and Lot 7. No portions of Lot 1 or Lots 3-6 were taken. In its Declaration of Taking, DOT identified only Lots 2 and 7 as land “affected” by the taking. The Riddles responded by alleging that all seven lots constitute a single tract for purposes of DOT’s taking and, therefore, should be considered together by a jury in determining damages.

In 2014, the trial court entered an order concluding that the jury could only consider the effect of the taking on Lots 2 and 7. The Riddles appealed that order to this Court. In 2015, we remanded the matter, ordering the trial court to determine whether any of the other five lots should be unified with Lots 2 and 7 for purposes of determining just compensation. *See D.O.T. v. Riddle*, ___ N.C. App. ___, 775 S.E.2d 36 (2015) (unpublished).

On remand, the trial court conducted another pre-trial hearing and ordered that Lot 1 be unified with Lots 2 and 7 for purposes of determining just compensation. The Riddles appealed, contending that the effect of the taking on the other four lots should be considered by the jury. DOT cross-appealed, contending that the trial on damages should not include Lot 1 and should be limited to the effect the taking had on Lots 2 and 7.

3. DOT actually commenced two separate actions: (1) 12 CVS 3993 concerned Lot 2 and (2) 12 CVS 4714 concerned Lot 7.

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III. Appellate Jurisdiction

[1] This appeal is interlocutory, as the jury trial on damages has yet to occur. And “[g]enerally, there is no right of immediate appeal from interlocutory orders and judgments.” *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, “immediate appeal is available from an interlocutory order or judgment which affects a substantial right.” *Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999). We hold that, for the reasons stated below, the trial court’s pre-trial order affects a substantial right.

This appeal is from an order entered by the trial court from a hearing held pursuant to N.C. Gen. Stat. § 136-108, in which the trial court is to decide important issues before the jury trial on damages takes place. It is important to note what this appeal is about and what it is not about in determining whether the appeal affects a substantial right. This appeal is not about any determination regarding the land actually taken by DOT. There is no disagreement in this regard. DOT has physically taken slivers from Lots 2 and 7 along Maxwell Road, and nothing else. Rather, this appeal is about the trial court’s determination regarding the land affected by the taking; that is, which lots should constitute the “entire tract.”

Our case law is somewhat nuanced on the question of whether an interlocutory order determining boundaries of the “entire tract” affects a substantial right.

In 1967, our Supreme Court held that an interlocutory order determining the land *actually taken* had to be appealed *before* the trial on damages in order to be preserved for appellate review. *N.C. State Highway Comm’n v. Nuckles*, 271 N.C. 1, 15, 155 S.E.2d 772, 784 (1967).

In 1999, our Supreme Court limited *Nuckles*, holding that an appeal from an interlocutory order determining the land affected – that is, the land which constitutes the “entire tract” – could be brought *after* the jury trial on damages. *Dep’t of Transp. v. Rowe*, 351 N.C. 172, 521 S.E.2d 707 (1999). Unlike in *Nuckles*, the issue in *Rowe* was not the land actually taken, but rather the land affected, that is, the land to be incorporated into the “entire tract.” In *Rowe*, our Supreme Court considered an appeal of a pre-trial order denying the landowner’s attempt to incorporate two additional lots into the “entire tract” *after* the jury trial on damages. DOT argued that the landowner lost his right to appeal the trial court’s determination because he did not appeal prior to the trial on damages. The *Rowe* Court, however, distinguished its holding in *Nuckles* and held that

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a landowner does not lose the right to appeal a pre-trial order determining the scope of the “entire tract” if the appeal is not taken immediately. The *Rowe* Court gave alternate reasons for its holding to distinguish a pre-trial order determining the land *actually taken* from a pre-trial order which merely determines *the land affected* by the taking. First, the Court stated that the pre-trial order refusing to incorporate lots into the “entire tract” did not affect a substantial right in that case. Second, the Court stated that even if the order did affect a substantial right, the landowner was still not *required* to appeal prior to the jury trial on damages but was free to wait until final judgment. *Rowe*, 351 N.C. at 176, 521 S.E.2d at 709.

Four years later, in 2003, our Court cited both *Rowe* and *Nuckles* in concluding that it had appellate jurisdiction to consider an interlocutory order determining the land affected by a partial taking, specifically holding that the issue addressed in the pre-trial order was a “vital preliminary issue.” *Dep't of Transp. v. Airlie Park, Inc.*, 156 N.C. App. 63, 65-66, 576 S.E.2d 341, 343 (2003). Essentially, our Court read *Rowe* as not foreclosing the possibility that a substantial right might be affected by a trial court's pre-trial order regarding unification of lots where there was otherwise no disagreement as to the actual land taken. Indeed, the *Rowe* Court recognized that “[w]hether an interlocutory ruling affects a substantial right requires consideration of the particular facts of that case[.]” *Rowe*, 351 N.C. at 175, 521 S.E.2d at 709 (internal marks omitted). Ultimately, the *Airlie* Court concluded that the trial court's determination was “vital,” based on the particular facts of that case.

More recently, in 2015, our Supreme Court exercised appellate jurisdiction to reach the merits of an interlocutory appeal of a pre-trial order, holding that a landowner's adjacent parcel should be unified with the landowner's parcel from which land was physically taken by a municipality. *See Town of Midland v. Wayne*, 368 N.C. 55, 773 S.E.2d 301 (2015). The *Midland* Court, though, did not cite *Rowe* nor did it directly address the jurisdictional issue.

Finally, a panel of this Court held in the first appeal of this present matter that the trial court's pre-trial order refusing to unify some of the Riddles' lots constitutes “ ‘a vital preliminary issue’ to [this] proceeding and, therefore, affects a substantial right.” *See Riddle*, 775 N.C. at *4. Our Supreme Court has held that “[o]nce a panel of the Court of Appeals has decided a question in a given case that decision becomes the law of the case and governs other panels which may thereafter consider the case.”

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North Carolina National Bank. v. Virginia Carolina Builders, 307 N.C. 563, 567, 299 S.E.2d 629, 631-32 (1983).⁴

The question of appellate jurisdiction in this case is a close one. *Rowe* could be construed as definitively holding that an interlocutory order which merely defines the boundaries of the “entire tract” does not affect a substantial right. However, based on the principles advanced in all the cases cited above, we conclude that we have appellate jurisdiction and proceed to address the merits of this appeal.

IV. Analysis

A. Condemnation Procedure

[2] The main issue on appeal is whether the trial court erred in determining that the area affected by DOT’s taking for purposes of determining just compensation was comprised of Lots 1, 2 and 7, but not Lots 3-6. Before addressing this specific issue in this case, we first review some basics in condemnation law.

When the DOT takes land for a highway project, the divested owner is entitled to just compensation under the “Law of the Land” clause found in Article I, section 19 of our Constitution. *Yancey v. N.C. State Highway*, 222 N.C. 106, 108, 22 S.E.2d 256, 258-59 (1942).⁵

4. We note that our Supreme Court later declined to rule definitively whether the “law of the case” principle applies to the issue of appellate jurisdiction; specifically, whether a second panel can revisit the question of appellate jurisdiction where a prior panel has already decided this legal issue in the case. *See State v. Stubbs*, 368 N.C. 40, 44, 770 S.E.2d 74, 76 (2015). *Stubbs* had produced majority, concurring, and dissenting opinions from our Court. The concurring and dissenting judges in *Stubbs* determined that the “law of the case” principle did *not* apply to jurisdictional determinations, and therefore that the Court was free to decide whether it had appellate jurisdiction, notwithstanding the holding of a prior panel on the issue. *See Stubbs*, 232 N.C. App. 274, 754 S.E.2d 174 (2014). However, this language in the concurring and dissenting opinions was dicta, and therefore not binding.

5. This right to just compensation for a public taking dates far back in our State’s history. *See, e.g., Johnston v. Rankin*, 70 N.C. 550, 555 (1870) (“Notwithstanding there is no clause in the Constitution of North Carolina which expressly prohibits private property from being taken for public use without compensation; . . . yet the principle is so grounded in natural equity, that it has never been denied to be part of the law of North Carolina.”); *Raleigh and Gaston Rail Road Co. v. Davis*, 19 N.C. 451, 459 (1837) (“[T]he right of property involves the right to precedent compensation for it, when taken for public use.”); *Trustees of University of North Carolina v. Foy*, 5 N.C. 58, (1805) (“The Legislature [has] no authority to make an act, divesting one citizen of his [property] without just compensation.”).

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A condemnation action involves a two-step process. First, prior to the jury trial on damages, the *trial court* is tasked with deciding “all issues raised by the pleadings other than the issue of damages.” N.C. Gen. Stat. § 136-108. After the trial court has decided these preliminary issues, a *jury* is then empaneled and tasked with determining the amount that constitutes “just compensation” for the taking.

Our General Assembly has provided that where there has been a partial taking, where the DOT has only taken a portion of the landowner’s property, the measure of damages is “the difference between the fair market value of *the landowner’s entire tract* immediately prior to the taking and the fair market value of the remainder immediately after the taking” N.C. Gen. Stat. § 136-112(2) (emphasis added).

Identifying which land constitutes the affected landowner’s “entire tract” for purposes of determining just compensation is not a point of contention where a partial taking is from the only lot in the immediate area owned by the affected landowner. However, the identity of the “entire tract” can be an issue, as is the case here, where the landowner has an interest in a lot or lots *in addition to* the lot(s) from which the physical taking is made. For instance, DOT may seek to include the landowner’s adjacent lot(s) as part of the “entire tract,” believing that a proposed road will increase the value of the landowner’s adjacent lots, thereby reducing or eliminating the amount of the just compensation DOT would be required to award. Conversely, such as in the present matter, it is sometimes the landowner who seeks to include an adjacent lot or lots within the “entire tract,” believing that DOT’s project will diminish not only the value of the lot(s) from which the taking is made, but also the value of adjacent lot(s).

In North Carolina, the *before and after values* of the “entire tract” are questions to be decided by a jury. However, our Supreme Court has held that the process of identifying which of the affected landowner’s lots constitute the “entire tract” is generally a question of law to be decided by the trial court. *Barnes v. North Carolina State Highway Comm’n*, 250 N.C. 378, 384, 109 S.E.2d 219, 224 (1959) (“Ordinarily the question [of] whether two or more parcels of land constitute one tract for the purpose of assessing damages for injury to the portion not taken . . . is one of law for the court.”); *see also Town of Midland*, 368 N.C. at 66, 773 S.E.2d at 309 (determining as a matter of law that a landowner’s adjacent parcel was part of the “entire tract” injured by the taking). In other words, before a jury can properly determine the amount of just compensation based on the before and after values of the landowner’s

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entire tract, the trial court must first determine which of the affected landowner's lots constitute the "entire tract."

B. Classification of Lots

In this action, DOT took portions of Lots 2 and 7. The trial court determined that the "entire tract" for purposes of the jury trial on just compensation would include Lots 1, 2 and 7. On appeal, DOT contends that Lot 1 should be excluded. The Riddles contend that Lots 3-6 should be included.

In determining which lots are part of the "entire tract," the Supreme Court has instructed as follows:

There is no single rule or principle established for determining the unity of lands[.] The factors most generally emphasized are [1] unity of ownership, [2] physical unity[,], and [3] unity of use. . . . The respective importance of these factors depends upon the factual situations in individual cases. Usually unity of use is given greatest emphasis.

Barnes, 250 N.C. at 384, 109 S.E.2d at 224-25.

In the present case, unity of *ownership* exists, except with respect to Lot 5, the outparcel which was sold to the fast-food restaurant developer in 2005. Joseph Riddle has a quantum of ownership in the remaining tracts, owning Lots 2, 3, 4, 6, and 7 with his wife, and owning Lot 1 as the controlling member of the entity which owns Lot 1, where the shopping center is located. *See Town of Midland*, 368 N.C. at 67, 773 S.E.2d at 309.

Also, *physical* unity exists with respect to all of the lots, as each lot is contiguous to at least one of the other lots. We note that physical unity does not require that each of the lots be directly contiguous with either Lot 2 or Lot 7, the lots from which DOT actually took land.

However, we hold that the factor which controls in the present case is unity of *use*. *See Town of Midland*, 368 N.C. at 65, 773 S.E.2d at 308 (stating that unity of use is "given [the] greatest emphasis"); *see also Barnes*, 250 N.C. at 385, 109 S.E.2d at 225 (stating that "the factor most often applied and controlling in determining whether land is a single tract is unity of use").

Our Supreme Court has stated that for an adjacent lot to be incorporated based on unity of use, the lot must "be presently, actually, and permanently used in such a manner that the enjoyment of the [lot] taken is

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reasonably and substantially necessary to the enjoyment of the remaining [lot].” *Town of Midland*, 368 N.C. at 65, 773 S.E.2d at 308 (quoting *Bd. of Transp. v. Martin*, 296 N.C. 20, 29, 249 S.E.2d 390, 396 (1978)).

Here, DOT has taken portions of an undeveloped outparcel (Lot 2) and the back corner of another undeveloped tract (Lot 7). The Riddles argue that all seven lots are part of an “integrated economic unit,” the test found in N.C. Gen. Stat. § 40A-67, but which has been applied to takings by the DOT. See *North Carolina Dep’t of Transp. v. Nelson*, 127 N.C. App. 365, 368, 489 S.E.2d 449, 451 (1997).

Our Supreme Court described the “integrated economic unit” test in a DOT case as follows:

[T]here must be such a connection, or relation of adaptation, convenience, and actual and permanent use between them, as to make the enjoyment of the parcel taken, reasonably and substantially necessary to the enjoyment of the parcel left, in the most advantageous and profitable manner in the business for which it is used. . . . The unifying use must be a *present* use.

Barnes, 250 N.C. at 385, 109 S.E.2d at 224.

In the present case, the re-routing of NC Highway 24 has impacted all of the lots. The value of the shopping center and the outparcels are impacted by the fact that they will no longer be fronting a well-traveled highway. However, our Supreme Court has held that any damage caused by the re-routing of traffic patterns is generally not compensable where reasonable access to a public road is provided. *Board of Transp. v. Terminal Warehouse Corp.*, 300 N.C. 700, 703, 268 S.E.2d 180, 182 (1980). And our Supreme Court further held that such “[n]oncompensable injuries to property . . . do not become compensable merely because some property was coincidentally taken in connection with [the] project.” *Id.* at 703-04, 268 S.E.2d at 183.

Therefore, in determining whether there is a unity of use between Lots 2 and 7 and the other lots, we are not to consider the impact that the re-routing of NC Highway 24 had on the other lots. Rather, we are only to consider if the portions of Lots 2 and 7 taken by DOT were “reasonably and substantially necessary to the enjoyment of the [other lots].”

Following our Supreme Court’s guidance in *Barnes* and *Terminal Warehouse*, we conclude as a matter of law that the portions of Lot 2 and of Lot 7 taken by DOT are not reasonably or substantially necessary to

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the Riddles ability to use and enjoy any of the other lots.⁶ Accordingly, we affirm the trial court's conclusion that Lots 3-6 are not part of the "entire tract," but we reverse the trial court's conclusion that Lot 1 is part of the "entire tract."

AFFIRMED IN PART, REVERSED IN PART.

Judges BRYANT and CALABRIA concur.

IN THE MATTER OF A.B., C.B., J.B., A.B.

No. COA16-1040

Filed 18 April 2017

Termination of Parental Rights—grounds—sufficiency of findings and conclusions—circumstances at time of hearing

The trial court's order terminating respondent mother's parental rights was vacated where the trial court's findings and conclusions did not adequately account for respondent's circumstances at the time of the termination hearing with regard to either the fitness of respondent to care for the children or the nature and extent of her reasonable progress.

Appeal by respondent mother from order entered 5 July 2016 by Judge Christy E. Wilhelm in Cabarrus County District Court. Heard in the Court of Appeals 3 April 2017.

Stephen A. Moore and H. Jay White for petitioner-appellee Cabarrus County Department of Human Services.

Mark L. Hayes for respondent-appellant.

6. Had DOT taken a portion of the shopping center itself (Lot 1) rather than portions of Lot 2 and Lot 7, the Riddles might have a stronger argument for unification of the other lots since an existing shopping center with anchor tenants in place is generally necessary for the maximization of an outparcel. However, an undeveloped outparcel which is reduced in size does not generally affect the use and enjoyment of an existing shopping center or other outparcel lots. In sum, the other lots were damaged by DOT's decision to re-route traffic, an impact which is not compensable, rather than by the partial taking of portions of Lots 2 and 7.

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Brandon J. Huffman for guardian ad litem.

BRYANT, Judge.

Where the trial court's findings and conclusions do not adequately account for respondent-mother's circumstances at the time of the termination hearing, as required to support a termination of her parental rights under N.C.G.S. § 7B-1111(a)(1) or (2), we vacate and remand.

On 22 October 2013, the Cabarrus County Department of Human Services ("CCDHS") obtained non-secure custody of the respondent-mother's¹ minor children A.B. (born October 2001), C.B. (born August 2006), J.B. (born March 2010), and A.B. (born November 2012) (collectively, "the children"). CCDHS filed petitions² alleging that they were neglected "due to ongoing substance abuse and domestic violence" by respondent-mother and respondent-father (collectively, "respondents"), which "place[d] their four young children at risk of harm" and created an environment injurious to their welfare. The petition described CCDHS's unsuccessful efforts to provide treatment services to respondents and implement a safety resource plan after substantiating reports of neglect and physical abuse, which reports included respondent-father's inappropriate physical discipline of respondents' two oldest daughters, who were then six and eleven years of age. The initial child protective services report was received on 25 February 2013.

The trial court held a hearing on CCDHS's petitions on 13 March 2014 and adjudicated the children to be neglected and dependent juveniles. It maintained the children in CCDHS custody and directed that they remain in their current placements. In its disposition, the court identified "substance abuse, improper supervision, injurious environment and domestic violence involving the parents" as the "issues which led to [the children's] placement" outside the home. It found that "[t]he following community-level services [were] needed to strengthen the home situation and to remediate or remedy the issues which led to placement:

- a. Psychological Evaluation
- b. Drug/Alcohol Screens
- c. Mental Health Treatment

1. Respondent-father is not a party to this appeal.

2. We note that the record on appeal contains only the petition and non-secure custody order filed with regard to the youngest child, A.B, in case number 13 JA 124, but includes the summonses issued and returned in all four cases.

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- d. Medication Management
- e. Parenting Education
- f. Suitable [H]ousing[.]”

The trial court imposed separate case plans for each respondent to address these concerns. Respondent-mother was ordered to obtain a new substance abuse evaluation through Genesis and follow any recommendations; submit to random drug screens as requested by CCDHS; comply with the recommendations of her parenting capacity evaluation by Dr. Susan Hurt; complete a court-approved parenting course and demonstrate skills learned in the course during visitation; comply with her visitation plan; attend the children’s medical, dental, and school appointments; maintain bi-weekly contact with her CCDHS social worker, reporting any changes in address, employment, or other significant events; sign releases allowing CCDHS to obtain information from service providers; “maintain her own suitable housing, including utilities, appropriate for the placement of all the children” for at least six months; and maintain employment allowing her to provide financially for her children for a continuous four- to six-month period. The court established reunification as the permanent plan.

The trial court ceased reunification efforts as to respondent-father in June 2015 and instituted concurrent permanent plans of reunification with respondent-mother only and adoption. At a subsequent review hearing on 13 August 2015, the court relieved CCDHS of further reunification efforts as to respondent-mother and changed the permanent plan to adoption with a secondary plan of legal guardianship.

CCDHS filed a motion to terminate respondents’ parental rights on 28 October 2015. After hearing evidence on 12 and 31 May 2016, the trial court concluded that respondent-mother’s parental rights were subject to termination for (1) neglect, and (2) willful failure to make reasonable progress to correct the conditions that led to the children’s removal from the home over three years earlier. N.C. Gen. Stat. § 7B-1111(a)(1)–(2) (2015). The court further determined that terminating respondent-mother’s parental rights was in the best interests of the children. Respondent-mother filed timely notice of appeal from the termination order.

On appeal, respondent-mother claims the trial court’s findings of fact do not support its adjudication of grounds to terminate her parental rights under either N.C. Gen. Stat. § 7B-1111(a)(1) or (2). She contends the court found no facts tending to show that, at the time of the May

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2016 termination hearing, she had failed to resolve the issues of substance abuse and domestic violence which led to the children's removal from her home and adjudication as neglected juveniles. As those issues were the only factors cited by CCDHS at the time of the initial removal and adjudication, respondent-mother argues that the court could not find a likelihood of a repetition of neglect if the children were returned to her care, *see* N.C.G.S. § 7B-1111(a)(1), or that she willfully failed to make reasonable progress to correct the conditions leading to the children's placement in foster care, *see id.* § 7B-1111(a)(2). For the following reasons, we agree.

We review an adjudication under N.C. Gen. Stat. § 7B-1111(a)(1) or (a)(2) to determine (1) whether the court's findings of fact are supported by clear, cogent, and convincing evidence, and (2) whether its findings in turn support its conclusions of law. *In re Shepard*, 162 N.C. App. 215, 221–22, 591 S.E.2d 1, 6 (2004) (citing *In re Clark*, 72 N.C. App. 118, 124, 323 S.E.2d 754, 758 (1984)). Uncontested findings are deemed to be supported by the evidence for purposes of our review. *See In re H.S.F.*, 182 N.C. App. 739, 742, 645 S.E.2d 383, 384 (2007). “[E]rroneous findings unnecessary to the determination do not constitute reversible error” where an adjudication is supported by sufficient additional findings grounded in competent evidence. *In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240 (2006) (citation omitted). The adjudication of any single ground under N.C. Gen. Stat. § 7B-1111(a) will support an order terminating parental rights. *In re P.L.P.*, 173 N.C. App. 1, 8, 618 S.E.2d 241, 246 (2005) (citation omitted).

The trial court found grounds to terminate respondent-mother's parental rights for neglecting the children under N.C. Gen. Stat. § 7B-1111(a)(1). Where a child has been in a placement outside the home for a significant period of time, an adjudication under N.C.G.S. § 7B-1111(a)(1) may be supported by “evidence of prior neglect and [of] the probability of a repetition of neglect” if the child were returned to the parent's care. *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984). “The trial court must . . . consider any evidence of changed conditions” since the prior adjudication of neglect and “make an independent determination of whether neglect authorizing termination of the respondent's parental rights existed at the time of the termination hearing.” *Id.* at 715–16, 319 S.E.2d at 232–33 (emphasis added); *accord In re Young*, 346 N.C. 244, 248, 485 S.E.2d 612, 615 (1997) (“Termination of parental rights for neglect may not be based solely on past conditions which no longer exist.” (citation omitted)). As our Supreme Court has emphasized, “[t]he determinative factors must be the best interests of the child and the

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fitness of the parent to care for the child *at the time of the termination proceeding.*” *Ballard*, 311 N.C. at 715, 319 S.E.2d at 232.

The trial court also adjudicated grounds to terminate respondent-mother’s parental rights under N.C.G.S. § 7B-1111(a)(2), which allows termination where “[t]he parent has 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.” N.C.G.S. § 7B-1111(a)(2). A finding that the parent acted “willfully” under N.C.G.S. § 7B-1111(a)(2) “does not require a finding of fault by the parent.” *In re B.S.D.S.*, 163 N.C. App. 540, 545, 594 S.E.2d 89, 93 (2004) (citation omitted). “Willfulness may be found where a parent has made some attempt to regain custody of the child but has failed to exhibit ‘reasonable progress or a positive response toward the diligent efforts of DSS.’ ” *Id.* (quoting *In re Oghenekevebe*, 123 N.C. App. 434, 440, 473 S.E.2d 393, 398 (1996)). Moreover, though “[a] parent’s failure to fully satisfy all elements of the case plan goals is not the equivalent of a lack of ‘reasonable progress,’ ” *In re J.S.L.*, 177 N.C. App. 151, 163, 628 S.E.2d 387, 394 (2006) (citation omitted), a parent’s “prolonged inability to improve her situation, despite some efforts in that direction, will support” an adjudication under N.C.G.S. § 7B-1111(a)(2). *In re B.S.D.S.*, 163 N.C. App. at 546, 594 S.E.2d at 93.

As with an adjudication of neglect under N.C.G.S. § 7B-1111(a)(1), “the nature and extent of the parent’s reasonable progress” must be “evaluated for *the duration leading up to the hearing on the motion or petition to terminate parental rights.*” *In re A.C.F.*, 176 N.C. App. 520, 528, 626 S.E.2d 729, 735 (2006) (second emphasis added) (citing *In re O.C. & O.B.*, 171 N.C. App. 457, 466–67, 615 S.E.2d 391, 396 (2005)).

I. Preliminary Issue

Initially, we must address respondent-mother’s argument that the trial court failed to enter affirmative findings of fact with regard to her conduct during the course of this case. Respondent-mother contends that the court’s findings simply state what the court itself found at prior hearings. However, we read the court’s findings as summarizing respondent-mother’s progress—or lack thereof—at various points in these proceedings. Finding of Fact No. 23 is representative of the order’s format:

23. At the Review Hearing on May 8, 2014, [respondent-mother was] present in the courtroom and represented by counsel. . . . *The mother’s progress was as follows:*

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- a. Mother continues to reside at 224 Evans St. Concord, NC. This is the same home that the children resided in prior to coming into CCDHS custody.
- b. Mother has not provided any information as to relative placement for her children during this reporting period.
- c. Mother has not provided CCDHS with verification of income.

(Emphasis added).

The trial court did not find merely that certain findings of fact were made at the prior hearings in this cause. Rather, as shown in Finding of Fact No. 23, the court made specific findings with regard to respondent-mother's progress as of the date of each prior hearing.³ As respondent-mother does not contest the evidentiary support for these findings, they are binding on appeal. *In re H.S.F.*, 182 N.C. App. at 742, 645 S.E.2d at 384 (citation omitted). Moreover, the fact that the court may have copied findings from its prior orders is "irrelevant," absent a claim that the findings are not supported by the evidence presented at the termination hearing. *In re J.W.*, ___ N.C. App. ___, ___, 772 S.E.2d 249, 253 (2015) ("The purpose of trial court orders is to do justice, not foster creative writing.").

II. *Insufficient Findings of Fact*

Respondent-mother claims that the findings of fact in the termination order are insufficient to support an adjudication under either N.C.G.S. § 7B-1111(a)(1) or (2). Specifically, she points to an absence of findings with regard to either the "fitness of [respondent-mother] to care

3. It is also true that the termination order refers to many of the trial court's prior findings in the cause. Finding of Fact No. 23, for example, states that "[a]t the Review hearing on May 8, 2014, . . . [t]he Court found that while the mother and father made progress . . . , the progress made is insufficient for the court to be assured that the juveniles could safely return to either mother or father's care." (Emphasis added). This type of procedural history is not necessarily out of place in an order terminating parental rights, particularly where a case has been pending for almost three years at the time of the termination hearing. However, we do not rely on the trial court's account of its own earlier findings when assessing the reasonableness of respondent-mother's progress under N.C.G.S. § 7B-1111(a)(2). *Cf. generally In re O.W.*, 164 N.C. App. 699, 703, 596 S.E.2d 851, 854 (2004) (explaining that a recitation of what a witness testified "is not even really a finding of fact"); *cf. also In re T.M.*, 180 N.C. App. at 547, 638 S.E.2d at 240–41 (allowing appellate court to disregard erroneous findings unnecessary to the trial court's adjudication).

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for the child[ren],” or “the nature and extent of [respondent-mother’s] reasonable progress” “*at the time of the termination proceeding.*” See *Ballard*, 311 N.C. at 715, 319 S.E.2d at 232 (“The determinative factors must be the best interests of the child and the fitness of the parent to care for the child *at the time of the termination proceeding.*”); *A.C.F.*, 176 N.C. App. at 528, 626 S.E.2d at 735 (noting that a parent’s reasonable progress “is evaluated for the duration leading up to the hearing on the motion or petition to terminate parental rights” (citation omitted)). We agree. Although the termination hearing was held more than three months after the 11 February 2016 review hearing, the court made no findings regarding respondent-mother’s conduct or circumstances at any time subsequent to the 11 February 2016 hearing date.

We recognize that the trial court’s ultimate findings with regard to the grounds for termination purport to describe present conditions:

46. The Court finds that the following grounds for termination exist to terminate the parental rights of mother and father pursuant to NC Gen Stat. §7B-1111(1) [sic]; that mother and father neglected the juveniles . . . and that *there is a likelihood* that such neglect would continue in the future; pursuant to NC Gen Stat. §7B-1111(a)(2), mother and father willfully left the juveniles in foster care for more than twelve months without showing to the satisfaction of the Court that reasonable progress under the circumstances *have [sic] been made* in correcting those conditions which led to the removal of the juveniles from the custody and care of the parents . . .

(Emphasis added). However, such ultimate findings must arise “by processes of logical reasoning from the evidentiary facts” found by the court. *In re Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002) (citation omitted); see also *In re D.M.O.*, ___ N.C. App. ___, ___, 794 S.E.2d 858, 861 (2016) (“[A] trial court must make adequate evidentiary findings to support its ultimate finding of willful intent.” (citation omitted)). Here, the evidentiary facts found and recited by the court are inadequate to support these ultimate facts.

Our review of the transcript reveals that CCDHS social worker Cynthia Bowers and respondent-mother presented testimony that would support additional findings up to the time of the termination hearing. We further believe “there are material conflicts in the evidence relating to the issue of respondent-mother’s willfulness” and the reasonableness of her progress “that were not resolved by the trial court’s order.” *In re*

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D.M.O., ___ N.C. App. at ___, 794 S.E.2d at 865–66 (vacating and remanding where the trial court’s findings were “inadequate or fail[ed] to resolve conflicts in the evidence material to a conclusion that respondent-mother abandoned” the juvenile). Similarly, we believe the evidence would support different inferences and conclusions regarding the likelihood of a repetition of neglect based on evidence regarding respondent-mother’s circumstances at the time of the hearing. “Given the findings of fact, however, we would be speculating as to the trial court’s rationale” were we to affirm its adjudication under either N.C.G.S. § 7B-1111(a)(1) or (2). *In re F.G.J.*, 200 N.C. App. 681, 694, 684 S.E.2d 745, 754 (2009).

The evidence and the trial court’s findings show that, following the initial adjudication of neglect and dependency in March 2014, respondent-mother engaged in an extended period of positive drug screens and general non-compliance with the court-ordered requirements for reunification. By the time of the May 2016 termination hearing, however, the nature and extent of respondent-mother’s progress was improved.

As CCDHS conceded at the hearing, respondent-mother had an unbroken series of negative drug screens between June 2015 and March 2016, after completing her third substance abuse evaluation and third round of treatment. In July 2015, she attended and completed the six individual therapy sessions recommended by Genesis as part of her most recent substance abuse re-evaluation. Respondent-mother had separated from respondent-father in December 2014 and obtained a domestic violence protective order against him in June 2015, which remained in place at the time of the termination hearing. After obtaining her commercial driver’s license, respondent-mother had obtained full-time employment as an interstate truck driver and was current on her child support payments.

In addition, with regard to respondent-mother’s court-ordered parenting classes, the trial court found as follows:

Mother completed parenting classes with Mar-Lee Cook, NC Certified Parent Educator, on June 5, 2014, and, as previously reported by Ms. Cook in her case summary, it is her experience with [respondent-mother and respondent-father] that, “nothing I say or present will change their parenting styles or the dysfunctional dynamics in the family.”

Despite this negative report from Ms. Cook, which predates respondent-mother’s separation from respondent-father, we find no evidence that CCDHS or the trial court ever prescribed additional parenting classes

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for respondent-mother after June 2014. Nor do the court's prior orders suggest that respondent-mother failed to demonstrate appropriate parenting techniques during her visitations, as originally ordered by the trial court.

To the contrary, the permanency planning orders show that respondent-mother consistently attended visitation throughout these proceedings and was found to interact with the children in an appropriate—and sometimes praiseworthy—manner. These orders include findings that respondent-mother “brings interactive fun activities for all her children to engage in, such as how to sew, doing nails, decorating shoes, board games, etc.,” and that she “does a wonderful job of acknowledging and spending equal amounts of time with the children.” After CCDHS permitted the eldest daughter, A.B., who was nearly fifteen years old at the time of the hearing, to opt out of visitations based on her belief that respondent-mother was overly critical of her, the court subsequently reiterated its finding that “[v]isits with the three younger children and [respondent-mother] go well and she is appropriate with the children.”

The parties offered conflicting testimony with regard to respondent-mother's willingness or ability to notify CCDHS in advance of her availability for random drug screens. Ms. Bowers testified that CCDHS had been unable to perform any subsequent random screens, because respondent-mother failed to notify the department of her availability based on her work schedule, other than during her scheduled visitations. Respondent-mother explained that, as a truck driver, she did not receive her work schedule in advance and had “no way” to know whether or when she would be in Cabarrus County during the work week. She provided CCDHS with the phone number of her fleet manager to verify this information.

While respondent-mother acknowledged that her current residence lacked water and electricity, she testified that she had the means to have these utilities turned on, but had chosen not to do so while her employment required her to stay out of town. We also note Ms. Bowers's testimony that respondent-mother's residence would “meet minimal standards” for the children, even without utilities, once a background check was performed on her aunt and any other adult residents in the downstairs dwelling.⁴ Respondent-mother admitted having failed to provide CCDHS with the necessary personal information about her aunt but claimed her aunt had refused to authorize the disclosure.

4. Respondent-mother testified that her aunt's husband and daughter also lived downstairs.

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We hold the trial court's findings and conclusions do not adequately account for respondent-mother's circumstances at the time of the termination hearing, as required to support a termination of her parental rights under N.C.G.S. 7B-1111(a)(1) or (2). As discussed above, the parties' evidence supports competing findings on material issues of fact, which in turn would support competing inferences with regard to the existence of grounds for termination. Accordingly, "we vacate the trial court's order and remand for further findings of fact and conclusions of law regarding N.C. Gen. Stat. § 7B-1111(a)[(1)–(2)]. The trial court may hear and receive additional evidence." *In re D.M.O.*, ___ N.C. App. at ___, 794 S.E.2d at 866; *see also In re F.G.J.*, 200 N.C. App. at 695, 684 S.E.2d at 755.

VACATED AND REMANDED.

Judges DAVIS and TYSON concur.

IN THE MATTER OF A.P.

No. COA16-1010

Filed 18 April 2017

1. Appeal and Error—motion to dismiss appeal—violations—motion to strike portions of appellate brief

In a child neglect dependency case, the Court of Appeals denied a joint motion to dismiss respondent mother's appeal and an alternative motion to strike portions of respondent's appellate brief. The alleged violations were not jurisdictional or gross violations. Further, the pertinent portions of the brief were unnecessary to the decision in the appeal.

2. Child Abuse, Dependency, and Neglect—neglect and dependency—subject matter jurisdiction—standing

The trial court erred by concluding that the Department of Social Services (DSS) had standing to file a juvenile petition. The trial court lacked subject matter jurisdiction to adjudicate the minor child as dependent and neglected since the minor child was neither found in nor residing in Mecklenburg County at the time DSS filed its juvenile petition.

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[253 N.C. App. 38 (2017)]

Appeal by respondent from order entered 29 June 2016 by Judge Ty Hands in Mecklenburg County District Court. Heard in the Court of Appeals 3 April 2017.

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

Anné C. Wright for respondent-appellant.

Guardian ad Litem Appellate Counsel Matthew D. Wunsche for guardian ad litem.

TYSON, Judge.

Respondent-mother (“Respondent”) appeals from an order adjudicating her minor daughter A.P. to be a neglected and dependent juvenile. The Mecklenburg County Department of Social Services (“MCDSS”) did not have standing to file the juvenile petition. We vacate the trial court’s order.

I. Background

At the time of A.P.’s birth in August 2015, Respondent was living at the Church of God Children’s Home (the “Home”) in Cabarrus County, North Carolina. Shortly after A.P.’s birth, Respondent began to display irrational behavior. The Home’s staff believed Respondent demonstrated a need for a higher level of care than they could provide her. On 22 September 2015, Respondent was taken to the Carolinas Medical Center-Northeast emergency room in Cabarrus County. She was subsequently involuntarily committed for mental health treatment in Mecklenburg County. Respondent agreed to a safety plan with the Cabarrus County Department of Social Services (“CCDSS”) to allow her daughter to live at the Rowan County home of Ms. B., an employee of the Church of God Children’s Home, while Respondent was undergoing in-patient mental health treatment.

Respondent subsequently identified her grandfather’s home in Mecklenburg County as a place where she could live with A.P. upon her release from in-patient mental health treatment. In October 2015, CCDSS asked MCDSS to investigate the appropriateness of the grandfather’s home for A.P. MCDSS found her grandfather’s home to be appropriate. Respondent moved into the home with A.P. Respondent entered

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into an agreement with CCDSS that she would cooperate with MCDSS in developing and following an in-home family services plan, and CCDSS transferred the social services case to MCDSS.

On 25 November 2015, Respondent's sister discovered Respondent and A.P. were living away from her grandfather's home in a dilapidated house in Mecklenburg County. Respondent's sister took A.P. to Ms. B., and MCDSS subsequently approved the placement of A.P. with Ms. B. MCDSS investigated the conditions in which Respondent and A.P. had been living, and determined that Respondent needed intensive outpatient substance abuse treatment and other services. Respondent initially engaged in services, which were performed in Mecklenburg County. On 10 December 2015, Respondent notified MCDSS that she had moved to South Carolina.

At an 18 December 2015 meeting with MCDSS, Respondent agreed A.P. would continue to stay with Ms. B., while she lived with a family friend in South Carolina. Respondent returned to Mecklenburg County in January 2016. She was subsequently jailed in Mecklenburg County on unidentified criminal charges. From 18 to 20 February 2016, Respondent was again an inpatient at Davidson Mental Health Hospital in Mecklenburg County.

On 22 March 2016, Respondent informed MCDSS that she was residing in Cabarrus County. On 23 March 2016, Ms. B. informed MCDSS that she could no longer care for A.P. On 29 March, MCDSS obtained a non-secure custody order from a Mecklenburg County magistrate, which did not list an address for either Respondent or A.P. Also on 29 March 2016, MCDSS retrieved the child from Ms. B. in Rowan County.

On 30 March 2017, MCDSS filed the nonsecure custody order and a juvenile petition alleging A.P. was a neglected and dependent juvenile. After a hearing on 17 May 2016, the trial court entered an adjudication and disposition order on 29 June 2016, in which it concluded that A.P. is a neglected and dependent juvenile. The court continued custody of A.P. with MCDSS, with placement in MCDSS's discretion. The court granted Respondent supervised visitation with A.P. and ordered Respondent to enter into an out-of-home family services agreement with MCDSS, and to comply with the terms of the agreement. Respondent filed timely notice of appeal from the court's order.

II. Motion to Dismiss

[1] We first address the joint motion to dismiss Respondent's appeal and alternative motion to strike portions of Respondent's appellate brief

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filed by MCDSS and the guardian ad litem (“GAL”). MCDSS and the GAL argue that Respondent’s appeal should be dismissed, because her brief contains (1) several footnotes which rely upon matters outside of the record on appeal and (2) a table of factual assertions without citation to the transcript or record on appeal. These alleged violations are not jurisdictional in nature and are not gross violations of our appellate rules to warrant dismissal. We deny the joint motion to dismiss Respondent’s appeal. *See Dogwood Dev. & Mgmt. Co. v. White Oak Transport Co.*, 362 N.C. 191, 198-99, 657 S.E.2d 361, 365-66 (2008). We also deny the joint motion to strike, because the portions of Respondent’s brief, which MCDSS and the GAL move to strike, are unnecessary to reach our decision in this appeal.

III. Jurisdiction

[2] Respondent asserts MCDSS did not have standing to file the juvenile petition, and argues the trial court lacked jurisdiction to adjudicate A.P. as dependent and neglected. District courts have “exclusive jurisdiction over any case involving a juvenile who is alleged to be abused, neglected, or dependent.” N.C. Gen. Stat. § 7B-200(a) (2015). However, “a trial court’s general jurisdiction over the type of proceeding or over the parties does not confer jurisdiction over the specific action.” *In re McKinney*, 158 N.C. App. 441, 447, 581 S.E.2d 793, 797 (2003) (citation omitted).

“[B]efore a court may act there must be some appropriate application invoking the judicial power of the court with respect to the matter in question.” *Id.* at 444, 581 S.E.2d at 795 (citation and quotation marks omitted). To properly invoke the court’s jurisdiction in a juvenile matter, the petitioner must have standing to file the juvenile petition. “Standing is jurisdictional in nature and ‘[c]onsequently, standing is a threshold issue that must be addressed, and found to exist, before the merits of [the] case are judicially resolved.’” *In re Miller*, 162 N.C. App. 355, 357, 590 S.E.2d 864, 865 (2004) (quoting *In re Will of Barnes*, 157 N.C. App. 144, 155, 579 S.E.2d 585, 592 (2003)); *see also In re T.R.P.*, 360 N.C. 588, 593, 636 S.E.2d 787, 792 (2006) (“A trial court’s subject matter jurisdiction over all stages of a juvenile case is established when the action is initiated with the filing of a properly verified petition.”).

Article 4 of the North Carolina Juvenile Code sets forth the requirements for the venue and proper parties of petitions. N.C. Gen. Stat. §§ 7B-400 to 408 (2015). N.C. Gen. Stat. § 7B-400(a) provides

[a] proceeding in which a juvenile is alleged to be abused, neglected, or dependent may be commenced in the district

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in which the juvenile resides or is present. Notwithstanding G.S. 153A-257, the absence of a juvenile from the juvenile's home pursuant to a protection plan during an assessment or the provision of case management services by a department of social services shall not change the original venue if it subsequently becomes necessary to file a juvenile petition.

N.C. Gen. Stat. § 7B-401.1(a) requires that “[o]nly a county director of social services or the director’s authorized representative may file a petition alleging that a juvenile is abused, neglected, or dependent.”

As defined in the Juvenile Code, a “director” is “[t]he director of the county department of social services in the county in which the juvenile resides or is found, or the director’s representative as authorized in G.S. 108A-14.” N.C. Gen. Stat. § 7B-101(10) (2015). Thus, only the director of the county department of social services, or the director’s representative, “*in the county in which the juvenile resides or is found*” has standing to file a petition alleging that a child is an abused, neglected, or dependent juvenile. No provision of the Juvenile Code defines the residence of a minor child. A minor child’s legal residence for the purpose of receiving social services is determined as follows:

A minor has the legal residence of the parent or other relative with whom he resides. If the minor does not reside with a parent or relative and is not in a foster home, hospital, mental institution, nursing home, boarding home, educational institution, confinement facility, or similar institution or facility, *he has the legal residence of the person with whom he resides*. Any other minor has the legal residence of his mother, or if her residence is not known then the legal residence of his father; *if his mother’s or father’s residence is not known, the minor is a legal resident of the county in which he is found*.

N.C. Gen. Stat. § 153A-257(a)(3) (2015) (emphasis supplied).

In the case of *In re S.D.A.*, 170 N.C. App. 354, 356, 612 S.E.2d 362, 363 (2005), the mother “agreed to voluntarily place” her minor children with custodians in Rutherford County until the Rutherford County DSS deemed it appropriate to return the children to her care. Allegations of abuse by the custodians surfaced and the Rutherford County DSS asked Lincoln County DSS to investigate. *Id.*, 612 S.E.2d at 363-64.

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The Lincoln County DSS was unable to substantiate any abuse; however, the Rutherford County DSS filed a juvenile petition alleging the children were abused and neglected by the mother for exposing the children to neglect by the custodians. *Id.* at 357, 612 S.E.2d at 364. The district court in Rutherford County adjudicated the children abused and neglected and removed them from the custodians' care. *Id.* This Court vacated the district court's orders and held the trial court lacked subject matter jurisdiction. Rutherford County DSS failed to follow the statutorily imposed duties prior to filing its petition. *Id.* at 361, 612 S.E.2d at 366.

In the case of *In re T.R.P.*, 360 N.C. 588, 636 S.E.2d 787, our Supreme Court vacated a custody review order where the juvenile petition that initiated the case was not verified by the director of the county DSS, as mandated by statute. The Court acknowledged abuse, neglect and dependency cases are purely "statutory in nature and governed by Chapter 7B." *Id.* at 591, 636 S.E.2d at 790. Notwithstanding that the juvenile petition alleged the respondent was manufacturing methamphetamines in the home, and that respondent had not cooperated with DSS to establish a safety plan, the Court vacated the order removing the juvenile from the respondent's physical custody for lack of subject matter jurisdiction. *Id.* at 588-89, 636 S.E.2d at 789.

Where jurisdiction is statutory and the Legislature requires the Court to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the Court to certain limitations, an act of the Court beyond these limits is in excess of its jurisdiction. Thus, for certain causes of action created by statute, the requirement that pleadings be signed and verified is not a matter of form, but substance, and a defect therein is jurisdictional.

Id. at 590, 636 S.E.2d at 790 (internal quotation marks and citations omitted).

Here, A.P. initially resided with her mother, Respondent, at the Church of God Children's Home located in Cabarrus County. Upon Respondent's hospitalization in Mecklenburg County for inpatient mental health services, she placed A.P. with her case manager at the Home, Ms. B., who resided in Rowan County.

Because Respondent and A.P. were planning to move to Mecklenburg County, Respondent's case was referred by CCDSS to MCDSS on 20 October 2015. Respondent was discharged from

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hospital care on 23 October 2015, and she and A.P. moved into her grandfather's home in Mecklenburg County. A.P. remained in Mecklenburg County, until she was removed by her aunt on 25 November 2015, and returned to the care of Ms. B. in Rowan County. At a Child and Family Team meeting held at MCDSS on 18 December 2015, Respondent agreed for A.P. to continue to reside with Ms. B., while Respondent would seek mental health, substance abuse, and parenting services in South Carolina. On 22 March 2016, Respondent reported to MCDSS that she was residing in Cabarrus County.

On 23 March 2016, Ms. B. notified MCDSS that she could no longer keep A.P. MCDSS contacted CCDSS to discuss transferring the case back to Cabarrus County. However, CCDSS was unable to confirm Respondent was living in Cabarrus County. The record reflects CCDSS indicated it was not willing to file a petition in this matter due to its lack of current involvement with the case. MCDSS sought and obtained a nonsecure custody order signed 29 March 2016 without alleging the address or residence of either Respondent or A.P. MCDSS found A.P. in Rowan County and took physical custody of A.P. on this date.

Based upon these facts, at the time MCDSS filed its juvenile petition A.P. was neither found in nor residing in Mecklenburg County. A.P. remained in the legal custody of Respondent until MCDSS attempted to obtain nonsecure custody of A.P. by filing its nonsecure custody order and juvenile petition on 30 March 2016.

From 25 November 2015 until 29 March 2016, A.P. resided with Ms. B. in Rowan County. A.P. was not residing in a foster home, hospital, mental institution, nursing home, boarding home, educational institution, confinement facility, or similar institution or facility. Her legal and physical residence was in Rowan County with Ms. B. N.C. Gen. Stat. § 153A-257(a)(3). The director of MCDSS lacked standing to file the juvenile petition, and the trial court lacked subject matter jurisdiction over this case. *Cf. In re J.M.*, __ N.C. App. __, __, __ S.E.2d __, __ (2016) (2016 WL 8542855) (holding the Durham County district court lacked jurisdiction to hear a petition to terminate parental rights where, at the time the petition was filed, the juvenile was not residing in Durham County, was not found in Durham County, and was not in the legal custody of a licensed child-placing agency in Durham County or Durham County DSS).

IV. N.C. Gen. Stat. § 7B-402(d)

On appeal, the GAL argues the plain language of N.C. Gen. Stat. § 7B-402(d) refutes Respondent's contention that MCDSS lacked authority

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to file the juvenile petition in this case. Section 7B-402(d) provides that “[i]f the petition is filed in a county other than the county of the juvenile’s residence, the petitioner shall provide a copy of the petition and any notices of hearing to the director of the department of social services in the county of the juvenile’s residence.” *Id.* The GAL asserts this statute anticipates that a jurisdictionally valid petition may be filed by a social services director of a county other than that where the juvenile resides. We disagree.

The GAL asserts that a social services director of a county in which the juvenile does not reside may file a juvenile abuse, neglect, or dependency petition, if the juvenile *is found* in the director’s county. *See* N.C. Gen. Stat. § 7B-101(10) and § 7B-401.1(a). Section 7B-402(d) provides that in such instances, notice of the petition and hearings must then be given to the social services director in the county in which the juvenile resides. Section 7B-402(d) is clearly a notice requirement to another social services director and is not a standing provision. The statute’s intent is to alert the department of social services of the juvenile’s county of residence of an ongoing out-of-county juvenile case, which may require investigation on its part.

Here, A.P. was neither found in nor a resident of Mecklenburg County. MCDSS failed to allege either Respondent’s or A.P.’s residence or physical presence in Mecklenburg County and lacked standing to file the petition alleging A.P. was a neglected or dependent juvenile. The petition failed to properly invoke the trial court’s jurisdiction. Without jurisdiction, the trial court’s order must be vacated.

V. Conclusion

The Mecklenburg County District Court did not obtain subject matter jurisdiction when MCDSS purportedly filed its petition without standing to do so. In light of our decision and mandate, it is unnecessary for us to address Respondent’s remaining arguments. The district court’s order is vacated. *It is so ordered.*

VACATED.

Judges BRYANT and DAVIS concur.

IN RE FORECLOSURE OF THOMPSON

[253 N.C. App. 46 (2017)]

IN RE FORECLOSURE OF REAL PROPERTY UNDER DEED OF TRUST FROM VICQUE THOMPSON AND CHRISTALYN THOMPSON, IN THE ORIGINAL AMOUNT OF \$205,850.00, AND DATED SEPTEMBER 26, 2007 AND RECORDED ON SEPTEMBER 28, 2007 IN BOOK 2953 AT PAGE 653 AND RERECORDED/MODIFIED/CORRECTED ON FEBRUARY 27, 2015 IN BOOK 4266, PAGE 911, ONSLOW COUNTY REGISTRY[,] TRUSTEE SERVICES OF CAROLINA, LLC, SUBSTITUTE TRUSTEE

No. COA16-1014

Filed 18 April 2017

Mortgages and Deeds of Trust—foreclosure—latent ambiguity—description of property—extrinsic documents referenced in deed of trust

The trial court did not err by allowing a substitute trustee appointed by appellee bank to foreclose on a loan secured by property owned by appellants. The deed of trust’s reference to “Section II-C” was a minor error that created only a latent ambiguity as to the description of the property, which could be rectified by examination of extrinsic documents referenced in the deed of trust.

Appeal by respondents from order entered 30 March 2016 by Judge D. Jack Hooks in Onslow County Superior Court. Heard in the Court of Appeals 7 March 2017.

Blanco Tackabery & Matamoros, P.A., by Ashley S. Rusher and M. Rachael Dimont, for petitioner-appellee.

The Barber Law Firm, PLLC, by Terence O. Barber, for respondent-appellants.

ZACHARY, Judge.

Appellants Vicque and Christalyn Thompson (“the Thompsons”) appeal from an order of the trial court that allowed the substitute trustee appointed by appellee USAA Federal Savings Bank (“the Bank”) to foreclose on a loan secured by property owned by the Thompsons. On appeal, the Thompsons argue that the trial court erred by failing to vacate an earlier order of the Clerk of Superior Court of Onslow County allowing foreclosure and by entering the order permitting the foreclosure sale to proceed. The Thompsons contend that “the trustee did not hold legal title to the property owned by [the Thompsons] by virtue of the faulty description in the deed of trust” and that, as a result, the substitute trustee was “not entitled to foreclose under the instrument.” For

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the reasons discussed below, we conclude that the trial court did not err and that its order should be affirmed.

I. Background

The relevant facts of this case are largely undisputed and may be summarized as follows: On 28 September 2007, the Thompsons acquired property located at 303 Old Pine Court, Richlands, North Carolina (“the property”). In order to purchase the property, the Thompsons borrowed \$205,850.00 from the Bank and secured the loan with a Deed of Trust on the property. The Thompsons later defaulted on the loan by failing to make the payment to the Bank that was due on 1 September 2013, or to make any payments thereafter. A letter informing the Thompsons of the default was mailed on 2 February 2014, and a pre-foreclosure notice was mailed to the Thompsons on 2 September 2014. On 23 July 2015, Trustee Services of Carolina, LLC was appointed as substitute trustee for the property. The Bank instructed the substitute trustee to institute foreclosure proceedings.

On 29 July 2015, the substitute trustee filed a notice of a foreclosure hearing to be conducted on 15 September 2015. The foreclosure hearing was continued until 17 November 2015, at which time the Clerk of Superior Court for Onslow County conducted a hearing and entered an order allowing the foreclosure to proceed. The Thompsons appealed the Clerk’s order to the Superior Court of Onslow County for a *de novo* hearing. The trial court conducted a hearing on 15 February 2016. On 8 April 2016, the court entered an order allowing the foreclosure to proceed. The Thompsons entered timely notice of appeal to this Court from the trial court’s order.

II. Standard of Review

“The applicable standard of review on appeal where, as here, the trial court sits without a jury, is whether competent evidence exists to support the trial court’s findings of fact and whether the conclusions reached were proper in light of the findings.” *In re Foreclosure of Adams*, 204 N.C. App. 318, 320, 693 S.E.2d 705, 708 (2010) (quotations and citations omitted). “Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal.” *In re Foreclosure of Bass*, 366 N.C. 464, 467, 738 S.E.2d 173, 175 (2013) (citation omitted).

III. Right to Foreclose: General Principles

The general principles by which foreclosure must be conducted are well established. “Foreclosure by power-of-sale proceedings conducted pursuant to N.C. Gen. Stat. § 45-21.16 are limited in scope. A

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power-of-sale provision contained in a deed of trust vests the trustee with the ‘power to sell the real property mortgaged without any order of court in the event of a default.’ ” *In re Foreclosure of Collins*, __ N.C. App. __, __, __ S.E.2d __, __ (7 February 2017) (quoting *In re Foreclosure of Michael Weinman Associates*, 333 N.C. 221, 227, 424 S.E.2d 385, 388 (1993)). N.C. Gen. Stat. § 45-21.16(a) (2015) requires that in order to initiate a foreclosure proceeding, the mortgagee or trustee must file a notice of hearing with the clerk of court and serve notice of the hearing upon the appropriate parties. The Thompsons do not dispute that they were properly served with notice of the hearing. Thereafter, a hearing “shall be held before the clerk of court in the county where the land, or any portion thereof, is situated.” N.C. Gen. Stat. § 45-21.16(d) (2015). At the hearing, the lender “bears the burden of proving that there was a valid debt, default, the right to foreclose under power of sale, and notice.” *In re Foreclosure of Brown*, 156 N.C. App. 477, 489, 577 S.E.2d 398, 406 (2003). N.C. Gen. Stat. § 45-21.16(d) provides in relevant part that:

If the clerk finds the existence of (i) valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) right to foreclose under the instrument, [and] (iv) notice to those entitled to such under subsection (b), . . . then the clerk shall authorize the mortgagee or trustee to proceed under the instrument, and the mortgagee or trustee can give notice of and conduct a sale pursuant to the provisions of this Article. . . .

IV. Discussion

In this case, the Thompsons’ only challenge to the order allowing foreclosure is their contention that the evidence fails to show that the Bank has the right to foreclose on the property. The Thompsons assert that as a result of an error contained in the Deed of Trust’s description of the property, the Bank “never received legal title” to the property and therefore has no right to foreclose on the loan secured by the Deed of Trust. Upon careful review of the relevant jurisprudence, in light of the facts of this case, we conclude that the Thompsons’ argument lacks merit.

Resolution of this appeal requires an examination of the contents of the General Warranty Deed and the Deed of Trust. Both the General Warranty Deed and the Deed of Trust (1) identify the location of the property as 303 Old Pine Ct., Richlands, N.C., (2) identify the property as being Lot 46 as shown on a plat recorded in Map Book 51, Page 149, Slide 1485 of the Onslow County Registry, and (3) identify the property as

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[253 N.C. App. 46 (2017)]

having Onslow County Tax Parcel ID Number 46B-153. The Thompsons' appellate argument is based upon a single error in the Deed of Trust, evidenced in the following discrepancy between the documents:

1. The General Warranty Deed describes the property as "all of Lot 46 as shown on a plat entitled 'Final Plat Walnut Hills, Section III-C', prepared by Parker & Associates, Inc., dated August 3, 2006 and recorded in Map Book 51, Page 149, Slide L-1485, Onslow County Registry."
2. The Deed of Trust describes the property as "all of Lot 46, as shown on a plat entitled 'Final Plat Walnut Hills, Section II-C' prepared by Parker & Associates, Inc., dated August 3, 2006 and recorded in Map Book 51, Page 149, Slide L-1485, Onslow County Registry."

(Emphasis added). The sole difference between these documents is that the Deed of Trust describes the property as being located in "Section II-C" of the Walnut Hills subdivision, and the General Warranty Deed identifies the property as being located in "Section III-C" of the Walnut Hills subdivision. The parties agree that the Walnut Hills subdivision did not include a "Section II-C" and that the reference in the Deed of Trust to "Section II-C" was incorrect and referred to a location that does not exist. The Thompsons contend that this error renders the Deed of Trust void as a matter of law. The Bank, however, argues that the Deed of Trust's reference to "Section II-C" is a minor error that creates only a latent ambiguity as to the description of the property, which may be rectified by examination of extrinsic documents referenced in the Deed of Trust. We agree with the Bank's analysis.

Neither the transfer of property from a buyer to a seller, nor the execution of documents securing a loan used to purchase real estate is a modern phenomenon or an unusual occurrence. Property has changed hands throughout North Carolina's history and there have been many occasions in which a party has challenged the validity of a document evidencing a property transaction on the grounds that the document contained an error or failed to identify the property with sufficient certainty. Our courts have had numerous opportunities during the last 150 years to consider the effect of an error or misnomer in a deed, promissory note, or other real estate-related document. As a result, the law governing the issue of errors or uncertainty in such documents has been firmly established for more than a century.

N.C. Gen. Stat. § 22-2 (2015), known as the statute of frauds, requires that all contracts to convey land "shall be void unless said contract, or

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some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized." The Supreme Court of North Carolina has held that "[a] valid contract to convey land, therefore, must contain expressly or by necessary implication all the essential features of an agreement to sell, one of which is a description of the land, certain in itself or capable of being rendered certain by reference to an extrinsic source designated therein." *Kidd v. Early*, 289 N.C. 343, 353, 222 S.E.2d 392, 400 (1976). The general rule regarding the validity of the description of property in a deed or related document is as follows:

The decisions in this State are in very general recognition of the principle that a deed conveying real estate or a contract concerning it, within the meaning of the statute of frauds, must contain a description of the land, the subject-matter of the contract, "either certain in itself or capable of being reduced to certainty by reference to something extrinsic to which the contract refers."

Patton v. Shuder, 167 N.C. 500, 502, 83 S.E. 818, 819 (1914) (quoting *Massey v. Belisle*, 24 N.C. 170, 177 (1841)).¹

"It is presumed that the grantor in a deed of conveyance intended to convey something, and the deed will be upheld unless the description is so vague or contradictory that it cannot be ascertained what thing in particular is meant." *Duckett v. Lyda*, 223 N.C. 356, 358, 26 S.E.2d 918, 919 (1943) (citations omitted). Thus, "[w]hile the contract must contain a description of the land to be sold, it is not essential that the description be so minute or particular as to make resort to extrinsic evidence unnecessary. The line of separation is the distinction between a patent and a latent ambiguity." *Gilbert v. Wright*, 195 N.C. 165, 166, 141 S.E. 577, 578 (1928) (citing *Lewis v. Murray*, 177 N.C. 17, 97 S.E. 750 (1919)). "Whether a description is patently ambiguous is a question of law." *Kidd*, 289 N.C. at 353, 222 S.E.2d at 400 (citation omitted).

Although a description of real property must adequately identify the subject property, the law will support a deed if possible. "When a description leaves the land 'in a state of absolute uncertainty, and refers to nothing extrinsic by which it might be identified with certainty,' it is patently ambiguous and parol evidence is not admissible to aid the description. The deed or contract is void." *Kidd*, 289 N.C. at 353, 222

1. The Southeastern Reporter does not report cases decided prior to 1887.

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S.E.2d at 400 (quoting *Lane v. Coe*, 262 N.C. 8, 13, 136 S.E. 2d 269, 273 (1964)). “ ‘A description is . . . latently ambiguous if it is insufficient in itself to identify the property but refers to something extrinsic by which identification might possibly be made.’ Thus, a description missing or uncertain in one document may be rendered certain by another and together the documents may satisfy the statute of frauds.” *River Birch Associates v. City of Raleigh*, 326 N.C. 100, 123, 388 S.E.2d 538, 551 (1990) (quoting *Lane*, 262 N.C. at 13, 136 S.E. 2d at 273 (other citation omitted)). In sum:

It is a general rule, that if the description be so vague or contradictory, that it cannot be told what thing in particular is meant; the deed is void. But it is also a general rule, that the deed shall be supported, if possible; and if by any means different descriptions can be reconciled, they shall be, or if they be irreconcilable, yet if one of them sufficiently points out the thing, so as to render it certain that it was the one intended, a false or mistaken reference to another particular shall not overrule that which is already rendered certain.

Proctor v. Pool, 15 N.C., 370, 373 (1833).

We have reviewed our appellate jurisprudence addressing challenges to the validity of the identification of property described in documents such as a deed, deed of trust, or contract for the sale of property, and observe that our Courts have generally affirmed the validity of such documents when it is possible to ascertain the identity of the subject property. For example, in *Carson v. Ray*, 52 N.C. 609, 609 (1860), our Supreme Court upheld as valid a deed in which the grantor agreed to transfer “[m]y house and lot in the town of Jefferson, in Ashe County, North Carolina.” The Court noted that “there was no evidence that [the grantor] owned any other house and lot” in Jefferson, and that the deed presented only a latent ambiguity. Similarly, in *Gilbert v. Wright, supra*, our Supreme Court upheld an order of the lower court ordering specific performance of a contract to sell “the vacant lot” on the grounds that the other documents and the factual circumstances associated with the transaction clearly identified a specific vacant lot.

Where a document that constitutes part of the transfer of property, such as a deed or deed of trust, describes the property in a manner that is uncertain or contains an error, our appellate courts generally have upheld the decision of a trial court to admit extrinsic evidence derived from sources referred to in the challenged document, in order

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to establish with greater certainty the identity of the subject property. Thus, in *Taylor v. Bailey*, 34 N.C. App. 290, 237 S.E.2d 918 (1977), this Court upheld an order by the trial court granting specific performance of a contract for the sale of property. The contract erroneously described the property as being located in Buncombe County, rather than giving its correct location in Henderson County. We held that this discrepancy created only a latent ambiguity:

Defendant argues that the description before us for construction is clearly patently ambiguous. We cannot agree. True, there is no metes and bounds description. However, the description gives the acreage and refers to a deed of trust, naming the parties and the date thereof, in which the land is described with particularity. This is adequate to satisfy the “something extrinsic by which identification might possibly be made.” Further, the complaint locates the property in Henderson County.

Taylor, 34 N.C. App. at 292, 237 S.E.2d at 919 (quoting *Lane* at 13, 136 S.E. 2d at 273). In *River Birch*, *supra*, our Supreme Court held that “[t]he trial court incorrectly excluded evidence of the preliminary plat for the purpose of resolving a latent ambiguity in the identity of the common area referred to in the covenants.” *River Birch*, 326 N.C. at 126, 388 S.E.2d at 553. And, in *Tomika Invs., Inc. v. Macedonia True Vine Pent. Holiness Ch. of God, Inc.*, 136 N.C. App. 493, 524 S.E.2d 591 (2000), the defendant claimed that the subject deed was void because of the misstatement of the name of one of the parties. This Court held that “there is only a latent ambiguity in the deed” that did not render the deed void. *Tomika*, 136 N.C. App. at 497, 524 S.E.2d at 594.

Applying the principles discussed above to the present case, we conclude that the erroneous reference in the Deed of Trust to “Section II-C” instead of “Section III-C” is merely a scrivener’s error and creates only a latent ambiguity in the description of the property. This uncertainty may be remedied by examination of the four corners of the Deed of Trust and documents referenced therein. The Deed of Trust identifies the property as Lot 46 of a subdivision depicted on a plat “prepared by Parker & Associates, Inc., dated August 3, 2006 and recorded in Map Book 51, Page 149, Slide L-1485, Onslow County Registry.” This plat correctly identifies Lot 46 as being located in “Section III-C.” In addition, the Deed of Trust identifies the property with a street address and tax parcel ID number, both of which correspond to the information in the General Warranty Deed and the plat. Upon examination of the information in the record, in the context of the long-established jurisprudence on this

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subject, we conclude that the erroneous reference to “Section II-C” in the Deed of Trust did not render the document void and that the trial court did not err by allowing the foreclosure to go forward.

In their arguments seeking a contrary result, the Thompsons do not acknowledge that extrinsic evidence may be utilized to clarify a latent ambiguity and do not discuss the law on this issue or make any attempt to distinguish cases such as those cited above. Instead, the Thompsons cite cases that, although they may involve a deed of trust or the transfer of property, do not address in any respect the principles discussed in this opinion. We conclude that the Thompsons have failed to establish that the trial court erred or that they are entitled to relief on appeal. Accordingly, we conclude that the trial court’s order should be

AFFIRMED.

Judges BRYANT and INMAN concur.

IN THE MATTER OF J.D.A.D.

No. COA16-1076

Filed 18 April 2017

Termination of Parental Rights—grounds—failure to make adjudicatory findings—safe home—incarceration

The trial court erred by concluding that grounds existed to terminate respondent father’s parental rights where it failed to make any adjudicatory findings concerning the alleged failings of respondent to provide a safe home based on his incarceration.

Appeal by respondent from order entered 25 August 2016 by Judge Ted McEntire in Yancey County District Court. Heard in the Court of Appeals 3 April 2017.

Hockaday & Hockaday, P.A., by Daniel M. Hockaday, for petitioner-appellee.

Julie C. Boyer for respondent-appellant.

TYSON, Judge.

IN RE J.D.A.D.

[253 N.C. App. 53 (2017)]

Respondent-father appeals from an order terminating his parental rights. We reverse.

I. Background

Respondent is the father of the juvenile, J.D.A.D. Petitioner is the juvenile's mother. Petitioner and Respondent never married, and J.D.A.D. was born out of wedlock. On 21 August 2014, the district court entered an order, in which it adjudicated Respondent to be J.D.A.D.'s father and awarded permanent primary legal and physical custody to Petitioner. The court declined to grant Respondent any visitation whatsoever with J.D.A.D.

On 10 February 2016, Petitioner filed a petition to terminate Respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(5) (failure to legitimate) and (7) (abandonment) (2015). On 20 May 2016, Petitioner took a voluntary dismissal of the allegation of abandonment. Petitioner filed an amended petition to terminate Respondent's parental rights and alleged Respondent's parental rights to other children had been involuntarily terminated and Respondent lacked the ability or willingness to establish a safe home as an additional ground. *See* N.C. Gen. Stat. § 7B-1111(a)(9) (2015). On 25 August 2016, the trial court terminated Respondent's parental rights. Respondent filed timely notice of appeal.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7B-1001(a)(6) (2015).

III. Background

Respondent argues the trial court erred by concluding that grounds existed to terminate his parental rights. We agree.

IV. Standard of Review

"[O]ur 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).

V. Analysis

The trial court concluded grounds existed to terminate Respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(9). This statute

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allows parental rights to be terminated when “the parental rights of a parent with respect to another child of the parent have been terminated involuntarily by a court of competent jurisdiction and the parent lacks the ability or willingness to establish a safe home.” N.C. Gen. Stat. § 7B-1111(a)(9).

To terminate a parent’s rights under N.C. Gen. Stat. § 7B-1111(a)(9), the trial court must perform a two-part analysis. The trial court must find by clear, cogent and convincing evidence that: (1) there has been an involuntary termination of parental rights of another child of the parent, and (2) the parent has an inability or unwillingness to establish a safe home. *In re L.A.B.*, 178 N.C. App. 295, 299, 631 S.E.2d 61, 64 (2006). A safe home is defined as a “home in which the juvenile is not at substantial risk of physical or emotional abuse or neglect.” N.C. Gen. Stat. § 7B-101(19) (2015).

Respondent challenges the court’s finding of the second element. Respondent asserts the court’s findings of fact and the admitted evidence do not support a conclusion that he lacked the ability or willingness to provide a safe home.

The trial court found, in pertinent part:

That the respondent father lacks the ability to establish a safe home for the juvenile in that he has been incarcerated in the NC Department of Adult Corrections since October, 2015 and was incarcerated in local confinement from July, 2015, until October, 2015; that his expected release date is not until October, 2018; that the Court finds the respondent is unable to provide a home for the juvenile although the Court does not find the respondent . . . willfully failed to establish a safe home for the juvenile.

This Court has repeatedly stated that while a parent’s imprisonment is relevant to determining whether grounds exist for termination, “incarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision.” *In re C.W.*, 182 N.C. App. 214, 220, 641 S.E.2d 725, 730 (2007) (citation omitted); *see also In re P.L.P.*, 173 N.C. App. 1, 10, 618 S.E.2d 241, 247 (2005) (affirming termination of parental rights based on neglect where trial court found by clear, cogent and convincing evidence that the incarcerated respondent “(1) ‘could have written’ but did not do so; (2) ‘made no efforts to provide anything for the minor child’; (3) ‘has not provided any love, nurtur[ing] or support for the minor child’; and (4) ‘would continue to neglect the minor child

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if the child was placed in his care' ”), *aff'd per curiam*, 360 N.C. 360, 625 S.E.2d 779 (2006).

The only rationale cited by the trial court in its adjudicatory findings to support termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(9) is Respondent's incarceration. Petitioner cites evidence that Respondent has not been approved for visitation with the juvenile, has provided minimal financial support, continues to abuse illegal substances, and has not obtained necessary substance abuse treatment, to support her argument that Respondent is unable to establish a safe home for J.D.A.D.

While record evidence may support Petitioner's claims, and the trial court relied upon some of this evidence at disposition when determining best interests, the trial court failed to make any adjudicatory findings concerning these alleged failings by Respondent. It is not this Court's duty or responsibility to make and issue findings of fact. *In re B.G.*, 197 N.C. App. 570, 574, 677 S.E.2d 549, 552-53 (2009). Our review is to determine whether there is clear, cogent and convincing evidence in the record supports the findings and whether the findings support the conclusions of law. *In re J.S.L.*, 177 N.C. App. at 154, 628 S.E.2d at 389.

VI. Conclusion

The trial court's findings of fact do not find clear, cogent and convincing evidence and are insufficient to support its conclusion of law that grounds existed to terminate Respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(9). *Cf. In re D.J.D.*, 171 N.C. App. 230, 242, 615 S.E.2d 26, 34 (2005) (respondent's “incarceration *and* his inability to suggest alternate arrangements for his children, supports the trial court's conclusion that respondent was unable to establish a safe home.” (emphasis supplied)).

The trial court found no other grounds existed upon which to base termination of Respondent's parental rights. The trial court erred by concluding grounds existed to terminate Respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(9). We need not address Respondent's remaining argument on appeal that it was not in J.D.A.D.'s best interest to terminate Respondent's parental rights. The order terminating Respondent's parental rights is reversed. *It is so ordered.*

REVERSED.

Judges BRYANT and DAVIS concur.

IN RE J.K.

[253 N.C. App. 57 (2017)]

IN THE MATTER OF J.K.

No. COA16-823

Filed 18 April 2017

1. Child Abuse, Dependency, and Neglect—permanency planning order—best interests of child—clerical errors

The trial court did not err in a child neglect and dependency case by granting custody of the minor child to respondent father and not respondent mother in the permanency planning order. The record supported that this was in the minor child's best interests. The references to "the Respondents" in conclusions of law 2 and 7 were clerical errors that should have read "Respondent Mother" only.

2. Child Custody and Support—civil custody order—child neglect and dependency—termination of juvenile court jurisdiction

The trial court erred in a child dependency and neglect case by entering a custody order that was not in compliance with N.C.G.S. § 7B-911.

Appeal by respondent-mother from order entered 17 May 2016 by Judge Cheri L. Siler-Mack in District Court, Cumberland County. Heard in the Court of Appeals 13 March 2017.

Christopher L. Carr, for petitioner-appellee Cumberland County Department of Social Services and Beth A. Hall, for guardian ad litem.

Robert W. Ewing for respondent-appellant-mother.

STROUD, Judge.

Respondent-mother appeals from a permanency planning order and a custody order, both entered the same day, both of which grant legal and physical custody of her daughter to respondent-father. We affirm the permanency planning order and remand for correction of a clerical error. We also reverse and remand the custody order since it does not comply with the requirements of North Carolina General Statute § 7B-911 for termination of juvenile court jurisdiction and entry of a civil custody order enforceable and modifiable under North Carolina General

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Statute Chapter 50. On remand, the trial court should enter a new order in accord with North Carolina General Statute § 7B-911.

I. Background

On 29 September 2014, the Cumberland County Department of Social Services (“DSS”) filed a juvenile petition alleging that one-year-old Jennifer¹ was neglected and dependent. According to the petition, DSS received two child protective services referrals in September of 2014. Respondent-mother had a history of problems due to her mental illness, and she failed to take her medication as prescribed. On 28 September 2014, respondent-mother was admitted to Cape Fear Valley Medical Center because she was having auditory and visual hallucinations; this was respondent-mother’s second hospital admission in one month due to the same issues. Shortly after her admission to the hospital, respondent-mother tested positive for marijuana. At that time, DSS was unable to locate any suitable relatives to provide temporary care and supervision for Jennifer, so DSS took Jennifer into non-secure custody. On 1 December 2014, the trial court had a hearing regarding the non-secure custody order; the trial court ordered “[t]hat the juvenile shall continue to be placed in the home with the Respondent Father and Paternal Grandmother.”² On 18 August 2015, the trial court entered an order adjudicating Jennifer dependent.

On 17 February 2016, the trial court held a permanency planning hearing. On 17 May 2016, the trial court entered two orders based upon the 17 February 2016 hearing. First, the trial court entered an order entitled “Permanency Planning Order and Order to Close Juvenile Court Case File” (“Permanency Planning Order”). (Original in all caps.) In the Permanency Planning Order the trial court made findings of fact regarding both respondents’ and the juvenile’s circumstances. The trial court also found as follows:

23. That the permanent plan of reunification with the Respondent Father has been achieved.
24. That a termination of parental rights should not be pursued in this matter inasmuch as the permanent plan of reunification has been accomplished.

....

1. A pseudonym is used to protect the juvenile’s privacy and for ease of reading.

2. The December 2014 order was not actually entered -- signed and filed -- until 22 April 2016, nearly two years later.

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26. The Court finds that at this time it would be appropriate to return legal and physical custody of the juvenile to the Respondent Father, . . . , and that will be the Order of the Court. The Court finds that this will achieve the permanent plan of care for the juvenile and that further Judicial Review hearings are no longer necessary. The Court will allow the Department and Guardian ad Litem to close their respective Juvenile Court case files in this matter[.]

The trial court then ordered “[t]hat legal and physical custody of the juvenile . . . shall be returned to the Respondent Father” and “[t]hat the Cumberland County Department of Social Service and the Guardian ad Litem should be allowed to close their Juvenile Court case files[.]” The trial court also released the respondents’ court-appointed counsel and granted visitation to respondent-mother for an hour of visitation supervised by respondent–father every other week at a particular McDonald’s restaurant.³

Also on 17 May 2016, the trial court entered another order, entitled simply “ORDER” (“Custody Order”).⁴ The brief, two-page Custody Order incorporates the findings from the Permanency Planning Order. The Custody Order includes a conclusion of law that “North Carolina is the home state of the juvenile[] and this Court has jurisdiction over the juvenile under the provisions of the Uniform Child Custody Jurisdiction Enforcement Act for the purpose of entering an Order on Custody.” The Custody order then grants legal and physical custody of the juvenile to respondent-father and supervised visitation to respondent-mother, just as set forth in the Permanency Planning Order. Respondent-mother filed notice of appeal “from the Review Order changing custody of the above minor child that was filed on May 17, 2016.”

II. Standard of Review

Our review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and whether the

3. Previously, DSS had been providing the supervision for visitation.

4. Within the text of the Custody Order, the trial court calls the order an “Order on Custody[.]” The Custody Order does not refer to any particular statutory basis for its provisions but only notes that it was based upon evidence presented “at a Permanency Planning hearing[.]”

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findings support the conclusions of law. The trial court's findings of fact are conclusive on appeal when supported by any competent evidence, even if the evidence could sustain contrary findings. In choosing an appropriate permanent plan under N.C. Gen. Stat. § 7B-906.1 (2013), the juvenile's best interests are paramount. We review a trial court's determination as to the best interest of the child for an abuse of discretion. Questions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court.

Unchallenged findings of fact are deemed to be supported by the evidence and are binding on appeal. Moreover, erroneous findings that are unnecessary to support the trial court's conclusions of law may be disregarded as harmless.

In re A.C., ___ N.C. App. ___, ___, 786 S.E.2d 728, 733 (2016) (citations and quotation marks omitted).

III. Permanency Planning Order

[1] Respondent-mother argues that “the trial court erred in granting . . . Jennifer[']s custody to the respondent father when it concluded that the return of the juvenile to the respondents would be contrary [] to the welfare and best interests of the juvenile.” (Original in all caps.) Specifically, respondent-mother argues the trial court's conclusions of law in the Permanency Planning Order are contradictory and prevent this Court from adequately determining whether granting respondent-father custody of Jennifer was in her best interests.

Here, the trial court made the following pertinent conclusions of law:

2. No reasonable means were available to protect the juvenile, short of out-of-home placement, because return to the custody of the Respondents would be contrary to the welfare of the juvenile.
3. That the primary permanent plan of reunification with the Respondent Father with a secondary permanent plan of guardianship with the Paternal Grandmother; the Court approves of the permanent plans and the plans are consistent with the juvenile's best interests.
4. That the primary permanent plan has been achieved today.

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5. That the Respondent Mother . . . is not a fit and proper person for the care, custody and control of the juvenile. That it is in the juvenile's best interests to have supervised visitation with the Respondent Mother.
 6. That the Respondent Father . . . is a fit and proper person for the care, custody and control of the juvenile.
 7. That return of the juvenile to the custody of the Respondents would be contrary to the welfare and best interests of the juvenile.
 8. That the juvenile remains in need of more care and supervision than the Respondent Mother can provide for the juvenile at this time.
-
10. That in the best interests of the juvenile, legal and physical custody should be with the Respondent Father

Respondent-mother argues that the trial court's conclusions are contradictory as conclusions of law 2 and 7 do not support the court's order awarding custody to respondent-father because they conclude that the return of Jennifer's custody to "respondents" was contrary to her welfare and best interests. After careful review of the record, we conclude the references to "the Respondents" instead of "Respondent Mother" in conclusions of law 2 and 7 were clerical errors. *See* N.C. Gen. Stat. § 1A-1, Rule 60(a) (2015).

Clerical mistakes are "mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission . . ." *Id.*

A clerical error is 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. When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record speak the truth.

In re D.B., 214 N.C. App. 489, 497, 714 S.E.2d 522, 527 (2011) (citations, quotation marks, and brackets omitted).

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After conducting the permanency planning hearing on 17 February 2016, the trial court made the following unchallenged findings of fact:

5. That the juvenile has been placed in the home with the Respondent Father since November 16, 2014. That the juvenile is doing very well in the placement.
6. That the Paternal Grandmother is a good support system for the Respondent Father.
7. That the juvenile attends day care five (5) days per week. She interacts well with the other children at the day care center. [Jennifer] is on a schedule[] for toilet training. The juvenile is able to speak a few words.

. . . .

9. That the juvenile continues to display self injurious behaviors such as scratching her face and neck as well as grabbing her hair to the point of pulling it out. That Dr. [Smith] at Coastal Carolina Neuropsychiatric Center indicated that [Jennifer]'s behaviors are most likely due to her lacking a stable nurturing environment. That the Respondent Father was provided with techniques to help with the behaviors.
10. That the Respondent Mother is unemployed. She receives disability benefits.

. . . .

12. That the Respondent Mother has history of mental health issues and hospitalizations. That the Respondent Mother believes she was in witness protection with Cape Fear Valley Medical Center. That the Respondent Mother continues to deny having any mental health problem and continues to refuse to obtain and maintain treatment for her mental health issues.

. . . .

15. That the Respondent Mother has a CPS history in Sampson County where she lost custody of two children to their father.
16. That the Respondent Mother has not been compliant with recommended Court ordered services.

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. . . .

20. That the Respondent Father is employed with Goodyear. He works as a driver for Uber Car Services and has enrolled in school.

21. That the Respondent Father has completed Court ordered services.

. . . .

23. That the permanent plan of reunification with the Respondent Father has been achieved.

. . . .

26. The Court finds at this time it would be appropriate to return legal and physical custody of the juvenile to the Respondent Father . . . and that will be the Order of the Court.

These binding findings of fact, *see In re A.C.*, ___ N.C. App. at ___, 786 S.E.2d at 733, support the trial court's conclusion of law 10 that "in the best interests of the juvenile, legal and physical custody should be with the Respondent Father" which supports the ultimate decree granting custody of Jennifer to respondent-father's custody. Furthermore, the record fully supports a determination that it was in Jennifer's best interests to live with respondent-father and not respondent-mother. Thus, we conclude the references to "the Respondents" in conclusions of law 2 and 7 were clerical errors in that they should read "Respondent Mother" only. Accordingly, we remand the Permanency Planning Order to the trial court to correct the clerical errors in conclusions of law 2 and 7 to read "Respondent Mother."

IV. Custody Order

[2] Respondent-mother next argues "the trial court erred in entering a civil custody order without first terminating the jurisdiction of the juvenile court and making the required finding that there was no need for continued State intervention on behalf of the child." (Original in all caps.) Specifically, respondent-mother contends the trial court failed to make the requisite findings of fact pursuant to North Carolina General Statute § 7B-911 to terminate the juvenile court's jurisdiction before entering a civil custody order. Again, "[q]uestions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court." *In re A.C.*, ___ N.C. App. at ___, 786 S.E.2d at 733.

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We first note that the Custody Order is not really a “civil custody order” as contemplated by North Carolina General Statute § 7B-911. The Custody Order was entered in the juvenile court file and does not include any provisions transferring jurisdiction of the case to a Chapter 50 custody matter:

N.C. Gen. Stat. § 7B-911 specifically provides the procedure for transferring a Chapter 7B juvenile proceeding to a Chapter 50 civil action. In certain cases which have originated as abuse, neglect, or dependency proceedings under Chapter 7B of the General Statutes, a time may come when involvement by the Department of Social Services is no longer needed and the case becomes a custody dispute between private parties which is properly handled pursuant to the provisions of Chapter 50. N.C. Gen. Stat. § 7B-911 sets forth a detailed procedure for transfer of such cases which will ensure that the juvenile is protected and that the juvenile’s custodial situation is stable throughout this transition. For this reason, N.C. Gen. Stat. § 7B-911(b) requires that the juvenile court enter a permanent order prior to termination of its jurisdiction. After transfer, if a party desires modification of the juvenile’s custodial situation under Chapter 50, that party must file the appropriate motion for modification and demonstrate a substantial change in circumstances affecting the best interests of the child. The procedure required by N.C. Gen. Stat. § 7B-911 is not a mere formality which can be dispensed with just because the parties agree to a consent order. Jurisdiction cannot be conferred upon the court by consent, but the trial court must exercise its jurisdiction only in accordance with the applicable statutes.

Sherrick v. Sherrick, 209 N.C. App. 166, 169–70, 704 S.E.2d 314, 317 (2011) (citations omitted). Indeed, North Carolina General Statute § 7B-911 provides in relevant part:

(a) Upon placing custody with a parent or other appropriate person, the court *shall* determine whether or not jurisdiction in the juvenile proceeding should be terminated and custody of the juvenile awarded to a parent or other appropriate person pursuant to G.S. 50-13.1, 50-13.2, 50-13.5, and 50-13.7.

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(b) When the court enters a custody order under this section, the court *shall* either cause the order to be filed in an existing civil action relating to the custody of the juvenile or, if there is no other civil action, instruct the clerk to treat the order as the initiation of a civil action for custody.

. . . .

If the court's order initiates a civil action, the court shall designate the parties to the action and determine the most appropriate caption for the case. The civil filing fee is waived unless the court orders one or more of the parties to pay the filing fee for a civil action into the office of the clerk of superior court. The order shall constitute a custody determination, and any motion to enforce or modify the custody order shall be filed in the newly created civil action in accordance with the provisions of Chapter 50 of the General Statutes. The Administrative Office of the Courts may adopt rules and shall develop and make available appropriate forms for establishing a civil file to implement this section.⁵

(c) When entering an order under this section, the court *shall* satisfy the following:

- (1) Make findings and conclusions that support the entry of a custody order in an action under Chapter 50 of the General Statutes
- (2) Make the following findings:
 - a. There is not a need for continued State intervention on behalf of the juvenile through a juvenile court proceeding.

N.C. Gen. Stat. § 7B-911 (2015) (emphasis added).

Here, after the 17 February 2016 permanency planning hearing, on 17 May 2016 the trial court entered the Permanency Planning Order establishing the permanent plan as custody with respondent-father, ordering DSS and the guardian ad litem to close their juveniles case files, and relieving the respondents' attorneys from any further duties;

5. Unfortunately, from our research it appears that no forms for implementation of North Carolina General Statute § 7B-911 have yet been developed.

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all of these provisions indicate that the trial court intended to terminate juvenile jurisdiction. The trial court's separate Custody Order returning legal and physical custody of Jennifer to respondent-father appears to be intended to transfer the case to be addressed in the future as a Chapter 50 civil custody matter, but the order does not include the provisions required by North Carolina General Statute § 7B-911. *See id.* Specifically, since the respondents did not have another custody matter already pending, any civil custody order would need to:

- “instruct the clerk to treat the order as the initiation of a civil action for custody”
- “initiate[] a civil custody action”
- “designate the parties to the action and determine the most appropriate caption for the case”
- “[m]ake findings and conclusions that support the entry of a custody order in an action under Chapter 50 of the General Statutes”
- make a finding that “[t]here is not a need for continued State intervention on behalf of the juvenile through a juvenile court proceeding.”

Id.

The trial court's Custody Order did “[m]ake findings and conclusions that support the entry of a custody order in an action under Chapter 50” and made findings which tend to show that “[t]here is not a need for continued State intervention on behalf of the juvenile through a juvenile court proceeding[,]” although the order did not use exactly these words. *Id.* At this point in time, the primary permanent plan for placement with respondent-father has been in place since 17 May 2016 and we have affirmed the Permanency Planning Order, with remand for the correction of minor clerical errors. We also reverse and remand the Custody Order so that the trial court may on remand enter a civil custody order terminating the juvenile court's jurisdiction in compliance with North Carolina General Statute § 7B-911. The trial court may, in its sole discretion, hold an additional hearing prior to entry of the new order on remand.

V. Conclusion

For the reasons discussed above, we affirm the Permanency Planning Order but remand for correction of clerical errors. We reverse and remand the Custody Order for additional proceedings before the trial court to enter a new order consistent with this opinion.

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AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Chief Judge McGEE and Judge McCULLOUGH concur.

IN THE MATTER OF L.C.

No. COA16-1009

Filed 18 April 2017

1. Child Abuse, Dependency, and Neglect—abuse adjudication—improperly compelled testimony

The trial court erred in a juvenile adjudication hearing by compelling the juvenile's mother to testify in violation of her Fifth Amendment right against self-incrimination. The trial court was instructed to disregard the portions of respondent mother's improperly compelled testimony at a hearing in which she testified to her belief regarding the source of the minor child's injuries.

2. Child Abuse, Dependency, and Neglect—neglect adjudication—failure to seek timely medical attention

The trial court did not err in its adjudication of neglect where it made sufficient findings, including respondent's decision to not seek medical attention for two days despite being on notice of the minor child's injuries. The findings were unaffected by the Fifth Amendment violation compelling respondent mother to testify.

3. Child Abuse, Dependency, and Neglect—dependency adjudication—sufficiency of findings of fact—care or supervision—alternative child care arrangements

The trial court erred by adjudicating a child dependent where it failed to address the parent's ability to provide care or supervision and the availability to the parent of alternative child care arrangements.

4. Child Abuse, Dependency, and Neglect—disposition order—ceasing reunification efforts—aggravating circumstances required in a prior order

The trial court failed to make adequate findings of fact in support of its decision to cease reunification efforts between respondent mother and her minor child in a child abuse, dependency, and neglect case. The trial court's determination as to the existence of

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aggravating circumstances appeared for the first time in its dispositional order rather than in a prior order.

5. Child Abuse, Dependency, and Neglect—permanent plan—adoption—appropriate relative placements—sufficiency of findings of fact

The trial court erred in a child abuse, dependency, and neglect case by setting adoption as the minor child’s permanent plan without making sufficient findings of fact as to whether appropriate relative placements existed. While the trial court may have been waiting for the Department of Social Services to complete its evaluation, that fact did not obviate the need for specific findings of fact under N.C.G.S. § 7B-903(a1).

Appeal by respondent from order entered 5 July 2016 by Judge Betty J. Brown in Guilford County District Court. Heard in the Court of Appeals 3 April 2017.

Mercedes O. Chut for petitioner-appellee Guilford County Department of Social Services.

Elysia Jones for guardian ad litem.

N. Elise Putnam for respondent-appellant.

DAVIS, Judge.

This appeal involves a variety of issues stemming from the trial court’s order adjudicating a juvenile to be abused, neglected, and dependent. Among the issues presented is whether a parent who was compelled to testify in a juvenile adjudication hearing was deprived of her Fifth Amendment right against self-incrimination when — despite her clear invocation of that right — the trial court ordered her to answer a question likely to elicit an incriminating response. A.S. (“Respondent”) appeals from an order (1) adjudicating her daughter L.C. (“Lily”)¹ to be an abused, neglected, and dependent juvenile; (2) ceasing reunification efforts; and (3) setting adoption as the juvenile’s permanent plan along with a concurrent plan of guardianship. After careful review, we affirm in part, vacate in part, and remand.

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

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Factual and Procedural Background

On 4 February 2016, the Guilford County Department of Social Services (“DSS”) received a report alleging that Lily had been physically abused. Lily, who was less than eight months old at the time, had been admitted to Brenner Children’s Hospital in Winston-Salem, North Carolina with various injuries, including three fractured ribs, a bruise consistent with a bite mark on her left shoulder, and bruises on both feet. Lily’s femur was also injured, although the pediatrician could not conclusively state whether it was fractured.

At the time these injuries occurred, Respondent was living in an apartment with her adult sister (“Ida”), her friend (“Becky”), the minor children of Ida and Becky, and Respondent’s boyfriend (“Matt”). After DSS became involved, Respondent, Ida, and Becky submitted to polygraph testing at the request of DSS regarding the cause of Lily’s injuries, but Matt failed to do so. As a result, Respondent entered into a safety plan with DSS that barred Matt from having any future contact with Lily.

On 9 April 2016, DSS received another report that Lily had been physically abused based on her admission to Brenner Children’s Hospital with new injuries, including a right fractured clavicle, hemorrhaging in her brain, bruising on various parts of her body, a swollen right eye, and a left rib fracture. Respondent admitted to a law enforcement officer that she had violated her safety plan by allowing Matt to care for Lily while she was at work on the evening of 7 April 2016. Respondent testified that when she came home from work at approximately 10:30 p.m., she noticed that Lily “was not acting like herself,” “had bruises on her,” and had one eye “rolled in the back of her head[.]” Respondent accused Matt of having harmed Lily and did not believe him when he denied responsibility for her injuries.

That night, Respondent gave Pedialyte to Lily but did not immediately seek medical attention for her because Respondent was afraid that DSS would “take [Lily] from me because [Matt] was not supposed to be there” Two days later — after having observed Lily alternate between acting normally and “[j]ust go[ing] into a daze” — Respondent took Lily to Thomasville Hospital. On 10 April 2016, Respondent was charged with misdemeanor child abuse, and Matt was charged with two counts of felony assault on a child inflicting serious injury.

On 11 April 2016, DSS filed a petition alleging that Lily was an abused, neglected, and dependent juvenile and obtained non-secure custody of her. At the time the petition was filed, both Respondent and Matt were confined in the Guilford County Jail on the above-referenced charges.

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On 12 May 2016, an adjudicatory and dispositional hearing was held before the Honorable Betty J. Brown in Guilford County District Court. DSS called Respondent as its sole witness during the adjudicatory portion of the hearing. In an order entered on 5 July 2016, the trial court adjudicated Lily to be an abused, neglected, and dependent juvenile. In the dispositional portion of the order, the trial court ceased reunification efforts and ordered that the permanent plan for Lily be changed to adoption with a concurrent plan of guardianship. Respondent filed a timely notice of appeal.

Analysis**I. Adjudication**

Respondent argues that the trial court erred in adjudicating Lily to be an abused, neglected, and dependent juvenile. We review the trial court's order of adjudication to determine "(1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact." *In re Q.A.*, ___ N.C. App. ___, ___, 781 S.E.2d 862, 864 (2016) (citation, quotation marks, and brackets omitted). Findings of fact that are supported by competent evidence or are unchallenged by the appellant are binding on appeal. *In re A.B.*, ___ N.C. App. ___, ___, 781 S.E.2d 685, 689, *disc. review denied*, ___ N.C. ___, 793 S.E.2d 695 (2016). "Such findings are . . . conclusive on appeal even though the evidence might support a finding to the contrary." *In re McCabe*, 157 N.C. App. 673, 679, 580 S.E.2d 69, 73 (2003). We review a trial court's conclusions of law *de novo*. *In re J.S.L.*, 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2006).

As an initial matter, Respondent argues that Finding No. 22 and its subparts in the trial court's 5 July 2016 order merely contain recitations of her testimony and, therefore, do not constitute actual findings of fact by the trial court. Finding No. 22 states, in relevant part, that at the 12 May 2016 hearing Respondent "proffered, in pertinent part, the following testimony" and then summarizes Respondent's testimony in 99 subparts. We agree with Respondent on this issue. *See In re Bullock*, 229 N.C. App. 373, 378, 748 S.E.2d 27, 30 ("Recitations of the testimony of each witness do not constitute findings of fact by the trial judge." (emphasis omitted)), *disc. review denied*, 367 N.C. 277, 752 S.E.2d 149 (2013). Accordingly, we do not treat those recitations of testimony as actual "findings" in conducting our analysis.

Respondent also challenges Findings Nos. 12-21, 25-29, and 33 on the ground that they are verbatim recitations of allegations contained in the petition and, as such, should be disregarded. As a general matter,

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“the trial court’s findings must consist of more than a recitation of the allegations” contained in the juvenile petition. *In re O.W.*, 164 N.C. App. 699, 702, 596 S.E.2d 851, 853 (2004) (citation omitted). However,

it is not *per se* reversible error for a trial court’s fact findings to mirror the wording of a petition or other pleading prepared by a party. Instead, this Court will examine whether the record of the proceedings demonstrates that the trial court, through processes of logical reasoning, based on the evidentiary facts before it, found the ultimate facts necessary to dispose of the case. If we are confident the trial court did so, it is irrelevant whether those findings are taken verbatim from an earlier pleading.

In re J.W., ___ N.C. App. ___, ___, 772 S.E.2d 249, 253, *disc. review denied*, 368 N.C. 290, 776 S.E.2d 202 (2015). Accordingly, we will only consider those findings that are, in fact, supported by evidence in the record regardless of whether they mirror the language used in the petition.²

The following findings of fact are supported by Respondent’s own testimony: (1) in February 2016, Lily was admitted to Brenner Children’s Hospital after having sustained numerous injuries, including three fractured ribs, multiple bruises, a bite mark on her shoulder, and a possible fractured femur (Finding No. 12); (2) at the time that these injuries occurred, Lily was living with Respondent and three other adults, including Matt (Finding No. 13); (3) at DSS’s request, all of these adults except for Matt took a polygraph test regarding the cause of Lily’s injuries (Finding No. 14); (4) in March 2016, Respondent and DSS entered into a safety plan that forbade Matt from having any future contact with Lily (Finding No. 15); (5) on 7 April 2016, Respondent left Lily in Matt’s care (Finding No. 17); (6) when Lily was taken to the hospital on 9 April 2016, medical professionals discovered that she had suffered multiple injuries including a fractured collarbone, a brain hemorrhage, and bruising on various parts of her body, including her face (Finding No. 16); and (7) Respondent had noticed injuries to Lily at least two days prior to taking Lily to the hospital but had delayed seeking medical care because she feared DSS would take custody of the child based on her violation of her safety plan in allowing Matt to have contact with Lily (Finding Nos. 19, 24(d)).

2. The mere fact that some of the trial court’s findings may not be supported in the record constitutes harmless error to the extent that those findings are not required to sustain the trial court’s ultimate determinations. See *In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240 (2006) (erroneous findings that are unnecessary to support adjudication of neglect do not constitute reversible error).

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We must next determine whether the trial court's adjudication of Lily as an abused, neglected, and dependent juvenile was supported by adequate findings that were based upon competent evidence in the record.

A. Abuse

[1] An abused juvenile is defined, in pertinent part, as

[a]ny juvenile less than 18 years of age whose parent, guardian, custodian, or caretaker:

- a. Inflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means; [or]
- b. Creates or allows to be created a substantial risk of serious physical injury to the juvenile by other than accidental means[.]

N.C. Gen. Stat. § 7B-101(1)(a)-(b) (2015).

Although the trial court's order does not specify which particular findings provided the basis for its determination that Lily was an abused juvenile, it appears that this determination was primarily based upon Finding No. 24(b), wherein the trial court found that Respondent "did in fact know that [Matt] caused the first round of injuries that her child suffered in February 2016." Such knowledge would support a determination that Respondent "allow[ed] to be created a substantial risk of serious physical injury to the juvenile by other than accidental means[.]" N.C. Gen. Stat. § 7B-101(1)(b).

However, Respondent argues that Finding No. 24(b) was impermissibly based upon testimony by her that was elicited in violation of her right against self-incrimination under the Fifth Amendment to the United States Constitution. The standard of review for alleged violations of constitutional rights is *de novo*. *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009), *appeal dismissed*, 363 N.C. 857, 694 S.E.2d 766 (2010).

The Fifth Amendment — which is applicable to the states through the Fourteenth Amendment — "privileges an individual not to answer official questions put to him in any . . . proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Debnam v. N.C. Dep't of Correction*, 334 N.C. 380, 384-85, 432 S.E.2d 324, 328 (1993) (citation, quotation marks, and emphasis omitted). Our Supreme Court has held that "[t]he

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claim of privilege should be liberally construed.” *Herndon v. Herndon*, 368 N.C. 826, 830, 785 S.E.2d 922, 925 (2016) (citation and quotation marks omitted).

It is well established that “[t]his Fifth Amendment protection extends to civil proceedings.” *Id.* at 829, 785 S.E.2d at 925 (citation omitted). When the privilege is invoked in a civil case, “the finder of fact in a civil cause may use a witness’ invocation of his fifth amendment privilege against self-incrimination to infer that his truthful testimony would have been unfavorable to him.” *In re Estate of Trogdon*, 330 N.C. 143, 152, 409 S.E.2d 897, 902 (1991) (citation omitted).

In the present case, Respondent received a summons ordering her to appear at the 12 May 2016 hearing. At the adjudicatory phase of the hearing, DSS’s attorney called Respondent as its sole witness. At the beginning of her examination, the following exchange occurred between Respondent and DSS’s counsel.

Q. Has any one [sic] informed you that you have a right to plead the Fifth Amendment in regards to questions that may incriminate you, specifically, including incriminating you as to the charges that you’re currently facing?

A. Yes, sir.

Q. And they also explained to you that should you decide to plead The Fifth, in this particular case, that The Court, under the case law, can take civil inference and infer that had you testified, and answered the questions asked, that your testimony would have been harmful to your case?

A. Yes, sir.

Q. And it’s my understanding that you wish to proceed with this hearing?

A. Yes, sir.

Respondent then began answering questions posed by DSS’s attorney regarding the events that caused DSS to first become involved with Respondent’s family in February 2016, including questions regarding Lily’s initial injuries and hospitalization. However, as shown in the following exchange, after answering several questions regarding Matt’s status under the safety plan entered as a result of Lily’s February 2016 injuries, Respondent attempted to invoke her right against self-incrimination when she was explicitly asked who she thought was responsible for those injuries.

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Q. And the first Safety Plan, back in February, was there anything that prevented [Becky or Ida] from being around the child?

A. They just couldn't be around her by theirself [sic]

Q. You couldn't either at first?

A. No, sir.

Q. Right, but [Matt] couldn't be around [Lily] at all?

A. Yes, sir.

Q. Why do you reckon the Department and you, entered into an agreement, that for some reason treated one out of those four people completely different?

. . . .

Q. Do you know why [Matt] was treated differently than the other three people in that Safety Plan?

A. Because he didn't take his lie detector test.

THE COURT: Because what?

A. He did not take his lie detector test.

Q. And everybody else did?

A. Yes, sir.

Q. So after you found that out, of the four people --

A. Yes, sir, and that's the first Safety Plan [sic] it's not the only Safety Plan.

Q. -- of those four people; you, [Becky, Ida, and Matt], those are the only four people that could have done it; right?

A. Yes, sir.

Q. Who did you think did it?

A. After everything that's done happened --

Q. Uh-Uh. *At that time, before the child got the next round of injuries, after [Matt] refused to cooperate with police, who did you think hurt your child; breaking three ribs, a leg, bite marks, and bruises to the feet?*

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A. *I plead the Fifth.*

(Emphasis added.)

DSS's attorney argued that Respondent had waived her Fifth Amendment privilege by "open[ing] the door to this line of testimony through her prior testimony" After hearing arguments from both sides, the trial court ruled that Respondent had "waived her Fifth Amendment rights, and is required to answer the questions." Respondent proceeded to testify as to her belief that Matt had most likely been responsible for Lily's February 2016 injuries. In its subsequent order, the trial court found that Respondent "did in fact know that [Matt] caused the first round of injuries that her child suffered in February 2016."

Respondent contends on appeal that the trial court erred by ordering her to respond to the questions of the DSS attorney after she clearly invoked her right against self-incrimination. DSS, conversely, argues that her Fifth Amendment rights were not violated because during the initial portion of her testimony Respondent had voluntarily answered questions regarding some of the circumstances surrounding Lily's February 2016 injuries, thereby waiving her right to refuse to answer further questions on that topic.

Our Supreme Court has recently emphasized the importance of distinguishing between *compelled* witnesses and *voluntary* witnesses when analyzing whether a witness's Fifth Amendment rights have been violated:

Depending on whether a witness is compelled to testify or testifies voluntarily, the right against self-incrimination operates differently. . . . *A compelled witness has no occasion to invoke the privilege against self-incrimination until testimony sought to be elicited will in fact tend to incriminate.* . . . By contrast, a *voluntary* witness has the benefit of choosing whether to testify and determines the area of disclosure and therefore of inquiry. For that reason, a voluntary witness cannot claim an immunity from cross-examination on the matters he has himself put in dispute.

Herndon, 368 N.C. at 830, 785 S.E.2d at 925 (internal citations and quotation marks omitted and emphasis added).

This distinction between compelled and voluntary witnesses was explained in *Brown v. United States*, 356 U.S. 148, 2 L. Ed. 2d 589 (1958), a case that was relied upon by our Supreme Court in *Herndon*. As the

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United States Supreme Court observed in *Brown*, a voluntary witness is treated differently from a compelled witness because the voluntary witness “has the choice, after weighing the advantage of the privilege against self-incrimination against the advantage of putting forward his version of the facts and his reliability as a witness, *not to testify at all.*” *Id.* at 155, 2 L. Ed. 2d at 597 (emphasis added).

Accordingly, when a witness testifies *voluntarily*, the Fifth Amendment privilege will not provide a shield against questions as to matters that the witness has herself put into contention. When a witness is *compelled* to testify, however, her right to assert the privilege is preserved until such time as an answer to a particular question would incriminate her. At that point, the witness must decide whether to invoke the privilege or waive it. *See Herndon*, 368 N.C. at 830, 785 S.E.2d at 925. Once “the individual invokes the fifth amendment privilege, the trial court [then] must determine whether the question is such that it may reasonably be inferred that the answer may be self-incriminating. In situations where the trial court determines that the answer will not be self-incriminating, the trial court may compel the individual to answer the question.” *State v. Eason*, 328 N.C. 409, 418-19, 402 S.E.2d 809, 813 (1991) (internal citations omitted).

Here, Respondent was a compelled witness rather than a voluntary witness because she was called by DSS and did not have a choice regarding whether or not to testify. As explained in *In re Davis*, 116 N.C. App. 409, 448 S.E.2d 303, *disc. review denied*, 338 N.C. 516, 452 S.E.2d 808 (1994), a respondent at a hearing upon a juvenile petition may be compelled by the petitioner to give testimony even in the absence of a subpoena. *See id.* at 412, 448 S.E.2d at 305 (holding that despite the respondent’s objection to testifying, “DSS was . . . free to call [the respondent] to testify as an adverse party when she appeared at the proceeding, and a subpoena was not required”).

Thus, this case involves a situation in which Respondent, a compelled witness, invoked the Fifth Amendment when DSS directly asked her who she thought had hurt her child. At the time DSS’s attorney propounded this question, child abuse charges were pending against Respondent related to her decision to leave Lily in Matt’s care on 7 April 2016. Accordingly, her testimony that she thought Matt had been responsible for the February 2016 injuries to Lily was clearly incriminating as it constituted evidence that she was aware leaving Lily with Matt for a second time created a substantial risk of harm to the child. *See* N.C. Gen. Stat. § 14-318.2(a) (2015) (providing that a person may be convicted of

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child abuse who “allows to be created a substantial risk of physical injury, upon or to such child by other than accidental means . . .”).

DSS argues that “having voluntarily and knowingly waived her Fifth Amendment privilege, [Respondent] could not then pick and choose which questions she wanted to answer.” The fatal flaw with this argument, however, is that it incorrectly applies the Fifth Amendment standard applicable to voluntary witnesses rather than that applicable to compelled witnesses. Because, as discussed above, Respondent was a compelled witness, she did *not* “ha[ve] the choice, after weighing the advantage of the privilege against self-incrimination against the advantage of putting forward h[er] version of the facts and h[er] reliability as a witness, *not to testify at all.*” *Brown*, 356 U.S at 155, 2 L. Ed. 2d at 597 (emphasis added).

Our decision in this case is fully consistent with our Supreme Court’s recent decision in *Herndon*. In that case, the plaintiff sought a domestic violence protective order (“DVPO”) against his wife on the ground that she had secretly drugged his food on several occasions. *Herndon*, 368 N.C. at 827, 785 S.E.2d at 923. At the DVPO hearing, the plaintiff presented several witnesses and then rested his case. When the defendant’s attorney called the defendant to the stand to testify on her own behalf, the following exchange occurred:

[DEFENSE COUNSEL]: Call [the defendant].

THE COURT: All right. Before we do that, let me make a statement. You’re calling her. She ain’t going to get up there and plead no Fifth Amendment?

[DEFENSE COUNSEL]: No, she’s not.

THE COURT: I want to make sure that wasn’t going to happen because you—somebody might be going to jail then. I just want to let you know. I’m not doing no Fifth Amendment.

[DEFENSE COUNSEL]: No.

THE COURT: Okay. Call your witness.

Id. at 827, 785 S.E.2d at 923-24.

Following the direct examination of defendant by her counsel, the trial court proceeded to ask her questions regarding the plaintiff’s allegations. The trial court subsequently granted the plaintiff’s DVPO. *Id.* at 828, 785 S.E.2d at 924.

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On appeal, a divided panel of this Court held that the defendant's Fifth Amendment right against self-incrimination was violated when the trial court required her to choose between "forgoing her right to testify at a hearing where her liberty was threatened or forgoing her constitutional right against self-incrimination." *Herndon*, __ N.C. App. __, __, 777 S.E.2d 141, 144 (2015), rev'd, 368 N.C. 826, 785 S.E.2d 922 (2016). Moreover, the majority determined that the trial court had asked questions exceeding the scope of the defendant's testimony on direct examination and that "[t]he trial court's threat to imprison [her] if she invoked her Fifth Amendment rights may have forced [her] to answer these questions differently than she otherwise would have if she felt free to assert that constitutional right." *Id.* at __, 777 S.E.2d at 145. For these reasons, the majority vacated the trial court's order and remanded for a new hearing in which the trial court was directed to disregard the defendant's testimony from the previous hearing. *Id.* at __, 777 S.E.2d at 145.

The Supreme Court reversed the majority's decision, stating the following:

At no point during direct examination or the trial court's questioning did defendant, a voluntary witness, give any indication that answering any question posed to her would tend to incriminate her. Put simply, defendant never attempted to invoke the privilege against self-incrimination We are not aware of, and the parties do not cite to, any case holding that a trial court infringes upon a witness's Fifth Amendment rights when the witness does not invoke the privilege.

Herndon, 368 N.C. at 832, 785 S.E.2d at 926 (emphasis added).

Thus, the present case differs from *Herndon* in two critical respects: (1) Respondent here was a compelled witness rather than a witness who voluntarily took the stand as the witness did in *Herndon*; and (2) unlike the defendant in *Herndon*, Respondent explicitly invoked her Fifth Amendment right when faced with a question that would — and did — elicit an incriminating answer.

Accordingly, we conclude that Respondent was deprived of her constitutional right against self-incrimination when the trial court ordered her to answer the question of DSS's attorney regarding who she thought was responsible for Lily's February 2016 injuries prior to her decision to leave Lily in Matt's care on 7 April 2016. Consequently, the trial court was not permitted to consider her response to this question in the course of making its determination as to whether Lily was an abused juvenile.

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Having determined that a Fifth Amendment violation occurred, we must still determine whether Respondent was actually prejudiced. See *Hill v. Cox*, 108 N.C. App. 454, 461, 424 S.E.2d 201, 206 (1993) (“[E]very violation of a constitutional right is not prejudicial. Some constitutional errors are deemed harmless in the setting of a particular case, where the appellate court can declare a belief that it was harmless beyond a reasonable doubt.” (citation, quotation marks, and ellipsis omitted)).

Based on our review of the trial court’s order, it appears that (1) the challenged portion of Respondent’s testimony likely constituted the primary basis for the trial court’s finding that Respondent “did in fact know that [Matt] caused the first round of injuries that her child suffered in February 2016[;]” and (2) this finding, in turn, served as the primary ground for the trial court’s adjudication of Lily as an abused juvenile. Although it is conceivable that the trial court *might* have still made such a finding — and an ensuing adjudication of Lily as an abused juvenile — even in the absence of the testimony elicited in violation of Respondent’s right against self-incrimination, we are not at liberty to speculate as to the precise weight the trial court gave to this testimony in reaching its conclusion that Lily was an abused child. See, e.g., *Alvarez v. Alvarez*, 134 N.C. App. 321, 327, 517 S.E.2d 420, 424 (1999) (“Given our inability to determine the weight that the trial court assigned to these erroneous findings of facts, its use of these findings to support the apparent conclusions of law . . . requires the reversal and remand of its judgment.” (citation omitted)).

Thus, because we cannot ascertain with any degree of certainty whether the trial court’s adjudication of abuse would have been made even absent Respondent’s improperly compelled testimony, we are unable to uphold that adjudication. We therefore vacate the adjudication of abuse and remand for further proceedings. On remand, we direct the trial court to disregard the portions of Respondent’s testimony at the 12 May 2016 hearing in which she testified to her belief as of 7 April 2016 regarding the source of Lily’s injuries from February 2016.

B. Neglect

[2] N.C. Gen. Stat. § 7B-101(15) includes in the definition of a neglected juvenile a juvenile “who does not receive proper care, supervision, or discipline from the juvenile’s parent, guardian, custodian, or caretaker; . . . or who is not provided necessary medical care; . . . or who lives in an environment injurious to the juvenile’s welfare . . .” N.C. Gen. Stat. § 7B-101(15). Additionally, “[t]his Court has consistently required that there be some physical, mental, or emotional impairment of the juvenile

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or a substantial risk of such impairment as a consequence of the failure to provide proper care, supervision, or discipline in order to adjudicate a juvenile neglected.” *In re L.Z.A.*, __ N.C. App. __, __, 792 S.E.2d 160, 168-69 (2016) (citation, quotation marks, and emphasis omitted).

We are satisfied that the trial court made findings supported by competent evidence sufficient to establish that Lily was a neglected juvenile and that those findings were unaffected by the above-referenced Fifth Amendment violation. The trial court found that Respondent made the decision to leave Lily in Matt’s care on 7 April 2016 despite knowing that the safety plan in effect at that time specifically barred him from having contact with Lily. Moreover, after learning of the significant injuries to Lily on that date, Respondent waited two days to seek medical treatment for her because of Respondent’s concern that DSS would “take [Lily] from me because [Matt] was not supposed to be there”

These facts adequately support an adjudication of neglect. Indeed, Respondent herself testified as to the distressed state Lily was in on 7 April 2016, including the fact that Lily “was not acting like herself,” “had bruises on her,” and had one eye “rolled in the back of her head[.]” Respondent’s decision to not seek medical attention for two days despite being on notice of Lily’s condition fully supports the trial court’s adjudication of neglect. *See State v. Stevens*, 228 N.C. App. 352, 357, 745 S.E.2d 64, 68 (“[A] [parent’s] delay in seeking necessary medical care for a child supported the conclusion of law that the child was neglected.” (citation and quotation marks omitted)), *appeal dismissed and disc. review denied*, 367 N.C. 256, 749 S.E.2d 886 (2013).

C. Dependency

[3] Respondent next contends that the trial court failed to make adequate findings to support its adjudication of dependency. A “dependent juvenile” is defined, in pertinent part, as one whose “parent, guardian, or custodian is unable to provide for the juvenile’s care or supervision and lacks an appropriate alternative child care arrangement.” N.C. Gen. Stat. § 7B-101(9). In order to sustain an adjudication of dependency, “the trial court must address both (1) the parent’s ability to provide care or supervision, and (2) the availability to the parent of alternative child care arrangements.” *In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005). “Findings of fact addressing both prongs must be made before a juvenile may be adjudicated as dependent, and the court’s failure to make these findings will result in reversal of the court.” *In re B.M.*, 183 N.C. App. 84, 90, 643 S.E.2d 644, 648 (2007).

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DSS acknowledges that the trial court failed to make findings of fact addressing either of these prongs. Accordingly, we must also vacate the trial court's adjudication of dependency and remand for additional findings on these issues. *See id.* (remanding for "entry of findings as to the ability of the parent to provide care or supervision and the availability of alternative child care arrangements" (emphasis omitted)).

II. Disposition

Respondent next challenges several aspects of the dispositional portion of the trial court's order. Following an adjudication of neglect, abuse, or dependency, the trial court must enter an appropriate disposition based on the juvenile's best interests. *See* N.C. Gen. Stat. § 7B-903(a) (2015). We review a trial court's determination regarding the best interests of a child under an abuse of discretion standard. *In re A.K.D.*, 227 N.C. App. 58, 60, 745 S.E.2d 7, 9 (2013).

A. Ceasing Reunification Efforts

[4] Respondent contends that the trial court failed to make adequate findings of fact in support of its decision to cease reunification efforts between her and Lily. The pertinent section of the Juvenile Code that governs initial dispositional hearings provides as follows:

(c) If the disposition order places a juvenile in the custody of a county department of social services, the court shall direct that reasonable efforts for reunification as defined in G.S. 7B-101 shall not be required if the court makes written findings of fact pertaining to any of the following:

- (1) A court of competent jurisdiction *has determined* that aggravated circumstances exist because the parent has committed or encouraged the commission of, or allowed the continuation of, any of the following upon the juvenile:
 - a. Sexual abuse.
 - b. Chronic physical or emotional abuse.
 - c. Torture.
 - d. Abandonment.
 - e. Chronic or toxic exposure to alcohol or controlled substances that causes impairment of or addiction in the juvenile.

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- f. Any other act, practice, or conduct that increased the enormity or added to the injurious consequences of the abuse or neglect.

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

In the present case, the trial court ceased reunification efforts based upon its finding that “this Court has determined that aggravated circumstances exist because [Respondent] has committed or encouraged the commission of, or allowed the continuation of” the aggravated circumstances set forth in N.C. Gen. Stat. § 7B-901(c)(1)b, c, and f.

However, in the recent case of *In re G.T.* __ N.C. App. __, 791 S.E.2d 274 (2016), *appeal docketed*, No. 420A16 (N.C. Nov. 17, 2016), a divided panel of this Court construed N.C. Gen. Stat. § 7B-901(c) as follows:

[T]he dispositional court must make a finding that “[a] court of competent jurisdiction has determined” that the parent allowed one of the aggravating circumstances to occur. We conclude that the language at issue is clear and unambiguous and that in order to give effect to the term “has determined,” *it must refer to a prior court order.* The legislature specifically used the present perfect tense in subsections (c)(1) through (c)(3) to define the determination necessary. Use of this tense indicates that the determination must have already been made by a trial court — either at a previously-held adjudication hearing or some other hearing in the same juvenile case, or at a collateral proceeding in the trial court.

Id. at __, 791 S.E.2d at 279 (emphasis added).

We are bound by the majority’s decision in *G.T.* See *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (“Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent,

3. We note that N.C. Gen. Stat. § 7B-901(c) was amended by the General Assembly in 2016 to provide that even if the trial court finds that one of the aggravating circumstances set forth in N.C. Gen. Stat. § 7B-901(c)(1) exists, the trial court is not required to cease reunification efforts if it “concludes that there is compelling evidence warranting continued reunification efforts[.]” See 2016-3 N.C. Adv. Legis. Serv. 49. That statutory language was made effective 1 July 2016. See 2016-3 N.C. Adv. Legis. Serv. 302. However, we apply the version of the statute in effect on the date — 12 May 2016 — that the trial court held the dispositional hearing and rendered its decision. See *In re E.M.*, __ N.C. App. __, __, 790 S.E.2d 863, 870 (2016) (applying version of statute in effect when dispositional hearing was held and decision rendered rather than version in effect at time order was filed).

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unless it has been overturned by a higher court.”). Here, the trial court’s determination as to the existence of aggravating circumstances under N.C. Gen. Stat. § 7B-901(c) appears for the first time in its 5 July 2016 dispositional order rather than in a prior order. Thus, pursuant to *G.T.*, the trial court’s conclusion that reasonable reunification efforts must cease pursuant to N.C. Gen. Stat. § 7B-901(c)(1) was erroneous. Accordingly, we vacate that portion of the dispositional order and remand to the trial court.

B. Findings Regarding Appropriate Relative Placements

[5] Finally, Respondent contends that the trial court erred in setting adoption as Lily’s permanent plan without making sufficient findings of fact as to whether appropriate relative placements existed for her. Section 7B-903 of the Juvenile Code prescribes the dispositional alternatives available to a trial court following an adjudication of abuse, neglect, or dependency. *See* N.C. Gen. Stat. § 7B-903. Subsection (a1) provides, in pertinent part, as follows:

In placing a juvenile in out-of-home care under this section, the court shall first consider whether a relative of the juvenile is willing and able to provide proper care and supervision of the juvenile in a safe home. If the court finds that the relative is willing and able to provide proper care and supervision in a safe home, then the court shall order placement of the juvenile with the relative unless the court finds that the placement is contrary to the best interests of the juvenile.

N.C. Gen. Stat. § 7B-903(a1).

We have held that a “[f]ailure to make specific findings of fact explaining [why] the placement with the relative is not in the juvenile’s best interest will result in remand.” *In re A.S.*, 203 N.C. App. 140, 141-42, 693 S.E.2d 659, 660 (2010) (citation omitted). Here, the trial court found that “[r]elatives have been identified as potential placement options for the juvenile. The mother provided the maternal great-aunt [Ms. J.] as a possible placement for the juvenile. The Department is in the process of scheduling a home study for [Ms. J.]” The court also made a finding that “[t]he Department is evaluating relatives, and if the home study on a relative is approved, the child will be placed there or otherwise in a foster home.”

Despite these findings, the trial court proceeded to determine that neither custody nor legal guardianship with a relative should be pursued

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and instead set the primary permanent plan as adoption along with a concurrent permanent plan of guardianship. We note that the order does not specify whether adoption or guardianship would be with a relative. While the trial court may have been taking a cautious route by waiting for DSS to complete its evaluation of potential relative placements, this did not obviate the need for specific findings of fact under N.C. Gen. Stat. § 7B-903(a1). Because the trial court failed to make the required findings, we vacate and remand this part of the dispositional order in order for the trial court to make appropriate findings concerning Lily's possible placement with relatives.

Conclusion

For the reasons stated above, we affirm the trial court's adjudication of neglect but vacate the trial court's adjudications of abuse and dependency. We also vacate the dispositional portion of the court's 5 July 2016 order with respect to its decision to cease reunification efforts pursuant to N.C. Gen. Stat. § 7B-901(c) and its failure to make sufficient findings of fact concerning Lily's potential placement with a relative as required by N.C. Gen. Stat. § 7B-903(a1). We remand for further proceedings not inconsistent with this opinion.⁴

AFFIRMED IN PART; VACATED IN PART; AND REMANDED WITH INSTRUCTIONS.

Judges BRYANT and TYSON concur.

4. On remand, the trial court may, in its discretion, choose to take new evidence. *See In re J.M.D.*, 210 N.C. App. 420, 428, 708 S.E.2d 167, 173 (2011) ("Whether on remand for additional findings a trial court receives new evidence or relies on previous evidence submitted is a matter within the discretion of the trial court." (citation and quotation marks omitted)).

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WAYNE MORGAN MILLER, PLAINTIFF

v.

CYNTHIA BAILEY MILLER AKA CYNTHIA BAILEY, DEFENDANT

AND

CYNTHIA BAILEY MILLER, PLAINTIFF

v.

WAYNE MORGAN MILLER, DEFENDANT

No. COA16-486

Filed 18 April 2017

1. Divorce—setting aside divorce judgment—Rule of Civil Procedure 60(b)—equitable distribution—subject matter jurisdiction

The trial court did not abuse its discretion by entering a decree setting aside a divorce judgment under Rule of Civil Procedure 60(b). The trial court had subject matter jurisdiction over defendant wife's equitable distribution counterclaim as stated in her amended answer to the divorce complaint.

2. Divorce—equitable distribution—in-kind distribution—sale of real property—marital home—valuation of marital and divisible assets

The trial court erred in an equitable distribution case by failing to provide for an in-kind distribution and ordering the sale of real property (the marital home and the Virginia property). The case was reversed and remanded for valuation of each marital and divisible asset, and to determine the total net value of the entire marital estate.

3. Equitable Distribution—distributional factors—failure to make findings

The trial court erred in an equitable distribution case by failing to make findings and give proper consideration to plaintiff husband's evidence of distributional factors. The case was remanded for findings regarding all distributional factors for which evidence was presented and to determine whether an equal division was equitable.

4. Divorce—equitable distribution—valuation—Timber Agreement—speculation

The trial court erred in an equitable distribution case by its valuation of a Timber Agreement at \$5,000.00. It involved timber of an unknown variety, age, and quantity, and was not supported by competent evidence.

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5. Divorce—equitable distribution—classification—car—sufficiency of findings

The trial court erred in an equitable distribution case by classifying a 2011 Suburban and the debt it secured as plaintiff husband's separate property and debt. The case was remanded for clear findings to support the classification, valuation, and distribution of the Suburban and its debt.

Appeal by plaintiff Wayne Morgan Miller from judgment and orders entered 17 March 2014, 16 July 2014¹, and 17 November 2015 by Judge Lunsford Long in District Court, Chatham County. Heard in the Court of Appeals 3 November 2016.

Doster, Post, Foushee, Post & Patton, P.A., by Norman C. Post, Jr., for plaintiff-appellant.

Cynthia Bailey, pro se.

STROUD, Judge.

Plaintiff Wayne Morgan Miller (“Husband”) appeals from several orders entered by the district court related to his divorce from defendant Cynthia Bailey Miller (“Wife”). Husband raises both procedural and substantive issues with the trial court’s equitable distribution order. Although the trial court properly entered its order vacating the divorce judgment under Rule 60(b) and therefore had jurisdiction over the equitable distribution claims, we remand for the trial court to address substantive issues contained in the equitable distribution order itself.

Facts

The parties were married on 4 July 1983 and had no children. On 27 July 2011, Wife filed her complaint for divorce from bed and board and equitable distribution; the parties were still living together at that time. Husband filed his answer on 23 September 2011, which alleged in part that “[n]o facts exist to justify an unequal division of marital property.” His answer also alleged that the parties were “not living separate and apart.” Wife filed a motion to amend her complaint, and after the trial court granted the motion, Wife filed her amendment on 12 October 2011, adding detailed factual allegations to the fault grounds of her

1. Husband’s notices of appeal for these earlier orders are in a referred motion to amend the record on appeal, which we have granted.

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divorce from bed and board claim. On 3 January 2012, the trial court began the hearing on Wife's claim for divorce from bed and board. That same day, a "Memorandum of Judgment/Order" was apparently entered without prejudice which granted Wife exclusive possession of the marital home, prohibited the parties from disposing of personal property, and provided that "[t]his matter is continued until January 23, 2012".² On 19 January 2012, Husband filed his answer to the amended complaint. On 30 January 2012, the hearing on divorce from bed and board concluded, and on 15 March 2012, the district court entered an order granting Wife a divorce from bed and board and exclusive possession of the marital home, giving Husband ten days to vacate the home. The district court found Wife's testimony "more credible" than Husband's. The trial court found that Husband had admitted to committing adultery during the marriage and that he was "an excessive user of alcohol[.]" When drunk, Husband called Wife "stupid" and many derogatory and profane names. He had also told her that he wished she were dead and "threatened to punch [Wife] in her face on occasions when the [Wife] asked him questions about their properties."

In the divorce from bed and board order, the trial court also found that Wife had found evidence of Husband's affair at their Virginia residence, including a used condom, an earring, and "lips painted with lipstick on the bathroom mirror [and] the words 'Love You' underneath them." The trial court also found that Husband had been asked "whether he recently acquired a Virginia driver's license, and he falsely said 'no' under oath." Husband had also registered a vehicle in Virginia, using a Virginia address, although he had been living in North Carolina since "as early as June of 2010." He also "continued to have his ex-girlfriend of 26 years ago as a beneficiary on his life insurance policy."

A series of motions, counter motions, and orders arising from disputes regarding various items of personal property and Husband's move out of the marital home followed. The parties finally began living separate and apart on 21 March 2012. On 16 April 2012, the trial court entered an order appointing a referee to inventory the parties' marital and separate personal property. In addition, on the same date, the trial court

2. Only the first page of this memorandum of order is in the record; the second page where the signatures of the parties and judge would normally appear is not. We note this problem mainly because the last page is missing from several of the orders in the record, but fortunately, none of those orders are directly material to the legal issues presented. We are also not positive exactly what "matter" was continued until 23 January, but it was probably the divorce from bed and board hearing.

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entered a “Consent Order to Add Supplemental Pleading” which stated in relevant part as follows:

1. Since the filing of the complaint certain facts and events have occurred which makes it just to file a supplemental proceeding, to wit: the parties hereto have legally separated.
2. The Parties consent to republish the Second Claim for Relief as set forth in the original complaint in which both parties join in the relief sought. The Parties hereto do so move and the motion is granted by the Court.
3. The Defendant does not pray that an unequal division of the marital property be made.
4. Said Second Claim as contained in Plaintiff’s Complaint is hereby republished as of the date of entry of this Consent Order.
5. The Defendant’s defense to dismiss the Equitable Distribution claim due to it being filed before the date of separation is hereby withdrawn by the Defendant.

The parties engaged in extensive discovery related to equitable distribution, the referee’s report was filed, and both parties filed various motions regarding discovery and valuation of property, which led to the trial court entering several orders based on these motions. On 12 June 2012, Husband filed a motion for interim distribution, requesting sale of the marital home, as well as distribution of various items of personal property to him. On 3 December 2012, the trial court apparently entered a consent order on a “Memorandum of Judgment/Order” form in which the parties agreed that the fair market value of the marital home as of the date of separation was \$250,173.00; they also agreed that the fair market value of the Virginia real property as of the date of separation was \$87,200.00.³ The parties attended mediation of the equitable distribution claim on 17 December 2012 but did not reach an agreement.

On 22 March 2013, Husband filed a complaint for absolute divorce. Wife filed a motion for extension of time to answer. Husband filed a motion for summary judgment on 22 April 2013, alleging that “there is no genuine issue of a material fact and [Husband] is entitled to an absolute divorce as a matter of law.” Husband’s motion also noted: “In addition,

3. Again, the signature page of this consent order is not in our record.

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[Husband] requests that the Court take judicial notice of the entire files in those actions between the same parties hereto being 12 CVD 288, and 11 CVD 701.”⁴ Wife filed her answer on 16 May 2013, admitting the date of separation and alleging that the parties “currently have pending claims for equitable distribution in Chatham County District Court Case No. 11 CVD 701.” The district court entered an order on 22 May 2013 granting Husband’s claim for an absolute divorce while noting that “[a]ll existing issues raised in 11 CVD 701 between the same parties hereto should survive this absolute divorce.”

On 3 June 2013, Husband filed a motion to continue the equitable distribution trial scheduled for the next day and a motion for the trial judge to be recused on the basis that Husband thought the judge was unable to “complete the proceedings in a fair and impartial manner.” The trial court denied the motions but the trial was continued to 24 June 2013 after Husband’s counsel was granted leave to withdraw from the case. On 24 June 2013, Husband’s new counsel appeared but the trial was again continued.

On 1 July 2013, Husband’s new counsel made an oral motion to amend his pleadings to seek an unequal distribution in Husband’s favor; Wife did not oppose this motion and the trial court entered an order allowing it on 19 July 2013. But on 5 August 2013, Husband’s legal strategy changed course and he filed a motion to dismiss Wife’s equitable distribution claim for lack of subject matter jurisdiction, since the parties were not yet separated when the claim was filed. Husband alleged that he had not counterclaimed for equitable distribution and that the divorce from bed and board action in which Wife filed her claim was resolved on 15 March 2012 upon entry of the order granting divorce from bed and board. He also alleged that Wife had not filed any supplemental pleadings containing an equitable distribution claim and that the parties had already been divorced, ending Wife’s ability to bring a claim for equitable distribution.

Wife sought to preserve her equitable distribution claim on all fronts. In the divorce from bed and board case, she filed an affidavit opposing Husband’s motion to dismiss her equitable distribution claim;

4. File No. 11 CVD 701 is Wife’s claim for divorce from bed and board and equitable distribution; File No. 12 CVD 288 is Wife’s claim for a domestic violence protective order which was filed on 21 March 2012. Husband moved out of the marital home as a result of the *ex parte* domestic violence protective order entered on 21 March 2012, which was a few days earlier than he would have been required to move based upon the order for divorce from bed and board.

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in the absolute divorce case, she filed a Rule 60(b) motion asking the district court to set aside the absolute divorce judgment and allow her to file a new answer including a counterclaim for equitable distribution in the divorce case. The district court held a hearing on the motions filed by both parties on 23 October 2013 and rendered a ruling in open court, with both parties present, declaring that the court was granting Wife's motion to set aside the divorce judgment and allowing her to file a counterclaim for equitable distribution and dismissing Husband's motion to dismiss Wife's equitable distribution claim in the divorce from bed and board case.

Before the court filed a written order based upon its rendition of the ruling on 23 October 2013, Husband was remarried, on 28 October 2013, in Virginia. On 10 December 2013, Husband filed a motion to re-open evidence, noting that at the time of the hearing on 23 October 2013, he had not re-married, but that subsequent to the hearing and prior to the entry of an order vacating the divorce judgment, he had remarried. Thus, Husband argued that he "should be afforded an opportunity to present evidence to [the district court] as to his remarriage since the entry of an order vacating his divorce judgment would not be in any way equitable and would create great legal hardship for him, additionally the entry of such order would interfere with his right to remarry." Further, Husband alleged that "[t]he entry of an order vacating the divorce judgment is unnecessary given that [the district court] is prepared to enter an order dismissing [Husband's] motion to dismiss equitable distribution in 11 CVD 701 for lack of subject matter jurisdiction, and thus [Wife] will not be prejudiced."⁵

Husband also submitted his requested findings of fact for the court's "order vacating the divorce judgment entered in this action[.]" including that he began living with Dorothy Virginia Brinkley in January 2013 and that they then married on 28 October 2013. He noted that when he heard the trial court's

declaration made in open Court on October 23, 2013, that being that it was going to vacate the otherwise properly entered judgment of absolute divorce in this action, he informed Ms. Brinkley of this and Ms. Brinkley expressed concern about being unable to marry [Husband] for a considerable period of time in the event that an order

5. Since Husband appealed from the trial court's order dismissing his motion in 11 CVD 701, his allegation that vacating the divorce judgment would be "unnecessary" and Wife would not be prejudiced seems disingenuous at best.

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was actually entered vacating the divorce judgment and [Husband] was concerned about being able to maintain his relationship with Ms. Brinkley without being able to marry her for a considerable period of time. [Husband] loved Ms. Brinkley and did not want to lose the relationship. Ms. Brinkley was seventy-one years old as of October 23, 2013.

The trial court held a hearing on 23 January 2014 regarding Husband's motion to reopen evidence. Husband testified that he married Ms. Brinkley five days after the 23 October 2013 hearing, on 28 October 2013, and they had created and signed a prenuptial agreement during the time between the hearing and the marriage.⁶ After hearing the additional evidence, the trial judge noted that his "inclination is to find the evidence is not persuasive[.]"

Near the end of the hearing, after Wife's counsel noted that he had never faced this situation, the court agreed, noting: "I don't think any human being ever has, so we're all sailing uncharted seas here." In trying to figure out how to address the motions at issue, Husband's counsel argued that the court needed "to make findings about the new evidence that [it] heard and it all needs to be embodied in one order, and you can say that despite, uh it-it being equitable relief that, in your discretion, you don't think [Husband] having two wives is a problem."

The trial court replied:

I don't believe there's any prejudice to him that cannot be ameliorated by a remarriage, and I believe he married with full knowledge of the Court's intent and that [the], um, marriage should not be an impediment to the granting of the motion under these circumstances, and the motion should be allowed.

After more back and forth with Husband's trial counsel, the Court reiterated its position:

THE COURT: — he attempted to enter a marriage with full knowledge of the Court's intent, and I think it was a tactical marriage, entered for tactical reasons only, as demonstrated by the circumstances and by the prenuptial

6. October 23, 2013 was a Wednesday, and Husband was remarried on the following Monday, 28 October 2013, so they got the prenuptial agreement drafted and executed in just two business days.

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agreement and what its provisions appear to be. It doesn't appear to be a bona fide marriage that has any legitimate purpose other than to circumvent the Court's intended ruling, and you can put that in the order if you like, [Wife's counsel]. And he can live with the consequences on him and her because he made the decision to contract it. So, that's my decision.

On 17 March 2014, the court entered its order granting Wife's Rule 60(b) motion and setting aside the 22 May 2013 divorce judgment. In its very long and detailed order, the court addressed much of the procedural history of the various cases as summarized above and found that the hearing had been held on the motion on 23 October 2013 and before Wife's counsel completed drafting an order, Husband "proceeded to get remarried[.]" The order granting Wife's 60(b) motion included numerous findings, including that:

16. At the time of the entry of the Absolute Divorce Judgment in this action, *both parties* were operating under the *unequivocal belief* that both parties had pending claims for equitable distribution in the companion court action. This was evident based upon the actions of *both parties* in vigorously and continuously pursuing their equitable distribution claims in the companion court action for the 13 month period prior to the entry of the Absolute Divorce Judgment in this court action. This was also evident given the court filings of *both parties* in this court action, including the fact that [Husband] and his then counsel . . . submitted the Absolute Divorce Judgment to the Court for signature which contained express language stating that both parties have "pending, equitable distribution claims" in the companion court action and that these claims should be reserved for future hearing.

17. Nevertheless, *after* entry of the Absolute Divorce Judgment in this court action, [Husband] filed a Rule 12(b)(1) Motion to Dismiss as to [Wife's] equitable distribution claim in the companion court action. The Motion to Dismiss was filed in the companion court action on August 5, 2013.

18. Contrary to his earlier indications, [Husband] now contends that [Wife] does not have a valid, pending claim for equitable distribution in the companion court action

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and further contends that it is too late for [Wife] to file a new claim for equitable distribution in this action, in the companion court action or otherwise since the parties are now divorced.

19. In order to prevent the great injustice of [Wife] potentially being denied the right to proceed with an equitable distribution claim due to this newfound contention of [Husband], it is necessary to set aside the Absolute Divorce Judgment in its entirety and to allow [Wife] to file a counterclaim for equitable distribution in this court action.

(Emphasis in original).

In addition, while the order noted that Wife initially filed her request for equitable distribution prematurely, the court also found that “[i]n the Consent Order to Add Supplemental Pleading, [Husband] expressly joined in the request for an equitable distribution[.]” The order includes detailed findings addressing all of the many “Actions Taken in the Companion Court Action by Both Parties in Pursuit of their Respective Equitable Distribution Claims” and then finds:

42. At the time of the entry of the Absolute Divorce Judgment in this court action, both parties reasonably believed that the Consent Order to Add Supplemental Pleading effectively established the parties’ respective equitable distribution claims in the companion court action, and [Wife] had no knowledge otherwise until the Rule 12(b)(1) Motion to Dismiss was raised.

The court found that Wife “reasonably relied” on Husband’s statements and actions and reasonably believed “that both parties had valid equitable distribution claims pending[.]” Additionally, the trial court concluded in its findings that the parties had a “mutual belief” that they both had claims for equitable distribution pending at the time the trial court entered its absolute divorce decree.

The trial court also explicitly described its concerns regarding whether its ruling dismissing Husband’s motion in the divorce from bed and board action would be sufficient to protect Wife’s claim:

118. The Court believes that [Husband’s] Rule 12(b)(1) Motion to Dismiss in the companion court action should be denied. The decision as to denying said Motion in the companion court action was made after much thought and consideration. However, the Court does have concerns as

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to whether the appellate courts will come to the same conclusion despite the clearly expressed intent of the parties contained in the Consent Order to Add Supplemental Pleading. The concern is strong enough for the Court to believe that this Rule 60(b) Order should be entered to ensure that [Wife] can file a counterclaim in this action so that she can pursue her right to equitable distribution. To refuse the granting of this Rule 60(b) Order in this action would allow [Husband] to potentially benefit from a mutual mistake.

119. [Husband] has the right to appeal the Court's decision in the companion court action (as to the denial of his rule 12(b)(1) Motion to Dismiss). This Court is fully aware that the North Carolina Court of Appeals or a higher authority could determine that this Court should have granted [Husband's] Rule 12(b)(1) Motion to dismiss in the companion court action. The legal issues raised in the companion court action are very complex and the matter could be decided either way on appeal. The likelihood of the North Carolina Court of Appeals determining that no valid equitable distribution claims exist in the companion court action weighs heavily on this Court due to the great prejudice that would result to [Wife] under the circumstances. The Court cannot simply wait to set aside the Absolute Divorce Judgment pending a decision from the North Carolina Court of Appeals in the companion court action due to the great risk and prejudice that [Wife] would face by delaying the ruling in this matter. The only way to ensure that [Wife] has a valid equitable distribution claim is to set aside the Absolute Divorce Judgment entered in this action and allow [Wife] to file a counterclaim for equitable distribution. Justice requires that this occur now.

The court also entered its order denying Husband's 12(b)(1) motion to dismiss Wife's equitable distribution claim in the divorce from bed and board action on 17 March 2014. In that even more extensive order, the trial court made the following relevant conclusions of law:

4. Rule 15(d) of the North Carolina Rules of Civil Procedure allows for defective pleadings to be corrected by the filing of a supplemental pleading.

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5. Rule 13(e) of the North Carolina Rules of Civil Procedure allowed [Husband] the right to pursue his own counterclaim for equitable distribution by supplemental pleading.

6. The entry of the Consent Order to Add Supplemental Pleading, the “republishing” of the second claim for relief in [Wife’s] original complaint (for equitable distribution) as of April 16, 2012, and the parties’ act of joining in the relief sought therein effectively established [Wife’s] claim for equitable distribution.

7. Further, [Wife’s] various court filings after entry of the Consent Order to Add Supplemental Pleading further support the conclusion that [Wife] effectively established a valid claim for equitable distribution[.]

8. The entry of the Consent Order to Add Supplemental Pleading, the “republishing” of the second claim for relief in [Wife’s] original complaint (for equitable distribution) as of April 16, 2012, and [Husband’s] act of joining in the relief sought therein effectively established [Husband’s] claim for equitable distribution.

9. Further, [Husband’s] various court filings after entry of the Consent Order to Add Supplemental Pleading further support the conclusion that [Husband] effectively established a valid claim for equitable distribution[.]

10. In the event the Consent Order to Add Supplemental Pleading and any subsequent filings in this court action did not effectively establish a claim for equitable distribution for either party or in the event that it is determined that no valid claim for equitable distribution was filed by either party in this court action, then [Husband] is still estopped from defeating [Wife’s] right to pursue a claim for equitable distribution[.]

11. The principles of equitable estoppel prevent the dismissal of [Wife’s] claim for equitable distribution.

12. [Wife] has clean hands in this court action.

13. Justice requires that [Wife] be deemed to have the right to proceed with a claim for equitable distribution.

On or about 7 April 2014, Wife filed an amended or supplemental answer to Husband’s complaint for absolute divorce including a

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counterclaim for equitable distribution and a motion to consolidate the divorce claim with the 2011 action for divorce from bed and board. Husband filed a motion to dismiss Wife's counterclaim for equitable distribution, arguing that "he believes that the Court erred in vacating the divorce judgment in this action and that the counterclaim is being filed after the parties were properly divorced." Husband also noted that he "additionally opposes [Wife's] claim for an unequal distribution in her favor." The trial court filed an order granting Wife's motion and denying Husband's motion to dismiss on 16 July 2014, although it appears the order was never signed by the judge.⁷

The equitable distribution trial began on 29 September 2014 and was held over the course of four nonconsecutive days before coming to conclusion over a year later, on 17 November 2015. On 19 March 2015, the court made a partial ruling, and the trial court entered its judgment and order granting Husband an absolute divorce from Wife and dissolving the marriage. The order noted that the trial court "shall retain jurisdiction over the matter of equitable distribution in order to enter and enforce any final orders in these consolidated proceedings[.]" That same date, the trial court entered several "Court Order[s] Acceptable for Processing" ("COAP") for both parties' employee annuities and former spouse survivor annuities, addressing distribution of the retirement benefits of both parties. Husband filed a motion requesting findings of fact and modifications to the court's proposed equitable distribution judgment and order on 17 September 2015.

The district court entered its equitable distribution judgment and order on 17 November 2015. The court found that as of the date of separation and presently Husband and Wife were the joint owners of marital property in Siler City, North Carolina ("the marital home"). After noting that both parties testified that they did not want the property distributed to them, the court found that the marital home "should be listed for sale . . . within sixty (60) days after the entry of this Order at a price agreed upon by the parties, or in the event the parties are unable to agree, a price recommended by the realtor." The proceeds were to be divided equally between the parties. The court similarly found the parties to be joint owners of seven acres of land in Virginia (the "Virginia Property") and ordered that this marital property be sold as well, with the proceeds again split equally between the parties. If either property had not sold before the expiration of the six month listing agreement, the parties were to return to court for further review.

7. The order in our record is file stamped but not signed by the trial court.

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The court also found that “[a]s of the date of separation [Husband] and Randy A. Winkleman were parties to a Timber Agreement dated November 20, 2009, which entitled [Husband] to receive fifty percent of the proceeds from timbering certain property located in . . . Pennsylvania.” The court concluded that the Timber Agreement was marital property and that it should be distributed to Husband at its current value of \$5,000.00.

In addition, the trial court’s order adopted the COAP’s, which divided the monthly retirement benefits each party receives under the Civil Service Retirement System (CSRS) equally and requires Husband to pay Wife \$13,009.50, one-half of the difference between the monthly CSRS annuity payments received by the parties from the date of separation through 30 September 2014. In addition, the court ordered Husband to pay Wife a distributive award of \$13,462.00 within 30 days of the entry of the order.

Finally, the trial court classified Husband’s 2011 Suburban vehicle as his separate property with a value of \$49,000.00 and found that both it and the secured debt attached to it of \$64,638.82 were acquired after Wife filed her action for divorce from bed and board and not for the joint benefit of the parties. Wife filed a motion on 3 December 2015 to amend and correct issues related to the judgment and order and for reconsideration of all of the issues raised on 17 November 2015. Husband timely appealed the equitable distribution judgment and order to this Court.

Husband filed a motion to amend the record on appeal on or about 15 July 2016, claiming that he “inadvertently failed to include” his notices of appeal from: (1) the denial of his Rule 12(b)(1) motion to dismiss, filed 28 March 2014, (2) the order granting Wife Rule 60(b) relief, filed 18 March 2014, and (3) orders granting Wife’s motion to consolidate and strike and denying Husband’s motion to dismiss, filed 29 July 2014. On 18 August 2016, Wife filed a motion to amend the record on appeal, asking to include: (1) a copy of the 11 July 2016 OPM notice regarding the award of monthly annuity and survivor annuity; and (2) a copy of Husband’s 22 July 2016 COAP filing, a copy of the sanitized order for the record redacting certain personal and private information, and a copy of the un-redacted version for the file. By separate order, we have granted both motions to amend the record.

Discussion

On appeal, Husband raises multiple issues, both procedural and substantive, with the trial court’s equitable distribution order. We first

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address the procedural concerns and then address some of the substantive issues.

I. Subject Matter Jurisdiction Over Equitable Distribution Claims

[1] First, Husband argues that the trial court erred both by denying his motion to dismiss the equitable distribution claim Wife filed prior to the date of separation for lack of subject matter jurisdiction and its order vacating the divorce judgment pursuant to Rules 60(b)(1), (3), and (6), thus allowing Wife the opportunity to file a new equitable distribution claim after separation and prior to entry of the absolute divorce. Essentially, the trial court entered these two orders which have the same practical effect – preservation of Wife’s equitable distribution claim – by two different legal routes, in full recognition of jurisdictional problems caused by the filing of Wife’s equitable distribution claim before the parties had separated. Thus, Wife’s equitable distribution claim must be dismissed only if *both* orders were in error and reversed. We will therefore address only the order granting Wife’s Rule 60 motion since it is dispositive.

“Rule 60(b) has been described as a grand reservoir of equitable power to do justice in a particular case. The North Carolina Supreme Court has stated that its broad language gives the court ample power to vacate judgments whenever such action is appropriate to accomplish justice.” *Jim Walter Homes, Inc. v. Peartree*, 28 N.C. App. 709, 712, 222 S.E.2d 706, 708 (1976) (citations, quotation marks, and ellipses omitted). “Our courts have long held that a Rule 60(b) motion is addressed to the sound discretion of the trial court and its ruling will not be disturbed absent an abuse of that discretion.” *Venters v. Albritton*, 184 N.C. App. 230, 234, 645 S.E.2d 839, 842 (2007) (citations and quotation marks omitted). Under Rule 60(b)(6), the trial court “may relieve a party or his legal representative from a final judgment, order, or proceeding for . . . [a]ny other reason justifying relief from the operation of the judgment.” N.C. R. Civ. P. 60(b)(6). “The grounds for setting aside judgment pursuant to Rule 60(b)(6) are equitable in nature. What constitutes cause to set aside judgment pursuant to Rule 60(b)(6) is determined by whether (1) extraordinary circumstances exist; and (2) whether the action is necessary to accomplish justice.” *Trivette v. Trivette*, 162 N.C. App. 55, 63, 590 S.E.2d 298, 304 (2004) (citations omitted).

Husband relies in part on *Howell v. Howell*, 321 N.C. 87, 91, 361 S.E.2d 585, 588 (1987), where our Supreme Court reversed an order by this Court upholding a trial court order granting the defendant’s motion to set aside the effect of a divorce judgment “to the extent that it barred

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her claim for equitable distribution[.]” The Supreme Court noted in *Howell*, however, that it disagreed with this Court “on a narrow ground.” *Id.* Specifically, our Supreme Court stated:

Ms. Howell did not seek to have the trial court, and the trial court did not, set aside the divorce judgment. Rather, pursuant to Ms. Howell’s motion, the trial court ordered that she be given “relief from the effect of the divorce judgment . . . to the extent of allowing her to assert a counterclaim against the plaintiff for equitable distribution. . . .” Because the trial court did not set aside the divorce judgment itself, its terms and validity still abide. Likewise, the legal effects of the divorce judgment still obtain. Neither Rule 60(b)(6) nor any other provision of law authorizes a court to nullify or avoid one or more of the legal effects of a valid judgment while leaving the judgment itself intact.

In so ruling we are not insensitive to the plight of Ms. Howell and, if her testimony is believed, her apparently diligent reliance on counsel’s advice. We simply are unwilling to hold that a court may leave intact a judgment of absolute divorce, yet order that one or more of the legal effects of that judgment may somehow be avoided. Such a holding would empower a court to say, for example, that a divorce decree would not have the legal effect of permitting the parties to remarry or of dissolving other various rights arising out of the marital relation. These kinds of judicial rulings would negate the provisions of N.C.G.S. § 50–11 by which the legislature has prescribed the legal effects of judgments of absolute divorce. These effects are beyond the power of a court to change.

Id. at 91–92, 361 S.E.2d at 588 (footnote omitted).

Husband claims that the *Howell* Court “implicitly concluded that the failure to timely file an equitable distribution claim was not an extraordinary circumstance.” The Supreme Court’s own language in *Howell*, though, refutes this argument, as the Court specifically stated that it was reversing this Court “on a narrow ground.” *Id.* at 91, 361 S.E.2d at 588. The *Howell* decision is based upon the fact that the defendant, Ms. Howell, asked for relief from an effect of a divorce judgment while leaving the divorce decree itself intact. *Id.* at 92, 361 S.E.2d at 588. The Supreme Court never addressed whether failure to file a timely equitable distribution claim was or was not an extraordinary circumstance.

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Here, by contrast, the trial court completely vacated the divorce decree, using its discretion under Rule 60(b) and explicitly weighing the equities of the situation to both parties. Husband even alleged in his motion to reopen the evidence – so that he could present evidence of his remarriage days after the court’s rendition of its ruling – that “[t]he entry of an order vacating the divorce judgment is unnecessary given that [the district court] is prepared to enter an order dismissing [Husband’s] motion to dismiss equitable distribution in 11 CVD 701 for lack of subject matter jurisdiction, and *thus [Wife] will not be prejudiced.*” (Emphasis added). He then appealed from that very ruling with the obvious goal of prejudicing Wife by eliminating her equitable distribution claim. Fortunately, the trial court recognized Husband’s legal strategy of setting up a jurisdictional defect which he could then exploit on appeal, since a lack of subject matter jurisdiction cannot be waived and can be raised at any time.

Furthermore, Husband’s requested findings and statements at the hearing show that he was well aware that the trial court had decided to vacate the divorce judgment and would be entering an order accordingly when he arranged to have a prenuptial agreement prepared and signed immediately and got married only five days later. His calculated actions, which were obviously intended to eliminate Wife’s equitable distribution claim, created the predicament of bigamy that he now claims to face, and the trial court rightfully concluded that “extraordinary circumstances exist” in this case and that vacating the divorce decree was an action “necessary to accomplish justice.” *Trivette*, 162 N.C. App. at 63, 590 S.E.2d at 304. Since we have concluded the trial court was well within its discretion to enter its decree setting aside the divorce judgment with Rule 60(b), the trial court had subject matter jurisdiction over Wife’s equitable distribution counterclaim as stated in her amended answer to the divorce complaint.

II. In-Kind Distribution and Distributive Awards

[2] Next, Husband argues that the trial court erred by failing to provide for an in-kind distribution and ordering the sale of real property regarding the marital home and the Virginia property. We agree.

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. While findings of fact by the trial court in a non-jury case are conclusive on appeal if there is evidence to

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support those findings, conclusions of law are reviewable *de novo*. Our review of an equitable distribution order is limited to determining whether the trial court abused its discretion in distributing the parties' marital property. Accordingly, the findings of fact are conclusive if they are supported by any competent evidence from the record.

Robbins v. Robbins, __ N.C. App. __, __, 770 S.E.2d 723, 728, *disc. review denied*, __ N.C. __, 775 S.E.2d 858 (2015) (citations, quotation marks, and brackets omitted).

In this case, the trial court's equitable distribution order contained the following findings of fact regarding the sale of the marital home and the Virginia Property and the payment of a distributive award:

10. As of the date of separation and presently, the parties were and are the joint owners of real property located at 566 Melvin Clark Road, Siler City, North Carolina and more fully described in the Warranty Deed filed at Book 1456, Page 1104 of the Chatham County Registry on April 30, 2009 [the "marital home"]. Prior to the date of separation, this had been the parties' marital residence. The [marital home] is marital property.

11. The [marital home] was unencumbered as of the date of separation and currently. The parties stipulated that the fair market value of the [marital home] as of the date of separation and currently is \$250,173. Both [Husband] and [Wife] testified that they did not want to be distributed the [marital home]. [Husband] testified that the property should be distributed to [Wife] and [Wife] requested that the property be sold.

12. This Court finds that the [marital home] should be sold with the help of Elizabeth Anderson of Caldwell Banker in Pittsboro, North Carolina, and the net proceeds divided equally between the parties at closing. The [marital home] should be listed for sale, as is, with Ms. Anderson within sixty (60) days after the entry of this Order at a price agreed upon by the parties, or in the event the parties are unable to agree, a price recommended by the realtor. The listing agreement should be for a term of six months and Ms. Anderson should be entitled to receive her standard commission of six percent. In the event the [marital home] has not been sold prior to the expiration of the listing

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agreement, the parties should return to Court to determine if the listing agreement should be extended or if the property should be sold by auction[.]

. . . .

14. From the date of separation through November of 2013, Defendant resided in the [marital home] and enjoyed the benefits associated with the said residence. From the date of separation through the date of trial, [Wife] also testified that she had paid \$18,011 for property taxes, materials, labor, insurance and utilities to maintain and preserve the property. After November of 2013, neither party has resided in the residence[.]

. . . .

16. As of the date of separation and presently, the parties were and are the joint owners of 7 acres of unimproved land located in Augusta County, Virginia (the “Virginia Property”). The Virginia Property is marital property[.] The Virginia Property was unencumbered as of the date of separation and currently. The parties stipulated that the fair market value of the Virginia Property as of the date of separation and currently is \$87,200. Both [Husband] and [Wife] testified that they did not want to be distributed the Virginia Property[.] [Wife] requested that the property be sold.

17. This Court finds that the Virginia Property should be sold with the help of a real estate agent selected by [Wife] and the net proceeds divided equally between the parties at closing. The Virginia Property should be listed for sale, as is, within sixty (60) days after the entry of this Order at a price agreed upon by the parties, or in the event the parties are unable to agree, a price recommended by the realtor. The listing agreement should be for a term of six months and the realtor should receive a standard commission for the sale of land[.] In the event the Virginia Property has not been sold prior to the expiration of the listing agreement, the parties should return to Court to determine if the listing agreement should be extended or if the property should be sold by auction.

. . . .

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28[.] During their marriage, both [Husband] and [Wife] were federal employees and received retirement benefits under the Civil Service Retirement System (“CSRS”). The CSRS is administered by the United States Office of Personnel Management (“OPM”). Prior to the date of separation, [Husband] and [Wife] retired and each of them began receiving monthly annuity payments from OPM through the CSRS.

. . . .

32. Based upon a valuation performed by Williams Overman Pierce, LLP, the total value of [Husband’s] CSRS defined benefit plan as of the date of separation was \$1,354,235 with a survivor benefit awarded to [Wife]. The value of the marital portion of said benefit plan as of the date of separation was \$1,014,655. The balance of the benefit plan valued at \$339,580 was [Husband’s] separate property[.]

33. Based upon a valuation performed by Williams Overman Pierce, LLP, the total value of [Wife’s] CSRS defined benefit plan as of the date of separation was \$11,004,191 [sic]⁸ with a survivor benefit awarded to [Husband]. The value of the marital portion of said benefit plan as of the date of separation was \$797,026. The balance of the benefit plan valued at \$207,165 was [Wife’s] separate property[.]

34. On March 19, 2015, this Court entered two separate CSRS COAP’s equally dividing the marital portion of the parties’ annuity payments from OPM through the CSRS, and awarding each party a former spouse survivor annuity under CSRS in the same amount to which the party would have been entitled if the divorce had not occurred[.]

. . . .

36. The parties stipulated that from the date of separation through September 30, 2014, [Husband] owed [Wife] the sum of [\$13,009.50] to compensate her for the difference in the annuity payments the parties had received since the date of separation. This Court finds that [Husband] should

8. We note this clerical error to ensure it is not repeated in the order entered after remand, as the marital and separate portions of Wife’s benefit plan (as stated in the same finding) add up to \$1,004,191.00, *not* \$11,004,191.00.

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and has the ability to pay the sum of [\$13,009.50] to [Wife] within thirty (30) days after the entry of this Order.

....

47. Based upon the spreadsheet hereto attached as Exhibit 4, the amount of the distributive award [Husband] should pay to [Wife] to achieve an equal division of the marital and divisible property and debt is \$13,462.

On the Spreadsheet attached as Exhibit 4 of the order, the trial court did not list a value for the marital home or the Virginia property but instead listed “50% of Net Proceeds” in the column for each party. Likewise, instead of finding a value for the parties’ retirement plans, the trial court stated “Equal Division – CSRS COAP” in the column for each party. Thus, the total value of the marital estate listed on the spreadsheet includes only those items of property which were assigned a value on that spreadsheet, so that total value excludes the four largest marital assets. The trial court determined the distributive award based upon that partial “total” value of the marital estate.

In addition, the trial court made the following conclusions of law:

9. An in-kind distribution of the marital and divisible property and debt is not practical given that neither party desires to be distributed certain assets and the assets are capable of being sold in the marketplace with the assistance of qualified realtors.

10. The presumption of an in-kind distribution has been rebutted for the reasons set forth herein.

11. The payment of a distributive award by [Husband] to [Wife] is fair and reasonable, and [Husband] has the ability to pay the distributive award ordered herein[.]

“Under [N.C. Gen. Stat. § 50-20(c)], equitable distribution is a three-step process; the trial court must (1) determine what is marital and divisible property; (2) find the net value of the property; and (3) make an equitable distribution of that property.” *Robinson v. Robinson*, 210 N.C. App. 319, 322, 707 S.E.2d 785, 789 (2011) (citation, quotation marks, and brackets omitted). In order to properly conduct this process, it is clear that the second step is for the trial court to actually place a value on the property to be distributed. *See, e.g., Thomas v. Thomas*, 102 N.C. App. 127, 129, 401 S.E.2d 367, 368 (1991) (“By appointing commissioners to sell the property and divide the net proceeds after paying expenses and

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costs, the trial judge did not satisfy the requirement of the statute that the judge must place a value on the property.”); *Soares v. Soares*, 86 N.C. App. 369, 371-72, 357 S.E.2d 418, 419 (1987) (holding trial court erred by ordering sale of marital home for not less than the appraised value without first determining its value.).

The trial court’s role is to classify, value, and distribute property, not simply to order that it be sold. In doing so, “the trial court must consider the property’s market value, if any, less the amount of any encumbrance serving to offset or reduce the market value.” *Robinson*, 210 N.C. App. at 323, 707 S.E.2d at 789. Here, the parties had actually stipulated to the values of the marital home and the Virginia Property as of the date of separation and neither was encumbered by a mortgage. The trial court found that neither party wanted the real property, and the record reflects that Wife wanted the property to be sold.⁹ We understand that neither party *wanted* the real properties to be distributed to them for various reasons, but they also had not agreed to sell the properties. Sometimes the law does not allow the parties to get what they want; but sometimes they might find that that they get what they need.¹⁰ This is one of those times. What they need – and what the law requires – is an order classifying, valuing, and distributing all of the marital and divisible property. *See Fitzgerald v. Fitzgerald*, 161 N.C. App. 414, 418, 588 S.E.2d 517, 520 (2003) (“In making an equitable distribution of marital assets, the trial court is required to undertake a three-step process: (1) to determine which property is marital property, (2) to calculate the net value of the property, fair market value less encumbrances, and (3) to distribute the property in an equitable manner.” (Citation and quotation marks omitted)). The trial court must value and distribute each parcel of real property to a party, and a distributive award may be needed to equalize the division or to make the distribution equitable. Then, the party who receives distribution of the real property is free to keep it or sell it. We therefore reverse and remand for the trial court to value each marital and divisible asset – including the real property and the retirement plans – as of the date of separation and the date of division, and to determine the total net value of the entire marital estate, whether an equal division will be equitable, and if any distributive award will be needed, and to enter an order accordingly.

9. In his 12 June 2012 motion, Husband had requested that the marital home be sold, but by the time of trial, he no longer requested sale.

10. With apologies to The Rolling Stones. Jagger, Mick and Richards, Keith. “You Can’t Always Get What You Want.” The Rolling Stones, *Let It Bleed*. (London Records 1969).

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III. Distributional Factors

[3] Next, Husband argues that the trial court erred by failing to make findings and give proper consideration to his evidence of distributional factors. Wife seems to agree, noting that she “is not in disagreement with [Husband] that the Court order of November 17, 2015 lacks Findings of Facts and Conclusions of Law regarding the distributive award.”¹¹ (Emphasis omitted).

Pursuant to [N.C. Gen. Stat. § 50-20(c)], there shall be an equal division of marital and divisible property unless the court determines that an equal division is not equitable. If the court determines that an equal division is not equitable, the court shall divide the marital property and divisible property equitably. When making an unequal distribution, the trial court must consider the factors enumerated in G.S. § 50-20(c) and must make findings which indicate that it has done so. It is not necessary that the findings recite in detail the evidence considered but they must include the ultimate facts considered by the trial court.

Britt v. Britt, 168 N.C. App. 198, 204, 606 S.E.2d 910, 914 (2005) (citations, quotation marks, brackets, and ellipses omitted). “[W]hen evidence of a particular distributional factor is introduced, the court must consider the factor and make an appropriate finding of fact with regard to it.” *Fox v. Fox*, 114 N.C. App. 125, 135, 441 S.E.2d 613, 619 (1994); see also *Warren v. Warren*, 175 N.C. App. 509, 518-19, 623 S.E.2d 800, 806 (2006) (remanded for further findings of fact where evidence offered relating to N.C. Gen. Stat. § 50-20(c)(9), (11a), and (12) but court made no findings regarding those factors). The requirement to make such findings regarding the factors for which evidence is presented “exists regardless whether the trial court ultimately decides to divide the property equally or unequally.” *Warren*, 175 N.C. App. at 518, 623 S.E.2d at 806.

11. Despite this statement, Wife’s Reply brief stresses that her Appellee brief “does not agree with the Appellant’s attorney position.” Her Appellee brief also argues that the trial court “offered an explanation” of why it ordered sale of the real property and that the court considered Wife’s health and age in that she was “physically incapable of taking care of . . . approximately 15 acres” while Husband is “in a much better position physically to care for” the real property. According to the transcript, the trial court did discuss this rationale, but the order on appeal did not make these findings, and as discussed above, ordering that the real property be sold is not a distribution.

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Furthermore,

N.C. Gen. Stat. § 50–20(e) (2013) creates a presumption that an in-kind distribution of marital or divisible property is equitable, but permits a distributive award ‘to facilitate, effectuate, or supplement’ the distribution. If the trial court determines that the presumption of an in-kind distribution has been rebutted, it must make findings of fact and conclusions of law in support of that determination. Should a party successfully rebut the equity of an in-kind distribution, a trial court may order a distributive award pursuant to N.C. Gen. Stat. § 50-20(c) (2013). This statute sets forth distributional factors that the trial court must consider before ordering a distributive award. One of those factors is the liquid or nonliquid character of all marital property and divisible property. In other words, the trial court is required to make findings as to whether the defendant has sufficient liquid assets from which he can make the distributive award payment.

Sauls v. Sauls, 236 N.C. App. 371, 375, 763 S.E.2d 328, 331 (2014) (citations, quotation marks, brackets, and italics omitted).

At trial, the court and Wife’s counsel stated the following regarding the distributional factors evidence presented:

THE COURT: Heard a lot of evidence about distributional factors along the way.

[Wife’s Counsel]: Yes, we have.

THE COURT: And the court order has – the Court of Appeals says that the court order has to address each distributional factor in which any evidence was presented and make findings of fact about that and then make conclusions about the meaning of all the distributional factors. *So someone’s going to have to identify every distributional factor we’ve talked about, not just the one’s we’re about to talk about.* Okay?

(Emphasis added).

The trial court made the following finding – perhaps more properly characterized as a conclusion of law – regarding distribution in its equitable distribution order:

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46. Based upon the above findings and after considering the distributional factors raised by the parties at trial, this Court finds that an equal division of the marital and divisible property and debt is equitable. Based upon the in-kind division of the marital and divisible property set forth above and the equal division of the proceeds from the sale of the [marital home], the Virginia Property and the sale of the tangible personal property, this Court finds it necessary to order a distributive award for [Husband] to pay to [Wife] in order to equitably divide the parties' marital and divisible property.

Thus, while the court noted that it "consider[ed] the distributional factors" and concluded that an equal division was equitable, the order does not include sufficient findings about the distributional factors for us to review this conclusion. In addition, the trial court concluded that a distributive award was necessary to equalize the division of the marital and divisible assets of the parties, although that conclusion was based in part upon its erroneous decree that the real properties be sold instead of distributing them. The trial court then concluded:

6. An equal division of the marital and divisible property and debts is equitable.

. . . .

11. The payment of a distributive award by [Husband] to [Wife] is fair and reasonable, and [Husband] has the ability to pay the distributive award ordered herein[.]

The order did not identify the distributional factors "we're about to talk about[.]" much less "every distributional factor we've talked about" during the trial, as the trial court correctly noted should be addressed by the order. Those distributional factors are listed in N.C. Gen. Stat. § 50-20(c) (2015). Evidence was presented about several of these factors, most notably the liquidity of the marital estate (N.C. Gen. Stat. § 50-20(c)(9)); Wife's early retirement (N.C. Gen. Stat. § 50-20(c)(12) (catchall provision)); the physical health of the parties (N.C. Gen. Stat. § 50-20(c)(3)); and the "[a]cts of either party to maintain, preserve, develop, or expand; or to waste, neglect, devalue or convert the marital property . . . during the period after separation of the parties and before the time of distribution" (N.C. Gen. Stat. § 50-20(c)(11a)); but the trial court erred by failing to make any findings regarding that evidence. *See Warren*, 175 N.C. App. at 518, 623 S.E.2d at 806. On remand, the trial court must make findings regarding all distributional factors for

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which evidence was presented and determine in its discretion whether an equal division is equitable, since the trial court's analysis of this issue may change on remand considering the distribution instead of sale of the real property, as well as other matters addressed on remand.¹²

IV. Timber Agreement

[4] Husband next argues that the trial court's valuation of the Timber Agreement, which was an agreement between plaintiff and his cousin involving timber on land in Pennsylvania that the trial court classified as marital property, was not supported by competent evidence, and Wife seems to agree.¹³ Husband argues that "[i]t is completely unknown as to what the status or condition of that timber will be beginning in January 2018, when it will actually be cut or valued and [Wife]'s testimony as to the value, which was the only information before the trial court, was completely speculative."

The trial court made the following finding about the Timber Agreement:

39[.] As of the date of separation [Husband] and Randy A. Winkleman were parties to a Timber Agreement dated November 20, 2009, which entitled [Husband] to receive fifty percent of the proceeds from timbering certain property located in . . . Pennsylvania. The Timber Agreement is marital property, and the value of the Timber Agreement to the parties as of the date of separation and currently is \$5,000.

The court then concluded that Husband "shall be distributed as his sole and separate property the Timber Agreement and all benefits associated therewith."

12. In a related argument, Husband contends that the trial court erred by concluding that he had the ability to pay 50% of the costs to maintain the real property in addition to payment of the distributive awards within 30 days of entry of the order. We will not address this issue in detail since the new order on remand will address a new distribution of the real property and other related issues such as distributional factors including "[a]cts of either party to maintain, preserve, develop, or expand; or to waste, neglect, devalue or convert the marital property . . . during the period after separation of the parties and before the time of distribution." N.C. Gen. Stat. § 50-20(c)(11a).

13. Again, in her reply brief, Wife claims that she does not agree with any of Husband's arguments on appeal. But in her Appellee brief, as to this issue she stated, "The Appellee concurs with the Appellant's attorney. There is no creditable [sic] evidence before the Court."

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Husband is correct that the evidence regarding the Timber Agreement was speculative, at best. The timber in question was on land which the parties had owned during the marriage, but Husband had sold in 2009 to his cousin. Wife testified that she was unaware of the sale until later and that it was done without her signature. Neither party knew exactly what sort of timber was there or how much, although Wife estimated the value to be \$10,000.00. The Timber Agreement itself was quite unusual, as noted by the trial court:

THE COURT: “If the buyer should endure any financial hardship, the buyer, Randy Winkleman, divorce, bankruptcy, foreclosure, the buyer shall initiate the sale as soon as possible to ensure the seller will receive any proceeds owed to him under this agreement.” That’s an odd provision.

[Husband’s trial counsel]: It’s a very odd contract.

THE COURT: Uh-huh (yes).

[Wife]: Well, apparently when Mr. Miller bought this from my in-laws the same timber agreement existed between them and his parents.

THE COURT: I wonder if this is recorded anywhere in the Register of Deeds office.

[Wife]: There’s no indication that there is.

In any event, the future value of timber, planted during marriage on marital property but which will not mature until some years in the future, is too speculative to be considered a vested property right for purposes of equitable distribution. *See Cobb v. Cobb*, 107 N.C. App. 382, 386, 420 S.E.2d 212, 214 (1992) (“In the case at bar, we find that the future value of the timber is more analogous to an option which may be lost as a result of future events Appellee may never realize the future value of the timber if, for example, the trees are destroyed by fire or insects, or if appellee decides to sell the property or to not cut the trees at all.”). This Court concluded in *Cobb* that the future value of timber that would not mature until many years later should not be considered marital property or a distributional factor, since “characterizing growing trees as a vested property right is far too speculative,” and “[an] equitable distribution trial would become overwhelmingly complicated.” *Id.* at 386, 387, 420 S.E.2d at 214, 215. We therefore conclude that the valuation of the Timber Agreement in this case at \$5,000.00, which involved

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timber of an unknown variety, age, and quantity, was not supported by competent evidence.

V. Classification of 2011 Suburban and Debt as Separate Property

[5] Finally, Husband argues that the trial court erred in classifying the 2011 Suburban and debt secured by it as his separate property and debt. Specifically, Husband contends that “[t]he record does not support the Court’s finding that the vehicle was not acquired for the joint benefit of the parties and the judgment contains no findings or conclusions indicating that the Defendant rebutted the marital property presumption[.]” Husband also argues that the court below erred because it “apparently believ[ed] that property acquired prior to separation, but after the filing of an action for divorce from bed and board falls outside of the marital property definition.”

Here, the trial court valued Husband’s 2011 Suburban at \$49,000.00 with a secured debt of \$64,638.82. The trial court classified it as Husband’s separate property and debt. The court’s findings include the fact that the Suburban and debt was “acquired/incurred by [Husband] after [Wife] filed the 2011 Proceeding [for divorce from bed and board] and were not acquired/incurred for the joint benefit of the parties.”

Although the trial court noted that the Suburban was acquired after Wife filed her claim for divorce from bed and board, the relevant date for classification of property for equitable distribution purposes is the date of separation. *See* N.C. Gen. Stat. § 50-20(b)(1) (2015) (“ ‘Marital property’ means all real and personal property acquired by either spouse or both spouses during the course of the marriage and *before the date of separation of the parties*, and presently owned, except property determined to be separate property or divisible property[.]”) (emphasis added). Furthermore, “[t]he spouse claiming that the property is separate bears the burden of proof, as under N.C. Gen. Stat. § 50-20(b)(1), it is presumed that all property acquired after the date of marriage and before the date of separation is marital property[.]” *Allen v. Allen*, 168 N.C. App. 368, 374, 607 S.E.2d 331, 335 (2005) (quotation marks omitted). The presumption may, however, “be rebutted by the greater weight of the evidence.” N.C. Gen. Stat. § 50-20(b)(1).

Here, at the equitable distribution hearing, Husband testified that the Suburban was purchased on or about 12 November 2011 while the parties still resided together and that he did not believe the marriage was over when he purchased the vehicle. The date of separation was 21 March 2012. Thus, the Suburban was purchased before the parties were separated and is presumed to be marital property. Although the

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trial court also heard testimony that Husband purchased the vehicle on his own and financed the vehicle himself, that Wife never drove the vehicle, and that Husband put all 33,000 miles on it, the court made no findings indicating that Wife rebutted the marital property presumption. There was no evidence that Husband purchased the Suburban with separate funds. Based upon the record, it appears that the Suburban and its associated debt should have been classified as marital. On remand, the trial court must clearly make findings to support its classification, valuation, and distribution of the Suburban and its debt. But we note that on remand, the trial court may, in its discretion, also consider the circumstances of Husband's purchase of the Suburban and associated debt he incurred as a factor favoring an unequal distribution in favor of Wife, thus accomplishing the same result in the actual distribution. In other words, the trial court should do the "equity" in equitable distribution in the distribution phase of the order, not in the classification of the property or debt as marital or separate.

Conclusion

If ever there was a case where it was proper for the trial court to use the "grand reservoir of equitable power to do justice in a particular case" under Rule 60(b), this is it. *Jim Walter Homes, Inc.*, 28 N.C. App. at 712, 222 S.E.2d at 708 (citation and quotation marks omitted). We commend the trial court's extensive and detailed orders addressing the facts and equities of this very unusual situation. The trial court acted well within its discretion when it entered a decree vacating the divorce decree under Rule 60(b) and thus had jurisdiction over Wife's equitable distribution claim. We also appreciate the complexity of the case and the difficulty of dealing with all of the issues raised over several years of litigation. But for the reasons noted above, we must reverse the equitable distribution order and remand for the trial court to enter a new equitable distribution order which addresses the substantive issues in a manner consistent with this opinion. On remand, the trial court may in its discretion receive additional evidence limited to the issues of classification, valuation and distribution of property as necessary for preparation of a new equitable distribution order.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

Judges McCULLOUGH and ZACHARY concur.

MOON WRIGHT & HOUSTON, PLLC v. COLE

[253 N.C. App. 113 (2017)]

MOON WRIGHT & HOUSTON, PLLC, PLAINTIFF,
v.
CHARLES J. COLE AND SANDRA D. COLE, DEFENDANTS.

No. COA16-1046

Filed 18 April 2017

Appeal and Error—interlocutory orders—partial summary judgment

An appeal was dismissed as interlocutory where the case involved an action to collect attorney fees and a summary judgment for one of the two defendants. The judgment did not contain a certification that there was no just reason for delay and plaintiff made no argument on appeal that the order impacted a substantial right.

Appeal by plaintiff from order entered 17 June 2016 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 23 March 2017.

Moon Wright & Houston, PLLC, by Caleb Brown, Richard S. Wright, and Andrew T. Houston, for plaintiff-appellant.

Copeland Richards, PLLC, by Drew A. Richards, for defendant-appellee Charles J. Cole.

MURPHY, Judge.

Moon Wright & Houston, PLLC (“Plaintiff”), appeals from the trial court’s order partially granting Sandra and Charles Cole’s (collectively “Defendants”) motion for summary judgment. After careful review, we dismiss Plaintiff’s appeal as interlocutory.

Factual Background

On 27 August 2015, Plaintiff, a law firm operating out of Charlotte, North Carolina, filed a complaint in Mecklenburg County Superior Court against Sandra Cole (“Sandra”) and Charles Cole (“Charles”) concerning their failure to pay certain legal fees owed to Plaintiff. In its complaint, Plaintiff alleged (1) a breach of contract claim against Sandra; (2) a claim for unjust enrichment and *quantum meruit* against both Sandra and Charles; (3) a violation of the doctrine of necessities against Charles; (4) a fraud claim against Charles; and (5) a claim for negligent misrepresentation against both Sandra and Charles.

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On 12 May 2016, Defendants filed a motion for summary judgment as to Plaintiff's claims. On 25 May 2016, Sandra filed for bankruptcy in the United States Bankruptcy Court for the Western District of North Carolina under Chapter 13 of the United States Bankruptcy Code.¹ As a result of her filing, the automatic stay provided pursuant to 11 U.S.C. § 362 was triggered.

A hearing on Defendants' motion was held before the Honorable Richard D. Boner in Mecklenburg County Superior Court on 8 June 2016. On 17 June 2016, Judge Boner entered an order granting summary judgment in Charles' favor. The order did not address Plaintiff's claims against Sandra. Plaintiff filed a notice of appeal of the trial court's summary judgment order on 15 July 2016.

Analysis

As an initial matter, we note that the present appeal is interlocutory. "Since summary judgment was allowed for fewer than all the defendants and the judgment did not contain a certification pursuant to G.S. § 1A-1, Rule 54(b), that there was 'no just reason for delay,' plaintiff's appeal is premature unless the order allowing summary judgment affected a substantial right." *Bernick v. Jurden*, 306 N.C. 435, 438, 293 S.E.2d 405, 408 (1982). Although not raised by either party on appeal, "whether 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, internal 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 an interlocutory order. The prohibition against appeals from interlocutory orders prevents fragmentary, premature and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts. However, there are two avenues by which a party may immediately appeal an interlocutory

1. Charles Cole did not file for bankruptcy.

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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.

Feltman v. City of Wilson, 238 N.C. App. 246, 250, 767 S.E.2d 615, 618-19 (2014) (internal citations and quotation marks omitted).

In the present case, it is readily apparent that the trial court's summary judgment order only resolved Plaintiff's claims against Charles, and not Plaintiff's claims against Sandra:

This matter coming on for hearing before the undersigned judge at the June 8, 2016 Civil Session of the Superior Court in Mecklenburg County, North Carolina upon motion by *Defendant Charles J. Cole* for Summary Judgment regarding all of Plaintiff's claims against *Defendant Charles J. Cole*.

After reviewing the pleadings, affidavits, briefs and the court file in this matter, and hearing the arguments of counsel, the Court concludes as a matter of law that there are no genuine issues of material fact such that Defendant *Charles J. Cole's* Motion for Summary Judgment should be and is hereby **GRANTED**.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that summary judgment is granted in favor of *Defendant Charles J. Cole* and Plaintiff's Complaint against *Defendant Charles J. Cole* is hereby dismissed with prejudice.

(Emphasis added).

Nowhere in the trial court's order are Plaintiff's claims against Sandra resolved, or even, for that matter, addressed. Furthermore, the record on appeal is devoid of any documentation tending to show that Plaintiff's claims against Sandra have either been subsequently determined by the trial court, discharged in bankruptcy, or voluntarily dismissed by Plaintiff. We note that while Plaintiff complied with Local Rule 19 of the 26th Judicial District Superior Court Division Local Rules and Procedures insofar as it filed a notice of Sandra's bankruptcy filing

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with the Clerk of Superior Court, Local Rule 19 does nothing more than administratively close the case against Sandra and hold it in abeyance. See Local Rule 19.3 (“Upon submission of paperwork, as described above, the Clerk of Superior Court shall administratively close the case, but only as to the claims against the party in bankruptcy.”). Jurisdiction over Plaintiff’s claims against Sandra remains with the trial court pending resolution of Sandra’s bankruptcy case or a dismissal of the claims against her.

Plaintiff has made no argument on appeal that the trial court’s order impacts a substantial right which would be lost absent immediate appellate review. Nor has the trial court certified its summary judgment order for immediate appeal pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure. Consequently, because Plaintiff’s claims against Sandra remain outstanding, we dismiss the present appeal as interlocutory.

Conclusion

For the reasons stated above, Plaintiff’s interlocutory appeal is dismissed.

DISMISSED.

Judges STROUD and DILLON concur.

PAGE v. CHAING

[253 N.C. App. 117 (2017)]

JONATHAN PAGE, A MINOR, BY AND THROUGH HIS GUARDIAN AD LITEM, JOHN M. McCABE,
AND LOREE OLIVER, PLAINTIFFS

v.

SHU CHAING, PH.D., INDIVIDUALLY AND IN HER INDIVIDUAL CAPACITY, AND SUSAN BOWMAN,
INDIVIDUALLY AND IN HER INDIVIDUAL CAPACITY, DEFENDANTS

No. COA16-611

Filed 18 April 2017

Appeal and Error—motions to dismiss denied—appellate issue not decided below

An appeal was dismissed where the action involved sovereign immunity and defendants argued a trial court order denying their motions to dismiss was interlocutory but immediately appealable. The question of whether defendants were immune from suit was never decided below.

Appeal by defendants from order entered 7 March 2016 by Judge W. Osmond Smith III in Wake County Superior Court. Heard in the Court of Appeals 1 December 2016.

Abrams & Abrams, P.A., by Douglas B. Abrams, Noah B. Abrams, and Melissa N. Abrams, and Raynes McCarty, by Charles Hehmeyer and Martin McLaughlin, for plaintiff-appellees.

Attorney General Joshua H. Stein, by Assistant Attorney General John P. Barkley and Special Deputy Attorney General Gerald K. Robbins, for defendant-appellants.

McCULLOUGH, Judge.

Shu Chaing, Ph.D., and Susan Bowman (together “defendants”) appeal from an interlocutory order denying their motions to dismiss the case on grounds of public official immunity. For the following reasons, we dismiss the appeal.

I. Background

Jonathan Page (“juvenile”) and Loree Oliver (“mother”) (together “plaintiffs”) first filed a complaint in this matter on 10 August 2015. Plaintiffs then filed an amended complaint on 18 August 2015 (the “first amended complaint”) with the sole purpose to correct the last name of one of the defendants. In the first amended complaint, plaintiffs asserted negligence, gross negligence, punitive damages, negligent infliction of

emotional distress, and medical malpractice claims based on allegations that after juvenile was born to mother on 8 September 2010, defendants, both North Carolina Department of Health and Human Services employees in the State Laboratory of Public Health, followed newborn screening procedures that they knew to be inadequate to evaluate older infants. Plaintiffs allege, in the present case this failure resulted in a missed diagnosis of a treatable inborn metabolism error in juvenile that later caused juvenile to suffer a medical emergency, resulting in severe and permanent brain damage.

Defendants filed motions to dismiss and motions to strike on 21 October 2015. Pertinent to this appeal, defendants' motions to dismiss asserted that the court lacks subject matter jurisdiction because (1) defendants are being sued in their official capacity and the State has not waived sovereign immunity, (2) plaintiffs have not specifically pleaded that the State waived sovereign immunity, and (3) defendants are public officials and are entitled to all immunities afforded public officials. Notice of hearing filed 11 December 2015 indicated defendants' motions to dismiss would be heard on 1 February 2016.¹

Prior to the hearing on defendants' motion to dismiss, plaintiffs filed a motion to amend the first amended complaint and then filed a notice of hearing on 21 January 2016 indicating the motion to amend would also be heard on 1 February 2016. Plaintiffs then filed an amended motion to amend the first amended complaint on 29 January 2016. Pertinent to this appeal, the amended motion sought to insert the words "individually and in her individual capacity" after the names of each defendant, each time the name of a defendant appeared in the first amended complaint.

The motions came on for hearing in Wake County Superior Court before the Honorable W. Osmond Smith III on 1 February 2016. At the beginning of the hearing, defendants informed the judge that they were proceeding on their motions to dismiss on the bases that (1) the court lacked subject matter jurisdiction, Rule 12(b)(1), because plaintiffs failed to allege in the original complaint and the first amended complaint in what capacity defendants were being sued and (2) plaintiffs' failed to state a claim, Rule 12(b)(6), because there was no duty owed to plaintiffs by defendants. Defendants withdrew the remainder of their

1. The notice of hearing actually states the matter will be heard "1 February 2015." However, because the notice was filed on 11 December 2015, well after the indicated hearing date, it is obvious that the hearing date was recorded in error. It appears from the rest of the record that the court intended to notice a hearing for 1 February 2016.

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motions to dismiss. In response, plaintiffs argued that they believed the amended complaint was sufficient to show that defendants were being sued in their individual capacities; but in any event, plaintiffs filed the amended motion to amend the first amended complaint to address defendants' confusion and avoid "this kind of hypertechnical argument about the form of the complaint." Upon considering the arguments, the court granted plaintiffs' amended motion to amend the first amended complaint. The court then heard and considered arguments on defendants' motions to dismiss. The court held the subject matter jurisdiction portion of defendants' motions to dismiss was moot as a result of its granting plaintiffs' motion to amend. The court then denied defendants' Rule 12(b)(6) motion based on the argument that defendants owed no duty to plaintiffs.

On 2 February 2016, the court filed an order allowing plaintiffs' amended motion to amend the first amended complaint. That same day, plaintiffs filed the second amended complaint against defendants individually and in their individual capacities. Defendants filed separate answers to the second amended complaint on 2 March 2016. On 7 March 2016, the court filed an order denying "each and every of the Motions to Dismiss by [defendants]."

Defendants filed notice of appeal from the order denying their motions to dismiss on 1 April 2016. The notice specifically referenced "motions to dismiss based on claims of public official and sovereign immunity under Rule 12(b)(2) and (6) of the North Carolina Rules of Civil Procedure."

II. Discussion

The sole issue raised on appeal is whether the trial court erred in denying defendants' motions to dismiss based on assertions of public official immunity. Defendants contend they are immune from suit because they are public officials and not employees. Yet, it appears the trial court never decided that issue below. Thus, we must first address whether defendants' arguments are proper for appeal.

"Typically, the denial of a motion to dismiss is not immediately appealable to this Court because it is interlocutory in nature." *Reid v. Cole*, 187 N.C. App. 261, 263, 652 S.E.2d 718, 719 (2007). "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950).

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In this case, defendants acknowledge that the order denying their motions to dismiss is interlocutory. Nevertheless, defendants contend that immediate appeal of the interlocutory order is available pursuant to N.C. Gen. Stat. § 1-277(a) and (b) because the denial of their motions to dismiss on grounds of public official immunity affects a substantial right.

“[I]mmediate appeal is available from an interlocutory order or judgment which affects a substantial right.” *Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999) (quotation marks omitted); *see also* N.C. Gen. Stat. § 1-277 (2015). This court has held that,

“[o]rders denying dispositive motions based on public official’s immunity affect a substantial right and are immediately appealable.” *Summey v. Barker*, 142 N.C. App. 688, 689, 544 S.E.2d 262, 264 (2001). A substantial right is affected because “[a] valid claim of immunity is more than a defense in a lawsuit; it is in essence immunity from suit. Were the case to be erroneously permitted to proceed to trial, immunity would be effectively lost.” *Slade v. Vernon*, 110 N.C. App. 422, 425, 429 S.E.2d 744, 746 (1993), *implied overruling based on other grounds*, *Boyd v. Robeson County*, 169 N.C. App. 460, 621 S.E.2d 1 (2005).

Farrell v. Transylvania Cnty. Bd. of Educ., 175 N.C. App. 689, 694, 625 S.E.2d 128, 132-33 (2006); *see also Royal Oak Concerned Citizens Ass’n v. Brunswick Cnty.*, 233 N.C. App. 145, 149, 756 S.E.2d 833, 836 (2014) (“As an initial matter, we note that claims of immunity . . . affect a substantial right for purposes of appellate review.”). However, this Court has also made it clear that it matters how a motion to dismiss based on immunity is presented to the court.

Recently in *Murray v. University of North Carolina at Chapel Hill*, ___ N.C. App. ___, 782 S.E.2d 531 (2016) (Tyson, J. dissenting), this court addressed whether it had jurisdiction to hear the defendant’s appeal from a denial of a motion to dismiss. In *Murray*, this Court explained that the defendant filed a motion to dismiss “in which defendant asserted that pursuant to Rules 12(b)(1) and/or 12(b)(6) . . . , plaintiff’s complaint should be dismissed for ‘mootness, lack of standing, lack of subject matter jurisdiction, and failure to state a claim upon which relief may be granted.’” *Id.* at ___, 782 S.E.2d at 534. When the defendant’s motion came on for hearing, the defendant argued for the first time that “the complaint should be dismissed pursuant to Rules 12(b)(1) and 12(b)(2) based on the doctrine of sovereign immunity.” *Id.* at ___, 782 S.E.2d at 535. In denying the defendant’s motion, the trial court addressed Rules 12(b)(1)

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and 12(b)(6), finding “that it possesses subject matter jurisdiction over this action and that the Plaintiff’s complaint has made allegations sufficient to state a claim upon which relief may be granted under some legal theory.” *Id.* at __, 782 S.E.2d at 535. On appeal from the denial of its motion to dismiss, the defendant argued the appeal was properly before this Court because the trial court rejected its claim that the action was barred by sovereign immunity and, therefore, the order affects a substantial right. *Id.* at __, 782 S.E.2d at 535. Over dissent, this Court held that it did not have jurisdiction.

In so holding, this Court relied on its decision in *Can Am South, LLC v. State*, 234 N.C. App. 119, 759 S.E.2d 304, disc. review denied, 367 N.C. 791, 766 S.E.2d 624 (2014). As this court explained in *Murray*,

[i]n *Can Am*, the defendants moved to dismiss on sovereign immunity grounds under Rule 12(b)(1) for lack of subject matter jurisdiction and Rule 12(b)(2) for lack of personal jurisdiction, “but notably not Rule 12(b)(6)” 234 N.C. App. at 122, 759 S.E.2d at 307. Although the defendants had moved to dismiss for failure to state a claim for relief under Rule 12(b)(6), they based their Rule 12(b)(6) motion on the plaintiff’s failure to adequately plead an actual controversy and not on the sovereign immunity doctrine. *Id.* at 123-24, 759 S.E.2d at 308.

This Court held in *Can Am* that “[h]ad defendants moved to dismiss based on the defense of sovereign immunity pursuant to Rule 12(b)(6), we would be bound by the longstanding rule that the denial of such a motion affects a substantial right and is immediately appealable under section 1-277(a).” *Id.* at 122, 759 S.E.2d at 307. *See also Green v. Kearney*, 203 N.C. App. 260, 266, 690 S.E.2d 755, 761 (2010) (“This Court has held that a denial of a Rule 12(b)(6) motion to dismiss on the basis of sovereign immunity affects a substantial right and is immediately appealable.”), *aff’d per curiam*, 367 N.C. 113, 748 S.E.2d 143 (2013). However, since the defendants had only based their sovereign immunity defense on a lack of either subject matter jurisdiction under Rule 12(b)(1) or personal jurisdiction under Rule 12(b)(2), that longstanding rule was inapplicable. *Can Am*, 234 N.C. App. at 122, 759 S.E.2d at 307.

The Court next concluded that the defendants’ Rule 12(b)(1) motion could not justify an interlocutory appeal because “[a] denial of a Rule 12(b)(1) motion based on

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sovereign immunity does not affect a substantial right [and] is therefore not immediately appealable under section 1-277(a).” *Id.* at 122, 759 S.E.2d at 307. *See also Green*, 203 N.C. App. at 265-66, 690 S.E.2d at 760 (“[T]his Court has declined to address interlocutory appeals of a lower court’s denial of a Rule 12(b)(1) motion to dismiss despite the movant’s reliance upon the doctrine of sovereign immunity.”); *Meherrin Indian Tribe v. Lewis*, 197 N.C. App. 380, 385, 677 S.E.2d 203, 207 (2009) (holding “defendants’ appeal from the denial of their Rule 12(b)(1) motion based on sovereign immunity is neither immediately appealable pursuant to N.C. Gen. Stat. § 1-277(b), nor affects a substantial right.”).

In *Can Am*, this Court concluded its analysis of the jurisdictional issue by addressing Rule 12(b)(2) motions invoking the sovereign immunity doctrine. This Court pointed out that “beginning with *Sides v. Hospital*, 22 N.C. App. 117, 205 S.E.2d 784 (1974), *mod. on other grounds*, 287 N.C. 14, 213 S.E.2d 297 (1975), this Court has consistently held that: (1) the defense of sovereign immunity presents a question of personal, not subject matter, jurisdiction, and (2) denial of Rule 12(b)(2) motions premised on sovereign immunity are sufficient to trigger immediate appeal under section 1-277(b).” 234 N.C. App. at 124, 759 S.E.2d at 308.

As a result, the Court concluded in *Can Am* that it could consider the merits of the defendants’ Rule 12(b)(2) motion to dismiss, concluding “[a]s has been held consistently by this Court, [that] denial of a Rule 12(b)(2) motion premised on sovereign immunity constitutes an adverse ruling on personal jurisdiction and is therefore immediately appealable under section 1-277(b).” *Id.* at 125, 759 S.E.2d at 308. *See also Data Gen. Corp. v. Cnty. of Durham*, 143 N.C. App. 97, 100, 545 S.E.2d 243, 245-46 (2001) (“[T]his Court has held that an appeal of a motion to dismiss based on sovereign immunity presents a question of personal jurisdiction rather than subject matter jurisdiction, and is therefore immediately appealable.”).

Murray, ___ N.C. App. at ___, 782 S.E.2d at 535-36.

Similar to *Can Am*, in *Murray*, this Court held defendant could not rely on its motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6)

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because, “[d]uring the oral argument, where [the] defendant raised the sovereign immunity doctrine for the first time, [the] defendant relied only on Rules 12(b)(1) and 12(b)(2) in arguing that the complaint was barred by sovereign immunity and did not rely upon Rule 12(b)(6)[.]” and, “[a]s *Can Am* emphasizes, to the extent that defendant relied on Rule 12(b)(1) in moving to dismiss on sovereign immunity grounds, that motion does not support an interlocutory appeal.” *Id.* at __, 782 S.E.2d at 536. Concerning defendant’s oral assertion of a sovereign immunity defense based on personal jurisdiction pursuant to Rule 12(b)(2), this Court held that “the trial court reasonably confined its order to the bases asserted in the motion: Rules 12(b)(1) and 12(b)(6).” *Id.* at __, 782 S.E.2d at 536. Furthermore, “[s]ince [the] defendant did not take any action to obtain a ruling on its oral Rule 12(b)(2) motion, [the] defendant did not preserve for appellate review the question whether the trial court erred in not applying the sovereign immunity doctrine under Rule 12(b)(2).” *Id.* at __, 782 S.E.2d at 537.

The dissenting opinion in *Murray* disagreed that the defendant did not preserve its sovereign immunity argument under Rule 12(b)(6) by obtaining a ruling. *Id.* at __, 782 S.E.2d at 538. The dissent concluded that because “[the] [d]efendant’s motion to dismiss states [the] defendant ‘moves to dismiss [p]laintiff’s [c]omplaint pursuant to Rules 12(b)(1) and/or 12(b)(6) of the North Carolina Rules of Civil Procedure for mootness, lack of standing, lack of subject matter jurisdiction, and failure to state a claim upon which relief may be granted[,]’ ” *Id.* at __, 782 S.E.2d at 538 (emphasis in original), the defendant’s subsequent argument at the hearing that the plaintiff’s complaint “neither alleged a waiver of immunity nor demonstrated the basis for such a waiver[.]” was sufficient to assert sovereign immunity under Rule 12(b)(6) for failure to state a claim because “[i]t is well-settled that ‘[i]n order to overcome a defense of [sovereign] immunity, the complaint must specifically allege a waiver of [sovereign] immunity. Absent such an allegation, the complaint fails to state a cause of action.’ ” *Id.* at __, 782 S.E.2d at 538 (quoting *Green*, 203 N.C. App. at 268, 690 S.E.2d at 762).

As a result of the dissenting opinion in *Murray*, that case is currently before our Supreme Court for review. Yet, it is even more clear in the present case that dismissal of this appeal for lack of jurisdiction is appropriate.

To elaborate on the background above, in defendants’ motions to dismiss, defendants labeled all immunity defenses as issues of subject matter jurisdiction. In those defenses, defendants contended the trial court “lacks jurisdiction of the subject matter presented by the

complaint” in that (1) defendants are being sued in their official capacity and the State had not waived sovereign immunity; (2) plaintiffs did not specifically plead waiver of sovereign immunity; and (3) defendants’ are public officials and entitled to all immunities afforded public officials. Defendants also moved to dismiss for failure to state a claim on the bases that (1) defendants owed no duty to plaintiffs; (2) the negligence claims are, or should be, determined to be claims for medical malpractice; and (3) the medical malpractice claims fail to allege a physician/patient relationship.

At the 1 February 2016 hearing on defendants’ motions to dismiss, defendants stated they wanted to proceed only on their motions to dismiss for lack of subject matter jurisdiction and for failure to state a claim. In regards to subject matter jurisdiction, defendants clarified that the Rule 12(b)(1) motion was on the basis that plaintiffs failed to allege whether defendants were being sued in their individual or official capacity. In regards to failure to state a claim, defendants clarified that the Rule 12(b)(6) motion was on the basis that defendants owed no duty to plaintiffs to support the negligence claims. Defendants withdrew the remainder of their motions at that time.

Thereafter, the court granted plaintiffs’ motion to file a second amended complaint that made clear that plaintiffs were suing defendants in their individual capacities. The court then considered arguments on defendants’ two motions to dismiss based on “subject matter” and “duty.” As a result of allowing the motion to amend, the court held that defendants’ subject matter jurisdiction argument was moot. Defense counsel appeared to agree, replying “[i]t’s been dealt with[]” and “[y]es, sir.” The court then held the second amended complaint survived defendants’ motion to dismiss for failure to state a claim, indicating the issue of duty would be “litigated significantly down the road.”

Following the filing of plaintiffs’ second amended complaint, defendants never filed further motions to dismiss. The trial courts written order, filed on 7 March 2016, indicates defendants’ motions to dismiss came on for hearing with plaintiffs’ motion to amend the complaint and that all of defendants’ motions to dismiss are denied.

Upon review, it is evident that defendants’ immunity arguments in this case were presented to the trial court and decided solely as motions to dismiss for lack of subject matter jurisdiction. In keeping with *Murray, Can Am*, and the cases cited therein, we hold that the interlocutory denial of a motion to dismiss for lack of subject matter jurisdiction based on immunity is not immediately appealable. Moreover, contrary to

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the assertion in defendants' notice of appeal that the trial court denied "motions to dismiss based on claims of public official and sovereign immunity under Rule 12(b)(2) and (6) of the North Carolina Rules of Civil Procedure[,]" nothing in the record shows that defendants' argued for a dismissal based on immunity pursuant to Rules 12(b)(2) or 12(b)(6). Defendants' motion to dismiss pursuant to Rule 12(b)(6) was argued solely on the basis that defendants owed no duty to plaintiffs. Dismissal on grounds of immunity for lack of personal jurisdiction pursuant to Rule 12(b)(2) was never mentioned in defendants' motion to dismiss or in defendants' arguments to the trial court. The first mention in the record of personal jurisdiction as grounds for dismissal is in defendants' notice of appeal.

As this Court stated in *Murray*, "since our role is simply to review the actions of the court below, we find no basis for concluding that this Court has jurisdiction over the appeal pursuant to Rule 12(b)(2) [or Rule 12(b)(6)]." __ N.C. App. at __, 782 S.E.2d at 537. As a result, we must dismiss the appeal.

III. Conclusion

For the reasons discussed, we dismiss defendants' appeal from the trial court's order denying their motions to dismiss.

DISMISSED.

Judges DILLON and TYSON concur.

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PROVIDENCE VOLUNTEER FIRE DEPARTMENT,
A NORTH CAROLINA NON-PROFIT CORPORATION, PLAINTIFF

v.

THE TOWN OF WEDDINGTON,
A NORTH CAROLINA MUNICIPAL CORPORATION, DEFENDANT

No. COA16-80

Filed 18 April 2017

1. Appeal and Error—interlocutory appeal—subject matter jurisdiction—personal jurisdiction

In a case arising from a dispute between a town and its volunteer fire department, plaintiff's motion to dismiss the Town's appeal as interlocutory was granted as to the Town's appeal under Rule 12(b)(1) (subject matter jurisdiction) and denied as to the Town's appeal under Rule 12(b)(2). Governmental immunity has been traditionally recognized as an issue of personal jurisdiction and is immediately appealable.

2. Appeal and Error—interlocutory appeal—heard in the discretion of the Court

In a case arising from a dispute between a town and its volunteer fire department, issues arising from the denial of the Town's Rule 12(b)(6) motion to dismiss and an order allowing amendment of a complaint and imposing a preliminary injunction were heard in the Court of Appeals' discretion even though they were interlocutory.

3. Pleadings—amendment of complaint—no abuse of discretion

The trial court did not abuse its discretion by granting plaintiff's motion to amend its complaint. Even though plaintiff admitted that it had no factual basis for alleging waiver of governmental immunity through the purchase of liability insurance, the record did not show that the trial court abused its discretion by allowing the motion to amend.

4. Civil Procedure—Rule 12(b)(6) motion to dismiss—alternative ground in amended pleading

In a case arising from a dispute between a town and its volunteer fire department, the trial court properly denied defendant-town's motion to dismiss based on Rule 12(b)(6). That motion was based primarily on the first verified amended complaint and the trial court did not err by allowing plaintiff to amend the complaint. The second verified complaint alleged alternative grounds upon which

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immunity was unavailable beyond waiver by purchase of liability insurance and to which defendant did not adequately respond in its initial motion to dismiss or the accompanying affidavit.

5. Immunity—governmental—proprietary activity

The trial court did not err in case arising from a dispute between a town and its volunteer fire department by denying a motion to dismiss a fraud claim based on governmental immunity. There was an uncontroverted allegation in the second verified amended complaint that defendant-town's action was proprietary in nature.

6. Immunity—governmental—contract waiver—not applicable to tort claims

The precedent that government immunity is waived when a town enters into a valid contract was not extended to tort claims arising from a contract.

7. Civil Procedure—motion to dismiss—unfounded allegation in verified complaint—alternate basis for ruling

The issue of whether an unfounded allegation in a verified complaint could be used as evidence for purposes of a motion to dismiss was not addressed where the trial court order was affirmed on an alternate basis.

8. Injunctions—preliminary—*lis pendens*—adequate remedy at law

The trial court erred by granting plaintiff's motion for a preliminary injunction in a case arising from a dispute between a town and its volunteer fire department where plaintiff, the volunteer fire department, had filed a *lis pendens* against the fire station. The *lis pendens* provided an adequate remedy at law.

Appeal by Defendant from orders entered 25 August 2015 by Judge W. David Lee in Union County Superior Court. Heard in the Court of Appeals 9 August 2016.

The Duggan Law Firm, PC, by Christopher Duggan, Henderson, Nystrom, Fletcher & Tydings, by Robert E. Henderson and John Fletcher, for Plaintiff-Appellee.

Parker Poe Adams & Bernstein, LLP, by Anthony Fox and Benjamin R. Sullivan, for Defendant-Appellant.

INMAN, Judge.

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A municipality's motion to dismiss a tort claim based on governmental immunity is properly denied when the motion does not refute a verified complaint alleging that the tort occurred when the municipality was engaged in a proprietary function. A preliminary injunction is inappropriate where a plaintiff has filed a notice of *lis pendens*, thereby securing a full, adequate, and complete remedy at law.

Providence Volunteer Fire Department, Inc. ("Plaintiff" or "Providence") owned a fire station in Union County that needed substantial and cost prohibitive repairs and improvements. Providence agreed to convey the fire station to the Town of Weddington ("Defendant" or the "Town") in exchange for the Town's agreement to pay for repairs and improvements. The Town also agreed to lease the improved fire station back to Providence and to continue to pay for fire suppression and emergency medical services from Providence for ten years. After the conveyance and completion of repairs, the Town terminated its relationship with Providence and leased the fire station to another fire department. Providence filed a law suit against the Town for breach of contract, fraud, and unfair and deceptive trade practices and filed a notice of *lis pendens* in Union County Superior Court.

The Town appeals from orders (1) granting a motion by Providence to amend its complaint, (2) denying in part its motion to dismiss Providence's tort claims based on governmental immunity, and (3) granting Providence's motion for a preliminary injunction. After careful review, we reverse the order granting injunctive relieve and otherwise affirm the trial court.

Factual Background

From 1954 to 2012, Providence provided fire protection service to the Town and the surrounding areas in Union and Mecklenburg counties. In May 2012, the Town Council passed a resolution establishing a Municipal Fire District and taking responsibility for overseeing and funding this new district. To do so, the Town raised taxes and entered into various agreements with Providence and two other area fire departments, the Wesley Chapel Volunteer Fire Department and the Stallings Fire Department.

At the heart of this action is a series of agreements between Providence and the Town stemming from the creation of the new fire district. In October 2013, Providence and the Town entered into an Interlocal Agreement, which contemplated, *inter alia*, that the Town would invest approximately one million dollars in repairs and improvements to the Hemby Road fire station owned by Providence, and in

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exchange, Providence would convey the fire station and the land upon which it rests (the “Property”) to the Town. In addition to the Interlocal Agreement, the parties entered into a Fire Suppression Agreement (the “Suppression Agreement”), which designated Providence as the Town’s primary fire protection and emergency medical service provider for ten years.

The Suppression Agreement provided that after the first year of the ten-year term, the amount of compensation paid to Providence would be “established during the Town’s annual budget process.” Either party could terminate the Suppression Agreement for cause, but if the Town terminated the agreement without cause, it was obligated to pay liquidated damages to Providence:

If this Agreement is terminated by the Town for a reason other than cause or mutual agreement of the parties, the Department shall be entitled to \$750,000 as liquidated damages. . . . Such liquidated damages shall be the sole and exclusive remedy of the Department by reason of a default by Town under this Agreement, and the Department hereby waives and releases any right to sue Town, and hereby covenants not to sue Town, for specific performance of this Agreement or to prove that the Department’s actual damages exceed the amount which is herein provided the department as full liquidated damages.

Almost a year later after executing the Interlocal Agreement and the Suppression Agreement, in August 2014, Providence conveyed the Property by deed¹ and the parties entered into a third agreement (the “Lease Agreement”) providing that the Town would lease the Property to Providence for the same ten-year period as the term of the Suppression Agreement. The Lease Agreement also provided that if the Suppression Agreement were terminated early, the Lease Agreement would be terminated at the same time.

During the year following the Interlocal and Suppression Agreements and preceding the Lease Agreement, several new Town Council members were elected. Providence alleges that the new Town Council members opposed the first two agreements and that the new council

1. The deed is not included in the record on appeal, but the Second Verified Amended Complaint alleges that the agreement in which the Town purchased and leased back the Property was executed on 19 August 2014.

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members' acts and omissions fraudulently induced Providence to convey the Property to the Town through the Lease Agreement.

In February 2015, Providence projected a deficit of approximately \$70,000 in its operations budget and requested increased funding from the Town in order to meet its obligations to provide fire suppression and emergency medical services according to the standards required by the Suppression Agreement. On 15 April 2015, the Town notified Providence that unless it could provide documents and information confirming that it would be able to meet its performance obligations without increased funding, the Town intended to terminate the Suppression Agreement for cause. Providence responded with a revised operating budget and other documents. The Town Council reviewed the documents and voted to terminate the Suppression Agreement. On 29 April 2015, the Town notified Providence that it was terminating the Suppression Agreement for cause, effective 29 July 2015, because Providence had failed to provide adequate assurances that it could meet its ongoing and future obligations; the Lease Agreement also would terminate on that date.

The Town then contracted with the Wesley Chapel Volunteer Fire Department ("Wesley Chapel") as its new primary fire service provider to begin on 29 July 2015. The Town and Wesley Chapel signed an agreement requiring Wesley Chapel to use the Hemby Road fire station and containing a lease for the Property. The agreement also provided an option for Wesley Chapel to purchase the Property from the Town for \$750,000.

Procedural Background

On 4 June 2015, Providence filed a complaint alleging that the Town breached the Suppression Agreement and seeking \$750,000 in liquidated damages. On 10 July 2015, Providence filed a First Verified Amended Complaint, which added claims for fraud in the inducement and unfair and deceptive trade practices. On the same day, Providence filed a notice of *lis pendens* on the Property.

The Town on 17 July 2015 filed a motion for a preliminary injunction seeking to force Providence to surrender possession of the fire station. The trial court granted the motion and ordered Providence to vacate the Property and enjoined Providence from obstructing or interfering with the Property's use, occupancy, or possession by the Town or the Town's designees.

On 27 July 2015, Providence filed a motion for a temporary restraining order and a preliminary injunction seeking to prevent the Town from

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selling, transferring, or conveying the Property or any interest therein. The trial court granted Providence's request for a temporary restraining order on 29 July 2015.

The Town filed a motion to dismiss Providence's tort claims on 29 July 2015, asserting complete governmental immunity. On 6 August 2015, Providence filed a motion to amend the First Verified Amended Complaint.

The trial court granted Providence's motion to amend and Providence filed its Second Verified Amended Complaint on 27 August 2015. The trial court granted the Town's motion to dismiss Providence's unfair and deceptive trade practices claim but denied the Town's motion to dismiss Providence's fraud claim.

The Town filed a notice of appeal from the orders denying its motion to dismiss the fraud claim, granting Providence's motion to amend, and granting Providence's motion for a preliminary injunction.

Analysis**I. Appellate Jurisdiction**

[1] As an initial matter, we address Providence's motion to dismiss the Town's appeal as interlocutory. Because the Town is appealing the trial court's denial of its motion to dismiss based in part on a challenge to personal jurisdiction, we hold that it is properly before us.

The North Carolina Supreme Court has not directly addressed whether governmental immunity is an issue of personal jurisdiction or subject matter jurisdiction, and consequently whether an appeal of a denial of immunity should be reviewed either as a challenge to personal jurisdiction or subject matter jurisdiction. However, this Court has classified the issue as one of personal jurisdiction, which permits an immediate appeal. *See, e.g., Can Am S., LLC v. State*, 234 N.C. App. 119, 123-24, 759 S.E.2d 304, 308 (2014) (“[B]eginning with *Sides v. Hosp.*, 22 N.C. App. 117, 205 S.E.2d 784 (1974), *mod. on other grounds*, 287 N.C. 14, 213 S.E.2d 297 (1975), this Court has consistently held that: (1) the defense of sovereign immunity presents a question of personal, not subject matter jurisdiction, and (2) denial of Rule 12(b)(2) motions premised on sovereign immunity are sufficient to trigger immediate appeal under section 1-277(b).”); *Data Gen. Corp. v. Cnty. of Durham*, 143 N.C. App. 97, 100, 545 S.E.2d 243, 245-46 (2001) (“[A]n appeal of a motion to dismiss based on sovereign immunity presents a question of personal jurisdiction rather than subject matter jurisdiction, and is therefore immediately appealable.”) (citations omitted).

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The Town asserts, citing *Church v. Carter*, 94 N.C. App. 286, 288, 380 S.E.2d 167, 168 (1989), and N.C. Gen. Stat. § 1-75.4 (2015), that because subject matter jurisdiction is a prerequisite to personal jurisdiction, our Court may properly review a challenge to subject matter jurisdiction when there was an accompanying challenge to personal jurisdiction. *Church*, 94 N.C. App. at 288, 380 S.E.2d at 168 (holding that when a defendant challenges both subject matter jurisdiction and personal jurisdiction, the court was required to “decide the issue [the defendant] ha[d] raised concerning subject matter jurisdiction”). The Town’s argument overlooks the difference in the nature of the Rule 12(b)(1) challenges at issue in *Church* and in the present case. In *Church*, the defendant’s motion to dismiss for lack of subject matter jurisdiction was not based on sovereign immunity, but rather on the defendant’s status as a non-North Carolina entity. *Id.* Here, the Town’s motion to dismiss for lack of subject matter jurisdiction is based on governmental immunity.

In *Can Am*, our Court denied a defendant’s appeal asserting sovereign immunity as an issue of subject matter jurisdiction as interlocutory, while granting the defendant’s appeal of the lower court’s denial of the defendant’s motion to dismiss for sovereign immunity as an issue of personal jurisdiction. 234 N.C. App. at 124, 759 S.E.2d at 308. This case presents a procedural posture in line with that of *Can Am*. Because governmental immunity has traditionally been recognized as an issue of personal jurisdiction and not subject matter jurisdiction, we grant Providence’s motion to dismiss the Town’s appeal under Rule 12(b)(1) (subject matter jurisdiction) and deny Providence’s motion to dismiss the Town’s appeal under Rule 12(b)(2) (personal jurisdiction).

[2] The remainder of the Town’s appeal—challenging the denial of the motion to dismiss based on Rule 12(b)(6) and the orders allowing Providence to amend its complaint and imposing a preliminary injunction—raises issues that generally are not subject to interlocutory review. We agree that the Town’s appeal based upon substantive defenses other than governmental immunity do not affect a substantial right. However, in our discretion, because all of the remaining issues appealed are closely interrelated, we choose to address the Town’s additional arguments to avoid “fragmentary appeals.” *RPR & Assocs., Inc. v. State*, 139 N.C. App. 525, 530-31, 534 S.E.2d 247, 251-52 (2000) (choosing to address the defendant’s additional question on appeal, despite its interlocutory nature, noting “to address but one interlocutory or related issue would create fragmentary appeals”). We first address the Town’s appeal from the trial court’s order allowing a motion by Providence to file a Second Verified Amended Complaint because that amendment is ultimately dispositive of the Town’s motion to dismiss the tort claims.

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II. Motion to Amend

[3] The Town asserts that the trial court erred in granting Providence's motion to amend its complaint. We disagree.

We review a trial court's decision on a motion to amend the pleadings for abuse of discretion. *Williams v. Owens*, 211 N.C. App. 393, 394, 712 S.E.2d 359, 360 (2011) (citation omitted). "An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *Warren v. Gen. Motors Corp.*, 142 N.C. App. 316, 319, 542 S.E.2d 317, 319 (2001) (internal quotation marks and citations omitted).

"The party opposing the amendment has the burden to establish that it would be prejudiced by the amendment." *Carter v. Rockingham Cnty. Bd. of Educ.*, 158 N.C. App. 687, 690, 582 S.E.2d 69, 72 (2003) (citations omitted). "Reasons justifying denial of an amendment are (a) undue delay, (b) bad faith, (c) undue prejudice, (d) futility of amendment, and (e) repeated failure to cure defects by previous amendments." *Martin v. Hare*, 78 N.C. App. 358, 361, 337 S.E.2d 632, 634 (1985) (citations omitted).

Here, the Town challenges the order allowing Providence's motion to amend because counsel for Providence has admitted that it had no factual basis for alleging waiver of governmental immunity through the purchase of liability insurance and had not conducted any inquiry into the matter. As discussed *infra*, Providence concedes this issue; however, even with this concession, the record before us does not establish that the trial court abused its discretion in allowing the motion to amend. We therefore affirm the trial court.

[4] Because the Town's 12(b)(6) motion to dismiss was based primarily on Providence's First Verified Amended Complaint and we hold that the trial court did not err in allowing Providence to amend its complaint, the Town's 12(b)(6) motion to dismiss was properly denied. Additionally, we hold that the trial court properly denied the motion to the extent that the Town's argument was applicable to Providence's Second Verified Amended Complaint. As discussed *infra*, the Second Verified Amended Complaint alleged alternative grounds upon which governmental immunity was unavailable beyond waiver by purchase of liability insurance and to which the Town did not adequately respond in its initial motion to dismiss or accompanying affidavit. Therefore, the trial court was proper in denying the Town's motion to dismiss based on Rule 12(b)(6).

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III. Governmental Immunity

[5] The Town argues that the trial court erred by denying its motion to dismiss the fraud claim based on governmental immunity because (1) the Town was acting in its governmental capacity when it entered into the agreements, (2) waiver of immunity through contractual agreement does not waive immunity as to tort claims that may arise out of the contract, and (3) the Town did not have insurance to cover such claims. We disagree.

Because we hold that the trial court did not abuse its discretion in allowing Providence's motion to amend, the Second Verified Amended Complaint, verified under oath by Jack E. Parks, Jr., President of the Providence Volunteer Fire Department, was properly before the trial court as a source of evidence. The trial court, therefore, was permitted to consider its weight and credibility, along with the weight and credibility of the affidavit of Peggy Piontek, the Town Clerk of Weddington, submitted by the Town in support of its motion to dismiss.

A. Standard of Review

"The standard of review of an order determining personal jurisdiction is whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the trial court." *Replacements, Ltd v. MidweSterling*, 133 N.C. App. 139, 140-41, 515 S.E.2d 46, 48 (1999) (citations omitted). However, our review is also "depend[ent] upon the procedural context confronting the court." *Banc of Am. Secs. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 693, 611 S.E.2d 179, 182 (2005). Three procedural postures are typical: "(1) the defendant makes a motion to dismiss without submitting any opposing evidence; (2) the defendant supports its motion to dismiss with affidavits, but the plaintiff does not file any opposing evidence; or (3) both the defendant and the plaintiff submit affidavits addressing the personal jurisdiction issues." *Id.*

In this first category where neither party submits evidence, "[t]he allegations of the complaint must disclose jurisdiction although the particulars of jurisdiction need not be alleged." *Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 615, 532 S.E.2d 215, 217 (2000) (citations omitted). If, however, the defendant submits supportive evidence—for example an affidavit—along with the motion to dismiss, the complaint's allegations "can no longer be taken as true or controlling and [the] plaintiff[] cannot rest on the allegations of the complaint." *Id.* at 615-16, 532 S.E.2d at 218 (citation omitted). In this instance, the court must consider "(1) any allegations in the complaint that are not

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controverted by the defendant's affidavit and (2) all facts in the affidavit (which are uncontroverted because of the plaintiff's failure to offer evidence)." *Banc of Am.*, 169 N.C. App. at 693-94, 611 S.E.2d at 182-83 (citations omitted).

In the third category, when the parties submit competing evidence—such as affidavits or an affidavit and a verified complaint²—"the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions." N.C. R. Civ. P. 43(e) (2015); *see also Bruggeman*, 138 N.C. App. at 615, 532 S.E.2d at 217 ("If the exercise of personal jurisdiction is challenged by a defendant, a trial court may hold an evidentiary hearing including oral testimony or depositions or may decide the matter based on affidavits.") (citation omitted). When the trial court decides the motion on affidavits, "[t]he trial judge must determine the weight and sufficiency of the evidence [presented in the affidavits] much as a juror." *Fungaroli v. Fungaroli*, 51 N.C. App. 363, 367, 276 S.E.2d 521, 524 (1981). Even when the trial court is required to weigh evidence, it is not required to make findings of fact unless requested by a party when deciding a motion to dismiss. N.C. R. Civ. P. 52(e) (2015). When the record contains no findings of fact, "it will be presumed that the judge, upon proper evidence, found facts sufficient to support his ruling." *Cameron-Brown Co. v. Daves*, 83 N.C. App. 281, 285, 350 S.E.2d 111, 114 (1986) (citation omitted). "Where such presumed findings are supported by competent evidence, they are deemed conclusive on appeal, despite the existence of evidence to the contrary." *Data Gen.*, 143 N.C. App. at 101, 545 S.E.2d at 246.

In order to deny the Town's motion to dismiss based on governmental immunity, the trial court presumably determined that the Town was precluded from its governmental immunity defense by one of the three following alternatives: (1) acting in a proprietary capacity, (2) entering into a valid contract thereby implicitly waiving immunity, or (3) purchasing liability insurance.

B. Proprietary Function

Providence's primary contention on appeal is that the Town was engaged in a proprietary function when the parties entered into the

2. "A verified complaint may be treated as an affidavit if it (1) is made on personal knowledge, (2) sets forth such facts as would be admissible in evidence, and (3) shows affirmatively that the affiant is competent to testify to the matters stated therein." *Page v. Sloan*, 281 N.C. 697, 705, 190 S.E.2d 189, 194 (1972) (citations omitted).

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series of agreements, particularly the Lease Agreement and the Interlocal Agreement, so that governmental immunity does not shield the Town from suit for torts related to those agreements.

Whether an entity is entitled to governmental immunity can turn on whether its alleged tortious conduct arose out of an activity that was governmental or proprietary in nature. *Estate of Williams v. Pasquotank Cnty. Parks & Recreation Dep't*, 366 N.C. 195, 199, 732 S.E.2d 137, 141 (2012) (reviewing the Court of Appeals analysis of whether a county's operation of a swimming hole was governmental or proprietary in nature). A governmental function has long been held as an activity that 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). Conversely, a proprietary function is one that is "commercial or chiefly for the private advantage of the compact community." *Id.* (citations omitted). The reason for this distinction is that "[w]hen a municipality is acting 'in behalf of the State' in promoting or protecting the health, safety, security or general welfare of its citizens, it is an agency of the sovereign. When it engages in a public enterprise essentially for the benefit of the compact community, it is acting within its proprietary powers." *Id.* at 450-51, 73 S.E.2d at 293.

Our Supreme Court recently provided guidance on this often difficult and fact determinative distinction. In *Williams*, the Court laid out a three-step procedure with "the threshold inquiry" being "whether, and to what degree, the legislature has addressed the issue." 366 N.C. at 200, 732 S.E.2d at 141-42. This determination "turns on the facts alleged in the complaint." *Id.* at 201, 732 S.E.2d at 143. The Court remanded the case in *Williams* to this Court with instructions for further remand to the trial court "for detailed consideration of the degree of effect, if any, of section 160A-351," the policy provision of the Recreation Enabling Law providing that recreation is a governmental function, had on whether the defendant's operation of a swimming hole was a governmental or a proprietary endeavor. *Id.*

The Court in *Williams* addressed additional considerations necessary when the legislature has not specifically commented on the function to aid in a court's determination of the nature of an activity. *Williams*, 366 N.C. at 202, 732 S.E.2d at 142. "[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." *Id.* If, however, as

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is increasingly more often the case, the activity may be performed both privately and publicly, “the inquiry involves consideration of a number of additional factors, of which no single factor is dispositive.” *Id.* at 202, 732 S.E.2d at 143. The Court concluded that “[r]elevant to this inquiry is 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. Ultimately, “the proper designation of a particular action of a county or municipality is a fact intensive inquiry, turning on the facts alleged in the complaint, and may differ from case to case.” *Id.* at 203, 732 S.E.2d at 143.

The Town’s motion to dismiss, but not its supporting affidavit, refutes a theory of waiver based on proprietary activity underlying the alleged fraud. We therefore consider whether the complaint contains sufficient allegations to support the court’s exercise of jurisdiction on this basis. After a careful review of the pleadings, we hold that it does.

Because the trial court did not abuse its discretion in allowing Providence’s motion to amend, the Second Verified Amended Complaint controls our review. The Second Verified Amended Complaint alleges that “[t]he Town’s function in entering into the purchase agreement with lease back dated August 19, 2014 . . . with the Plaintiff is proprietary in nature and as such the Town can be sued by the Plaintiff for the causes of action stated herein.” This allegation was unchallenged by the Town through any evidence submitted in support of its motion. Therefore, we are required to take this allegation as true. The allegation is sufficient to support the trial court’s presumed finding that the Town was not entitled to immunity because it was performing a proprietary function. Accordingly, we hold that the trial court did not err in denying the Town’s motion to dismiss.

In affirming the trial court’s denial of the Town’s motion to dismiss based upon the theory of proprietary activity, we emphasize that our holding addresses only the sufficiency of the allegations in the Second Verified Amended Complaint that were not controverted by any evidence produced by the Town.

On remand should the trial court, at a subsequent procedural posture, base its jurisdiction over the Town on the ground that the Town was acting in a proprietary function when it entered into the agreements, the trial court must adhere to the guidance provided by this opinion and the Supreme Court’s precedent.

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C. Waiver by Contract

[6] Providence also asserts that the Town waived its immunity by entering into a valid contract, and based on this waiver, the trial court's denial of the Town's motion to dismiss was proper. Providence relies on two decisions by our Supreme Court, *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976), and *Ports Authority v. Fry Roofing Co.*, 294 N.C. 73, 82, 240 S.E.2d 345 (1978), *rejected on other grounds by Trustees of Rowan Technical College v. J. Hyatt Hammond Associates, Inc.*, 313 N.C. 230, 328 S.E.2d 274 (1985), to extend the principles of waiver of governmental immunity by contract to tort claims arising out of a particular contract—we disagree.

The Supreme Court held in *Smith* that “whenever the State of North Carolina, through its authorized officers and agencies, enters into a valid contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract.” *Smith*, 289 N.C. at 320, 222 S.E.2d at 423-24. *Smith* involved only a breach of contract claim. *Id.* at 307-08, 222 S.E.2d at 415-16. Its holding has not been extended to tort claims against a government entity. *See Dickens v. Thorne*, 110 N.C. App. 39, 47, 429 S.E.2d 176, 181 (1993) (rejecting the argument that an employee's employment contract with a county was sufficient to trigger a waiver of governmental immunity for tort liability on a libel claim because the complaint was not based on a breach of contract).

Ports Authority established that a tort claim may arise out of a breach of contract in the following instances:

- (1) The injury, proximately caused by the promisor's negligent act or omission in the performance of his contract, was an injury to the person or property of someone other than the promisee.
- (2) The injury, proximately caused by the promisor's negligent, or wilful[sic], act or omission in the performance of his contract, was to property of the promisee other than the property which was the subject of the contract, or was a personal injury to the promisee.
- (3) The injury, proximately caused by the promisor's negligent, or wilful[sic], act or omission in the performance of his contract, was loss of or damage to the promisee's property, which was the subject of the contract, the promisor being charged by law, as a matter of public policy, with the duty to use care in the safeguarding of the property from

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harm, as in the case of a common carrier, an innkeeper, or other bailee.

(4) The injury so caused was a wilful[sic] injury to or a conversion of the property of the promisee, which was the subject of the contract, by the promisor.

Ports Authority, 294 N.C. at 82, 240 S.E.2d at 350-51 (internal citations omitted). But the holding is limited to the context of an applicable statute of limitations and does not address governmental immunity. *Id.* at 81-86, 240 S.E.2d at 350-52.

Providence asks this Court to combine the principles delineated in *Smith* and *Ports Authority* to establish that the Town implicitly waived immunity against tort claims arising out of a breach of contract claim. Providence contends that because its claim of fraud in the inducement alleges a willful conversion of the Property, the claim arises out of the agreements and the Town implicitly waived its immunity to the fraud claim.

In light of *Dickens* and the lack of any precedent extending the holding of *Ports Authority* to a governmental immunity case, we decline to do so here. We therefore reject this theory of waiver asserted by Providence.

D. Waiver by Insurance

[7] The parties dispute whether Providence's Second Verified Amended Complaint's allegation concerning the purchase of insurance was properly made on the basis of personal knowledge.

During oral argument before this Court, Providence's counsel conceded that he was not aware of any factual basis for the allegation in the Second Verified Amended Complaint that the Town had purchased liability insurance, thereby waiving its governmental immunity as to the fraud claim. Although the parties agree that this allegation was unsubstantiated, because we affirm the trial court's order on an alternative theory of waiver of governmental immunity, we decline to address the Town's argument that an unfounded allegation contained in a verified complaint may not be used as evidence for the purposes of a motion to dismiss.

IV. Preliminary Injunction

[8] The Town argues that the trial court erred in granting Providence's motion for a preliminary injunction because Providence's filing of a *lis pendens* provided for an adequate remedy at law and Providence failed to establish a likelihood of success on the merits. We agree.

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“A preliminary injunction is an interlocutory injunction which restrains a party pending trial on the merits.” *N.C. Baptist Hosp. v. Novant Health, Inc.*, 195 N.C. App. 721, 724, 673 S.E.2d 794, 796 (2009) (citing *A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, 400, 302 S.E.2d 754, 759 (1983); N.C. Gen. Stat. § 1A-1, Rule 65 (2007)). “[O]n appeal from an order of superior court granting or denying a preliminary injunction, an appellate court is not bound by the findings, but may review and weigh the evidence and find facts for itself.” *A.E.P.*, 308 N.C. at 402, 302 S.E.2d at 760 (citations omitted).

A preliminary injunction will be issued only “(1) if a plaintiff is able to show likelihood of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff’s rights during the course of litigation.” *Ridge Cmty. Investors, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977) (emphasis omitted) (citations omitted). “Ordinarily, an injunction will not be granted where there is a full, adequate and complete remedy at law, which is as practical and efficient as is the equitable remedy.” *City of Durham v. Public Serv. Co. of N.C., Inc.*, 257 N.C. 546, 557, 126 S.E.2d 315, 323-24 (1962) (citations omitted).

Our Supreme Court has held that the filing of a *lis pendens* provides “a full, complete and adequate remedy at law.” *Whitford v. N.C. Joint Stock Land Bank of Durham*, 207 N.C. 229, 232, 176 S.E. 740, 742 (1934). The Court went on to note that “[b]y complying with these plain statutory provisions [regarding *lis pendens*] the plaintiffs can preserve every right they may have under their pleadings; and it is too well settled in this jurisdiction to require citations of authority that where there is a full, complete, and adequate remedy at law, the equitable remedy of injunction will not lie.” *Id.* at 233, 176 S.E. at 742.

Here, the record is clear that Providence filed a notice of *lis pendens* on the Property. This provided constructive notice to any subsequent purchaser and binds him to “all proceedings taken after the cross-indexing of the notice to the same extent as if he were made a party to the action.” N.C. Gen. Stat. § 1-118 (2015). Therefore, Providence was provided an adequate remedy at law and the issuance of the preliminary injunction was improper. Accordingly, we reverse the trial court’s grant of Providence’s motion for a preliminary injunction.

Conclusion

For the above reasons, we affirm the trial court’s order granting Providence’s motion to amend and denying the Town’s motion to dismiss

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based on governmental immunity pursuant to Rules 12(b)(2) and (6). We reverse the trial court's order granting Providence's motion for a preliminary injunction. We remand for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

Judges BRYANT and TYSON concur.

STATE OF NORTH CAROLINA

v.

KENRICK J. BATTLE

No. COA16-1002

Filed 18 April 2017

Firearms and Other Weapons—possession by a felon—evidence of possession—insufficient

The trial court should have granted defendant's motion to dismiss a charge of possession of a firearm by a felon where a rifle was found seventy-five to one hundred yards from the spot to which a dog tracked defendant. No evidence was presented regarding the ownership of the rifle. Viewed in the light most favorable to the State, the evidence raised only a suspicion or conjecture and was not sufficient for an inference of actual or constructive possession of the rifle.

Appeal by defendant from judgment entered 10 February 2016 by Judge Wayland J. Sermons, Jr. in Edgecombe County Superior Court. Heard in the Court of Appeals 22 March 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.

William D. Spence for defendant-appellant.

TYSON, Judge.

Kenrick J. Battle ("Defendant") appeals from judgment entered upon a jury's conviction of felonious possession of a firearm by a felon. We reverse the trial court's denial of Defendant's motion to dismiss.

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I. Background

On 3 February 2015, Edgecombe County Sheriff's deputies arrived at a residence in a rural part of the county in an attempt to locate Defendant. They determined Defendant was not present inside the residence and left. The deputies received a "tip" approximately fifteen minutes later, which caused them to establish a perimeter around a large section of woods adjacent to the residence.

Deputy Kenneth Wooten deployed a canine, a Dutch Shepherd, "Max," to track human scent in the wooded area. Deputy Wooten testified Max is trained "to track human beings that have fled from an area" and "indicate where someone is hiding" by tracking a combination of human scent, crushed vegetation, and sedimentation. Deputy Wooten further testified Max is trained to "ensure [he] is not going to veer off of one track onto another," and to remain on the original track in the event he detects the scent of another human being.

Deputy Wooten took Max along a wood line and was accompanied by Detective Greg Weeks. Max detected a human scent on a footpath, which led into the woods. Max led the deputies and proceeded along the footpath, which ended approximately fifteen to twenty yards from the beginning of the wood line. Max continued to track into the woods, and led the deputies across a ditch and into a dense thicket. While in the vegetation, Max raised his head and began sniffing the air. This behavior, Deputy Wooten referred to as "air scenting," indicated they were "close to someone or something." The deputies saw an "assault rifle" in front of Max, which they retrieved and determined it was loaded.

Max began tracking away from the area from where the rifle was found. He led the deputies through the woods, parallel to Highway 122. The deputies continued to follow Max parallel to the highway, until they came upon a ditch at the edge of a field. A footprint was visible on the other side of the ditch. Max led the deputies across the ditch, but lost the track. Another man, Anthony Lyons, emerged from the woods at another location, while Max and the deputies were near the ditch. Another deputy arrested Lyons at the perimeter of the woods.

The deputies and Max emerged from the woods after Max lost the track. They gave the recovered rifle to their supervisor, and allowed Max to rest for approximately five minutes. The deputies and Max returned to the ditch, where Max had lost the track. According to Deputy Wooten, Max "immediately picked the track back up," and led the officers toward the highway. Max led the officers into an area of extremely thick briars and began "air scenting." Defendant was discovered lying upon the

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ground. Deputy Wooten testified the distance between where the rifle was recovered and Defendant was found was between seventy-five and one hundred yards.

No evidence was presented regarding the ownership of the rifle. DNA swabs that were taken from the rifle and compared to Defendant's DNA were inconclusive. The State did not present any fingerprint or additional evidence to connect Defendant to the rifle.

The State presented evidence tending to show Defendant was previously convicted of a felony offense, taking indecent liberties with a child, in 2009. The jury convicted Defendant of possession of a firearm by a felon. The trial court sentenced Defendant to an active prison term of nineteen to thirty-two months. Defendant appeals.

II. Jurisdiction

Jurisdiction lies in this Court from final judgment of the superior court entered upon the jury's verdict pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2015).

III. Sufficiency of the Evidence

In his sole argument on appeal, Defendant argues the trial court erred by denying his motion to dismiss the charge of possession of a firearm by a felon. Defendant asserts the State presented insufficient evidence to show he possessed the rifle found in the woods. We agree.

A. Standard of Review

"We review the trial court's denial of a motion to dismiss *de novo*." *State v. Sanders*, 208 N.C. App. 142, 144, 701 S.E.2d 380, 382 (2010). Under a *de novo* standard of review, this Court "considers the matter anew and freely substitutes its own judgment for that of the trial court." *Id.*

In ruling on a motion to dismiss for insufficiency of the evidence,

the trial court must consider the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor. All evidence, competent or incompetent, must be considered. Any contradictions or conflicts in the evidence are resolved in favor of the State, and evidence unfavorable to the State is not considered. In its analysis, the trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense.

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Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. When the evidence raises no more than a suspicion of guilt, a motion to dismiss should be granted. However, so long as the evidence supports a reasonable inference of the defendant's guilt, a motion to dismiss is properly denied even though the evidence also permits a reasonable inference of the defendant's innocence. The test for sufficiency of the evidence is the same whether the evidence is direct, circumstantial or both.

State v. Bradshaw, 366 N.C. 90, 92-93, 728 S.E.2d 345, 347 (2012) (internal citation and quotation marks omitted).

B. Possession of the Firearm

To convict Defendant of felonious possession of a firearm by a felon, the State must prove: (1) Defendant was previously convicted of a felony; and (2) Defendant thereafter possessed a firearm. N.C. Gen. Stat. § 14-415.1 (2015); *State v. Best*, 214 N.C. App. 39, 45, 713 S.E.2d 556, 561, *disc. review denied*, 365 N.C. 361, 718 S.E.2d 397 (2011). Defendant does not challenge his status as a convicted felon. He argues the State failed to present sufficient evidence he possessed the firearm the deputies discovered in the woods.

Possession of a firearm may be actual or constructive. *State v. Billinger*, 213 N.C. App. 249, 253, 714 S.E.2d 201, 205 (2011). Our Court has explained:

A person has actual possession of a firearm if it is on his person, he is aware of its presence, and either by himself or together with others he has the power and intent to control its disposition or use. In contrast, a person has constructive possession of a firearm when, although not having actual possession, the person has the intent and capability to maintain control and dominion over the firearm.

Id. at 253-54, 714 S.E.2d at 205.

“It is sometimes difficult to distinguish between evidence sufficient to carry a case to the jury, and a mere scintilla, which only raises a suspicion or possibility of the fact in issue.” *State v. Brooks*, 136 N.C. App. 124, 129, 523 S.E.2d 704, 708 (1999) (quoting *State v. Johnson*, 199 N.C. 429, 154 S.E. 730 (1930)), *disc. review denied*, 351 N.C. 475, 543 S.E.2d 496 (2000). If the evidence “is sufficient only to raise a suspicion

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or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion for nonsuit should be allowed. This is true even though the suspicion so aroused by the evidence is strong.” *In re Vinson*, 298 N.C. 640, 656-57, 260 S.E.2d 591, 602 (1979) (citations omitted). Here, the testimonies of Deputy Wooten and Detective Weeks regarding Max’s tracking behavior may raise a “strong suspicion” that Defendant possessed the rifle, constructively or otherwise, “but [is] not sufficient to remove that issue from the realm of suspicion and conjecture.” *State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983).

Our Court has declined to uphold convictions based upon constructive possession in cases where the defendant is not the sole occupant of the area where the firearm is found, and no other incriminating evidence links the defendant to the weapon. For example, Defendant cites *State v. Bailey* to support his argument the State failed to present sufficient evidence to show he constructively possessed the rifle. 233 N.C. App. 688, 757 S.E.2d 491, *disc. review denied*, 367 N.C. 789, 766 S.E.2d 678 (2014). In *Bailey*, officers responded to a report of gunshots at an apartment complex, and saw a vehicle drive away. *Id.* at 689, 757 S.E.2d at 492. Officers stopped the vehicle, which was owned and driven by the defendant’s girlfriend. *Id.* The defendant was seated in the passenger’s seat and told the officers that a firearm was located on the rear floorboard. *Id.* The firearm was warm, had recently been fired, and was registered to the defendant’s girlfriend. *Id.* A gunshot residue test taken of the defendant’s hands was inconclusive. *Id.* at 689-90, 757 S.E.2d at 492. This Court held “the only evidence linking [the] defendant to the rifle was his presence in the vehicle and his knowledge that the gun was in the backseat[.]” and was insufficient to allow the jury to infer constructive possession. *Id.* at 693, 757 S.E.2d at 494.

We acknowledge the officers’ testimonies that Max tracked an unknown human scent from the wood line to the area where the rifle was recovered, and that Max is trained not to veer off one human scent and onto another. However the rifle was not found in Defendant’s physical possession or in the immediate area under his “capability to maintain control and dominion over the firearm.” *Billinger*, 213 N.C. App at 254, 714 S.E.2d at 205. Another man was also present in the same woods as Defendant, while the officers searched for Defendant. Furthermore, Max lost the original track at the ditch, took a break to rest outside of the woods, and then resumed tracking.

This Court has upheld a defendant’s conviction, where the defendant was identified as the perpetrator by a tracking canine. *State*

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v. Green, 76 N.C. App. 642, 334 S.E.2d 263, *disc. review denied*, 315 N.C. 187, 340 S.E.2d 751 (1985). In *Green*, the officers utilized two canines to investigate a breaking and entering and larceny from a store. *Id.* at 643, 334 S.E.2d at 264-65. The canines were offered a “scent source” at the crime scene, which consisted of gloves and shoes taken from the defendant and the codefendant. *Id.* at 643, 334 S.E.2d at 265. One of the dogs, a Doberman pinscher, tracked the scent to a location where two stolen microwave ovens had been abandoned. *Id.* The Doberman was taken off the trail to protect the dog from the cold rain. *Id.* The other dog, a Rottweiler, “then traced the scent along the same path . . . to where the defendant and the codefendant were apprehended.” *Id.*

The defendant in *Green* argued the trial court erred by admitting the dog tracking evidence without testimony of the characteristics of the breeds, and by failing to dismiss the charges of larceny and breaking and entering for insufficient evidence. *Id.* Our Court held the trial court properly admitted the evidence and the defendant’s motion to dismiss was properly denied. *Id.* at 646, 334 S.E.2d at 266.

In *State v. Styles*, 93 N.C. App. 596, 599, 379 S.E.2d 255, 258 (1989), two bloodhounds tracked a human scent originating from the rape scene to the front door of a trailer where the defendant was staying. The defendant argued on appeal that the evidence was insufficient to convict him, because the victim was unable to identify the defendant as the perpetrator of the rape. *Id.* at 603, 379 S.E.2d at 260.

Our Court disagreed, and explained “a bloodhound specially trained in tracking human beings led a path from the front of the victim’s house to the culvert where shoe prints were found and then to the trailer where the defendant was staying.” *Id.* An expert testified the defendant’s shoes made the prints at the rape scene and by the culvert. *Id.* at 600, 379 S.E.2d at 258. Additional expert testimony showed hairs found and recovered at the scene were consistent with the defendant’s hair. *Id.*

The facts of this case are distinguishable from those in both *Green* and *Styles*. Here, the testimony of Max’s tracking behaviors was the *sole* testimony offered by the State to establish that Defendant constructively possessed the rifle. In *Styles*, hair and shoe print evidence was also presented to show Defendant was the perpetrator. *Id.* In *Green*, the canines were offered a scent source of the defendant and codefendant, and were tracking a known scent. *Green*, 76 N.C. App. at 643, 334 S.E.2d at 265. Further, unlike the facts in this case, nothing in *Green* and *Styles* indicates the canine lost the track, took a break for a period of time, and then resumed. Defendant was not alone in the immediate area

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where the rifle was found. No other evidence, such as fingerprints, DNA, or ownership, linked Defendant to the rifle or the site from which it was recovered.

The officers' testimony is insufficient to establish any link between Defendant and the firearm. The canine tracking evidence on an unknown scent fails to raise, as a matter of law, a reasonable inference of either actual or constructive possession of a firearm by Defendant as a convicted felon. Viewed in the light most favorable to the State, the evidence raises only a "suspicion [or] conjecture" that Defendant possessed the rifle. The trial court erred in denying Defendant's motion to dismiss. *Malloy*, 309 N.C. at 179, 305 S.E.2d at 720.

IV. Conclusion

After viewing the evidence in the light most favorable to the State, the evidence is insufficient to raise or permit an inference that Defendant actually or constructively possessed the rifle, and to "remove that issue from the realm of suspicion and conjecture." *Id.* The trial court erred by denying Defendant's motion to dismiss the charge of possession of a firearm by a felon.

The trial court's judgment is reversed. This matter is remanded to the trial court for entry of an order granting Defendant's motion to dismiss. *It is so ordered.*

REVERSED AND REMANDED.

Judges ELMORE and DIETZ concur.

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[253 N.C. App. 148 (2017)]

STATE OF NORTH CAROLINA

v.

MICHAEL VERNON HUDDY

No. COA16-904

Filed 18 April 2017

1. Search and Seizure—knock and talk doctrine—curtilage of home

The trial court erred in a prosecution for possession of marijuana with intent to sell or deliver by relying on the knock and talk doctrine to justify an officer's warrantless search of the curtilage of defendant's home. The officer did more than knock and talk: he ran a license plate not visible from the street, checked windows for signs of a break-in, and walked around the entire residence to "clear" the sides of the home before approaching the back door, which was inside a chain link fence.

2. Search and Seizure—community caretaker doctrine—car doors open—intrusion into backyard

The trial court erred in a prosecution for possession of marijuana with intent to sell or deliver by relying on the community caretaker doctrine where the officer approached defendant's back door after seeing a car with its doors open in defendant's driveway. The facts did not justify a warrantless intrusion; moreover, there are many innocent reasons to leave the doors open on a vehicle in a driveway and there were alternatives the officer could have used.

Judge TYSON concurring.

Appeal by defendant from judgment entered 8 June 2016 by Judge L. Todd Burke in Guilford County Superior Court. Heard in the Court of Appeals 22 February 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Martin T. McCracken, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Aaron Thomas Johnson, for defendant.

DIETZ, Judge.

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Defendant Michael Vernon Huddy appeals the trial court's denial of his motion to suppress evidence obtained after a law enforcement officer searched the curtilage of Huddy's home without a warrant. The officer saw a vehicle with its doors open at the back of a 150-yard driveway leading to Huddy's home. Concerned that the vehicle may be part of a break-in or home invasion, the officer drove down Huddy's 150-yard driveway, ran the tags on the vehicle, checked the front door (but did not knock), checked the home's windows, "cleared" the sides of the house, and then went through a gate in a chain-link fence enclosing the home's backyard and approached the storm door at the back of the house, not visible from the street—all without a warrant or probable cause and accompanying exigent circumstances. As the officer approached the back door, he smelled marijuana, which ultimately led to Huddy's arrest and conviction for possession of marijuana.

We hold that the officer's conduct violated the Fourth Amendment and thus Huddy's motion to suppress should have been granted. At the suppression hearing, the State relied on two exceptions to the warrant requirement to justify the officer's search of the curtilage of Huddy's home: the "knock and talk" doctrine and the "community caretaker" doctrine. As explained below, neither exception applies here. First, the State cannot rely on the knock and talk doctrine because the officer did more than merely knock and talk. The officer ran a license plate not visible from the street, walked around the house examining windows and searching for signs of a break-in, and went first to the front door (without knocking) and then to a rear door not visible from the street and located behind a closed gate. These actions went beyond what the U.S. Supreme Court has held are the permissible actions during a knock and talk. *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013).

Likewise, the State cannot rely on the community caretaker doctrine. The presence of a vehicle in one's driveway with its doors open is not the sort of emergency that justifies the community caretaker exception. *State v. Smathers*, 232 N.C. App. 120, 126, 753 S.E.2d 380, 384 (2014). Accordingly, the trial court erred by denying Huddy's motion to suppress. We reverse the trial court's order and remand for further proceedings.

Facts and Procedural History

On 16 July 2016, around 11:00 a.m., Deputy Tracy Smith of the Guilford County Sheriff's Department was patrolling an area that law enforcement believed was at risk of home invasions or break-ins. Deputy Smith approached Huddy's home and saw a parked vehicle with

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open doors at the end of a 150-yard driveway leading to the rear of the home. Deputy Smith thought it was unusual for a vehicle to be parked in a driveway with the doors open at that time of day. Deputy Smith also observed that the house was surrounded by trees, which Deputy Smith believed made it susceptible to break-ins.

Deputy Smith drove to the back of the driveway, parked behind the vehicle, and ran the vehicle's license plate. The address on record for the vehicle did not match the address for Huddy's home. Deputy Smith continued to investigate by walking to the front of the house and checking windows and doors for signs of forced entry. Deputy Smith saw that the front door was "covered in cobwebs" and did not appear to be used as the main entrance to the house. Deputy Smith did not knock on the front door. Observing no signs of forced entry, Deputy Smith then "cleared" the sides of the home before walking to the back of the house.

The back yard of Huddy's home was enclosed by a chain-link fence. Deputy Smith opened the gate in that chain-link fence and entered the enclosed back yard. Deputy Smith then approached a storm door on the rear porch, which was not visible from the street. Deputy Smith smelled marijuana in the area around the storm door.

Deputy Smith knocked on the door and Huddy answered. Deputy Smith asked Huddy to verify that he was lawfully present in the house. Huddy first offered his driver's license, which matched the address for the vehicle in the driveway, but not the house. Deputy Smith requested additional verification, and Huddy eventually produced a rental agreement for the house.

Based on the odor of marijuana, Deputy Smith secured a warrant to search the house. Law enforcement later seized a large quantity of marijuana. The State indicted Huddy on 14 September 2015 for possession of marijuana with intent to sell or deliver, possession of marijuana, and possession of marijuana paraphernalia. On 16 February 2016, Huddy moved to suppress the evidence of marijuana seized from the residence. On 4 April 2016, the trial court entered a written order denying the motion.

On 16 May 2016, Huddy entered an *Alford* plea to one count of possession of marijuana with intent to sell or deliver while reserving his right to appeal the denial of his motion to suppress. The court sentenced Huddy to a 4 to 14 month active sentence, suspended the sentence, and ordered 12 months of supervised probation. Huddy timely appealed.

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[253 N.C. App. 148 (2017)]

Analysis

Huddy challenges the denial of his motion to suppress. He contends that the investigating officer violated the Fourth Amendment when he searched throughout the curtilage of Huddy's home to "check the windows, check the doors" for signs of a possible break-in. As explained below, we agree that neither the knock and talk doctrine nor the community caretaker doctrine permitted the officer to conduct this type of warrantless search of the home's curtilage. Accordingly, we reverse the trial court's order and remand for further proceedings.

"The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Biber*, 365 N.C. 162, 167–68, 712 S.E.2d 874, 878 (2011). Unchallenged findings of fact "are deemed to be supported by competent evidence and are binding on appeal." *Id.* at 168, 712 S.E.2d at 878. "Conclusions of law are reviewed de novo and are subject to full review." *Id.*

We start by reviewing the Fourth Amendment's core principles. "[W]hen it comes to the Fourth Amendment, the home is first among equals. At the Amendment's very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013). This protection extends not only to the interior of one's home, but also to the "curtilage," which is "the area immediately surrounding and associated with the home." *Id.* As a result, law enforcement ordinarily cannot enter the curtilage of one's home without either a warrant or probable cause and the presence of exigent circumstances that justify the warrantless intrusion. *Id.*

Courts have recognized several exceptions to this general rule, and the trial court relied on two of these exceptions: the "knock and talk" doctrine and the "community caretaker" doctrine. We address these two exceptions in turn below.

I. Knock and Talk Doctrine

[1] We begin with the knock and talk doctrine. Because "no search of the curtilage occurs when an officer is in a place where the public is allowed to be, such as at the front door of a house," officers are permitted to approach the front door of a home, knock, and engage in consensual conversation with the occupants. *State v. Lupek*, 214 N.C. App. 146, 151, 712 S.E.2d 915, 919 (2011). Put another way, law enforcement may

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do what occupants of a home implicitly permit anyone to do, which is “approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave.” *Jardines*, 133 S. Ct. at 1415.

Importantly, law enforcement may not use a knock and talk as a pretext to search the home’s curtilage. *Id.* at 1416. “[N]o one is impliedly invited to enter the protected premises of the home in order to do nothing but conduct a search.” *Id.* at n.4. Likewise, the knock and talk doctrine does not permit law enforcement to approach *any* exterior door to a home. An officer’s implied right to knock and talk extends only to the entrance of the home that a “reasonably respectful citizen” unfamiliar with the home would believe is the appropriate door at which to knock. *Id.* at 1415 n.2. This limitation is necessary to prevent the knock and talk doctrine from swallowing the core Fourth Amendment protection of a home’s curtilage. Without this limitation, law enforcement freely could wander around one’s home searching for exterior doors and, in the process, search any area of a home’s curtilage without a warrant.

Under *Jardines*, the officer in this case did not conduct a permissible knock and talk. The court found—and the record supports—that the officer searched throughout the home’s curtilage *before* going to the back door to knock. Indeed, the officer conceded during the suppression hearing that he was searching for signs of a break-in before he knocked on any door to the home:

Q. You stated that you guess that the driveway was approximately 150 yards, but you didn’t measure it.

A. No.

Q. And based on your experience, when you’re looking at a residence such as this, what are the signs for a burglary?

A. Forced entry on the doors, doors unlocked, doors—you can always shimmy a door to make entry on the back door, side door, just by moving a credit card or sliding something in the doorjamb. *I’m looking for any kind of signs of forced entry, opened doors, unlocked doors, things of that nature.*

Q. Based on your experience, what would cause you to approach a residence like this in the first place?

A. My primarily [*sic*] duty there was, once I saw the vehicle in the driveway, doors were open on it, there was no

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other cars there. The house—at least to my—all my years, it’s typically a type of house that’s surrounded by woods. The vehicle was—there’s no other vehicle in the driveway. The doors are open on the vehicle. The tag comes back to a residence other than that residence, which is—okay, that’s things I might need to know. *I get out, walk around to the front, check the windows, check the doors, don’t see any indicators. Since the back is, to me, there’s a primary entrance, that’s also where the vehicle was parked, that’s probably my point that I may be close—paying close attention to. So I went around to the other side, cleared the other side and came around to the back of the residence.*

Q. *And is walking around the entire residence like that, is that normal procedure?*

A. *Yes, ma’am.*

(Emphasis added.)

Simply put, the officer, by his own admission, did more than simply knock and talk. The officer ran a license plate on a car whose license plate was not visible from the street, checked windows for signs of a break-in, and walked around the entire residence to “clear” the sides of the home before approaching the back door. Under *Jardines*, this is precisely the sort of search of a residence that falls outside the knock and talk doctrine. As the Court explained in *Jardines*, “the background social norms that invite a visitor to the front door do not invite him there to conduct a search.” 133 S. Ct. at 1416. Accordingly, we hold that the trial court erred by relying on the knock and talk doctrine to justify the officer’s warrantless search of the curtilage of Huddy’s home.

II. Community Caretaker Doctrine

[2] We next turn to the community caretaker doctrine. Our State first recognized the community caretaker doctrine in *State v. Smathers*, 232 N.C. App. 120, 126, 753 S.E.2d 380, 384 (2014). The origin of the doctrine “is the desire to give police officers the flexibility to help citizens in need or protect the public even if the prerequisite suspicion of criminal activity which would otherwise be necessary for a constitutional intrusion is nonexistent.” *Smathers*, at 125, 753 S.E.2d at 384. In applying the doctrine, courts must assess whether “the public need or interest outweighs the intrusion upon the privacy of the individual.” *Id.* at 129, 753 S.E.2d at 386. Factors that courts should consider include “(1) the degree of the public interest and the exigency of the situation; (2)

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the attendant circumstances surrounding the seizure, including time, location, the degree of overt authority and force displayed; (3) whether an automobile is involved; and (4) the availability, feasibility and effectiveness of alternatives to the type of intrusion actually accomplished.” *Id.*

Notably, our State’s appellate courts have never applied the community caretaker doctrine to a search of a home. As explained above, the Fourth Amendment’s protections are at their very strongest within one’s home, and thus the public need must be particularly strong to justify a warrantless search of a home under the community caretaker exception.

We hold that the facts in this case do not justify that warrantless intrusion. At the time the officer searched the curtilage of the home, the only indication that there was an emergency was a vehicle in the home’s driveway with its doors open. Although this *might* suggest a home invasion is in progress, there are countless innocent reasons why one might leave doors open in a vehicle parked in a driveway—for example, to make it easier to grab the rest of the groceries or other items the homeowner is in the process of bringing into the home. Thus, this situation is unlike one in which the facts point unquestionably to some public emergency, such as a door that has been broken open, or signs that someone inside the home needs emergency medical attention.

Moreover, there were other available alternatives to the search that the officer could have used, such as knocking at the front door and calling out to ask if anyone needed assistance, or waiting at the entrance to the driveway to observe the vehicle. Applying the objective “totality of the circumstances” test established in *Smathers*, we hold that the trial court’s findings in this case are insufficient to justify a search of the curtilage of Huddy’s home under the community caretaker exception.

In sum, the officer’s warrantless search of the curtilage of the home was not justified by either the knock and talk doctrine or the community caretaker doctrine. Accordingly, the trial court should have granted Huddy’s motion to suppress. *See State v. Pope*, 333 N.C. 106, 113–14, 423 S.E.2d 740, 744 (1992). We reverse the trial court’s order and remand for further proceedings.

Conclusion

For the foregoing reasons, we reverse the trial court’s order and remand for further proceedings.

REVERSED AND REMANDED.

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Judge ELMORE concurs.

Judge TYSON concurs with separate opinion.

TYSON, Judge, concurring.

I fully concur in this Court's opinion. I write separately to further address the State's argument and the trial court's conclusion that Deputy Smith's actions were lawful under the "knock and talk" exception to the requirement for a warrant. The trial court relied upon the fact that Huddy's front door "was covered in cobwebs and did not appear to [be] in use or the primary door to the residence" to justify Deputy Smith's decision to walk around the sides of the house and enter a gated fence to the backyard to look for a different door.

An officer conducting a knock and talk cannot ignore an unobstructed, accessible front door simply because it has cobwebs and does not appear to be used as regularly as the homeowner's customary entrance to the home. Like Huddy's, many homes have driveways, entrances, or garages on the back or sides of the house. The home's occupants, family, or frequent invitees may use a closer side or back door or a door within a garage to enter the home, rather than walk further to use a front door.

Nonetheless, even a seldom-used front door is the door uninvited members of the public are expected to use when they arrive. *See State v. Jardines*, 133 S. Ct. 1409, 1415, 185 L. Ed. 2d 495, 502 (2013) (holding there is an implicit license, which "typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent an invitation to linger longer) leave."). Were law enforcement officers always allowed to proceed directly to the door they subjectively believed to be the homeowner's customary entrance, the officers' warrantless intrusion into the home's curtilage could potentially exceed the limited "implied license" discussed by the Supreme Court of the United States in *Jardines*.

Although the implied license to approach a person's home traditionally contemplates a knock at the front door, this Court and others have recognized instances where officers might be justified in approaching an alternate door in appropriate circumstances. *See State v. Gentile*, 237 N.C. App. 304, 309-10, 766 S.E.2d 349, 353 (2014); *State v. Pasour*, 223 N.C. App. 175, 178, 741 S.E.2d 323, 325 (2012); *Alvarez v. Montgomery Cty.*, 147 F.3d 354, 358-59 (4th Cir. 1998); *Pena v. Porter*, 316 Fed.Appx.

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303, 313-14 (4th Cir. 2009) (unpublished). In this case, the State relies upon *Alvarez* to argue law enforcement officers may enter a person's backyard, without a warrant, when the officers assert a legitimate law enforcement purpose to do so.

In *Alvarez*, the officers received a complaint about an underage drinking party underway at a home in a nearby neighborhood. *Alvarez*, 147 F.3d at 356. The officers arrived and approached the home with the intent to simply “notify the homeowner or the party’s host about the complaint and to ask that no one drive while intoxicated.” *Id.* at 358. When the officers reached the front porch, they noticed a sign on the door, which read “Party In Back” and displayed an arrow pointing guests toward the backyard. *Id.* at 357. Without knocking on the front door first, the officers proceeded to the backyard and asked to speak to the hosts of the party. *Id.* Upon discovering underage drinking, *Alvarez* was issued a citation for furnishing an alcoholic beverage to a person under the age of twenty-one. *Alvarez* challenged the officers’ actions as an unreasonable search. *Id.* at 358.

The Court of Appeals emphasized that “the textual touchstone of the Fourth Amendment is reasonableness.” *Id.* at 358 (citation and quotation marks omitted). Under these circumstances, the court held the officers’ entry into the backyard, without knocking on the front door first, satisfied this reasonableness requirement. *Id.* at 358-59. The court noted:

Though we conclude the officers’ conduct comported with the Fourth Amendment, we reiterate that the area within the curtilage of the home typically is afforded the most stringent Fourth Amendment protection. *It was not unreasonable, however, for officers responding to a 911 call to enter the backyard when circumstances indicated they might find the homeowner there.*

Id. at 359 (emphasis supplied).

However, this Court has further concluded, “where officers have no reason to believe that entering a homeowner’s curtilage will produce a different response than knocking on the residence’s front door, the Fourth Amendment is violated.” *Gentile*, 237 N.C. App. at 309, 766 S.E.2d at 353; *see Pasour*, 223 N.C. App. at 178, 741 S.E.2d at 325 (citing *Pena*, 316 Fed.Appx. at 314). In *Gentile*, the officers proceeded to the back of the house after they knocked on the front door and received no response. *Id.* at 309-10, 766 S.E.2d at 353. While the officers’ testified they only proceeded to the back of the house because they believed the occupant may

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not have heard their knock due to the barking dogs nearby, this Court held the officers' actions violated the Fourth Amendment and noted:

[t]here was no evidence of any vehicles on the property, persons present, lights illuminated in the residence, or furniture in the house, and the detectives believed that no one resided there. Accordingly, the sound of barking dogs, alone, was not sufficient to support the detectives' decision to enter the curtilage of defendant's property by walking into the back yard of the home and the area on the driveway within ten feet of the garage.

Id. at 310, 766 S.E.2d at 353 (citing *Jardines*, 133 S. Ct. at 415, 185 L. Ed. 2d at 502).

Unlike in *Alvarez*, where a sign posted on the front door invited and directed visitors to the backyard, nothing indicated Deputy Smith would find Huddy or others in the backyard. Deputy Smith never saw anyone come out of the house, nor did he hear any noises coming from the house or backyard, nor detect any other suspicious activity. While Deputy Smith testified he believed the front door was unused because it had cobwebs hanging from the door but was otherwise "nice and clean," no evidence indicates he had reason to believe entering Huddy's gated and fenced backyard to knock on the back door would "produce a different result than knocking on the home's front door[.]" *Pasour*, 223 N.C. App. at 178, 741 S.E.2d at 325; see *Gentile*, 237 N.C. App. 310, 766 S.E.2d at 353.

Even if the back door was the entrance primarily used by Huddy or regular visitors, an uninvited visitor would not necessarily acquire any "implied license" to also use that door. In cases where other jurisdictions have permitted an officer to knock at a back or side door, the door was easily visible to the public and not within any defined curtilage or fenced enclosure. See, e.g., *United States v. Shuck*, 713 F.3d 563, 565 (10th Cir. 2013) (holding the officers reasonably approached the back door when a chain-link fence enclosed the front door, but not the back door); *United States v. James*, 40 F.3d 850, 862 (7th Cir. 1994), vacated on other grounds, 516 U.S. 1022, 133 L. Ed. 2d 515 (1995), and modified, 79 F.3d 553 (7th Cir. 1996) ("The passage to the rear side door was not impeded by a gate or fence. Both the paved walkway and the rear side door were accessible to the general public and the rear side door was commonly used for entering the duplex from the nearby alley.").

No gate or fence blocked access to Huddy's front door, but his back door was located within a gated and fenced-in backyard. After crossing

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the yard, the back door could only be accessed by further opening a storm door and walking across a small porch. While the front door in this case may have been covered in cobwebs or not frequently used, a “reasonably respectful citizen” would not have taken this fact as an “implied license” to go to the back areas of the house, open the closed fence gate, cross the fenced backyard, open the storm door, and walk across the porch, just to knock upon the back door. *See Jardines*, 133 S. Ct. at 1415, 185 L. Ed. 2d at 502. However, the record demonstrates Deputy Smith followed this exact process to knock on Huddy’s back door.

Deputy Smith’s actions far exceeded the scope of any implied license to conduct a knock and talk at Huddy’s home without a warrant. *See Pasour*, 223 N.C. App. at 178, 741 S.E.2d at 325 (“[w]here officers have no reason to believe that entering a homeowner’s backyard will produce a different result than knocking on the home’s front door, the Fourth Amendment is violated.”).

Under *de novo* review, Deputy Smith’s conduct, after failing to knock upon the front door of Huddy’s home and with the absence of anything other than a car registered to another address parked with an open door in the driveway, cannot be justified as a “knock and talk” to excuse the requirement of a warrant. The trial court’s conclusions of law 3, 4, 5, 7, and 8 to deny the motion to suppress are not supported by the evidence presented or the order’s findings of fact. Huddy’s motion to suppress should have been allowed under these facts. This Court properly rules error occurred in the denial of Defendant’s motion to suppress.

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STATE OF NORTH CAROLINA, PLAINTIFF

v.

LAQUAN TIRIK LITTLE, DEFENDANT

No. COA16-870

Filed 18 April 2017

1. Evidence—prior convictions—cross examination—instructions to defendant before testifying

The trial court did not err in a prosecution for armed robbery by instructing defendant that the prosecutor could question him about prior convictions if he testified. The trial court limited its discussion with defendant to the possibility of impeachment by proof of prior convictions and defendant identified nothing in the trial court's statements to defendant that suggested that defendant would be questioned beyond the permissible scope of limited cross-examination.

2. Evidence—photographs—not authenticated—used for illustrative purposes only

The trial court did not err in a prosecution for armed robbery by allowing a witness to use photographs for illustrative purposes even though the photographs had not been authenticated.

Judge BRYANT concurring in the result only.

Appeal by defendant from judgment entered 8 March 2016 by Judge L. Todd Burke in Guilford County Superior Court. Heard in the Court of Appeals 21 February 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Charles G. Whitehead, for the State.

Parish & Cooke, by James R. Parish, for defendant-appellant.

ZACHARY, Judge.

Laquan Tirik Little (defendant) appeals from judgment entered upon his conviction for robbery with a dangerous weapon. On appeal, defendant argues that the trial court erred in its colloquy with defendant concerning the scope of cross-examination to which defendant would be exposed if he chose to testify. Defendant also contends that the trial court committed error and plain error by admitting certain photographs

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downloaded from the Facebook and Instagram websites to illustrate the testimony of the State's witnesses. Upon careful consideration of defendant's arguments in light of the record and the applicable law, we conclude that these arguments lack merit and that defendant is not entitled to relief on appeal.

I. Factual and Procedural Background

This appeal arises from an incident in which a motorcycle was stolen at gunpoint from the bike's fourteen-year-old owner. On 12 October 2015, the Grand Jury of Guilford County indicted defendant for robbery with a dangerous weapon and for possession of a firearm by a felon. At some point after these indictments were returned, defendant was also charged with possession of a controlled substance in a confinement facility. The charges against defendant came on for trial at the 17 February 2015 criminal session of Superior Court for Guilford County, the Honorable L. Todd Burke presiding. At the outset of the trial, the prosecutor dismissed the charge of possession of a firearm by a felon and announced that the State was postponing its prosecution on the charge of possession of a controlled substance in a confinement facility. Defendant did not testify or present evidence at trial. The State's evidence tended to show, in relevant part, the following:

Randy Garcia testified that he was fifteen years old and attended high school. On 13 May 2015, the date of the incident giving rise to the charge against defendant, Mr. Garcia had been fourteen years old. Mr. Garcia owned a Honda motorcycle and during the afternoon of 13 May 2015, Mr. Garcia was riding his motorcycle in his neighborhood. Mr. Garcia's ten-year-old friend, Anthony Salazar, was a passenger on the bike. During the ride, a car approached the motorcycle and stopped about five feet from the boys. The passenger in the car pointed a gun through the window, and then exited the car and ran toward Mr. Garcia and Mr. Salazar, pointing the gun at them. The man demanded that the boys get off the motorcycle and when they complied, he got on the motorcycle and drove away. Mr. Garcia testified that when defendant got out of the car, he approached Mr. Garcia until they were close together. Mr. Garcia noticed that defendant had tattoos on his neck and arm, and described defendant's firearm as a gray handgun with an extended barrel. In court, Mr. Garcia identified defendant as the man who had stolen his motorcycle at gunpoint.

After defendant rode away on Mr. Garcia's motorbike, the two boys walked to Mr. Garcia's home. Soon thereafter, a neighbor, Victor Rivera-Salazar, came to Mr. Garcia's house. Mr. Garcia called the police and gave

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a statement about the incident. Law enforcement officers later showed Mr. Garcia a photographic lineup from which he identified defendant as the person who had robbed him. At trial, Mr. Garcia was shown several photographic exhibits which he used to illustrate his testimony about the appearance of his motorcycle, defendant, and the gun that defendant had brandished.

Victor Rivera-Salazar testified that he was a seventeen-year-old high school senior, that Anthony Salazar was his younger brother, and that they lived in the same neighborhood as Mr. Garcia. On 13 May 2015, Mr. Rivera-Salazar heard the sound of Mr. Garcia's motorcycle and went to look for him. When Mr. Rivera-Salazar located the motorcycle, defendant was attempting to start it and Mr. Rivera-Salazar confronted defendant about his possession of the motorcycle. Defendant claimed that Mr. Rivera-Salazar's friend had loaned him the bike and then rode away on the bike. During his conversation with defendant, Mr. Rivera-Salazar stood very close, "face to face," and observed that defendant had tattoos on his hands and neck. He identified defendant at trial and testified that he was "a hundred percent" sure that defendant was the person with whom he had spoken. After defendant rode away, Mr. Rivera-Salazar went to Mr. Garcia's house. Mr. Rivera-Salazar later identified defendant in a photographic line-up. Mr. Rivera-Salazar used State's Exhibits Nos. 1 - 3 to illustrate his testimony.

Greensboro Police Officer D.T. Sims testified that on 13 May 2015 he was dispatched to Mr. Garcia's house, where Mr. Rivera-Salazar and Mr. Garcia gave statements similar to their trial testimony. Greensboro Police Detective R. E. Ferrell testified that, after he had interviewed Mr. Garcia and read the police reports about the robbery, he then looked at photographs that had been shared on the social media sites Facebook and Instagram. On the Facebook page for an individual who identified himself online as "L-Nice Little," Detective Ferrell found the photograph that was marked as State's Exhibit No. 1, depicting a motorcycle that matched the description that the detective had been given for Mr. Garcia's motorbike. On Instagram, Detective Ferrell found the photographs designated as State's Exhibits Nos. 4 and 5.¹ In the course of his investigation, Detective Ferrell also obtained a possible home address for defendant. Greensboro Police Officer B.E. Faust testified that on 16 May 2015 he observed a motorcycle parked behind the house at this

1. No evidence was introduced regarding the source for the photographs marked as State's Exhibits Nos. 2 and 3. Because defendant has not challenged the admission of these exhibits, we do not discuss them further.

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address, and used State's Exhibit No. 1 to illustrate his testimony about this motorcycle.

On 17 February 2016, the jury returned a verdict finding defendant guilty of robbery with a dangerous weapon. The prosecutor dismissed the charge of possession of a controlled substance in a confinement facility. The trial court imposed a sentence of 72 to 99 months' imprisonment. Defendant gave notice of appeal in open court.

II. Trial Court's Instructions to Defendant on the Right to Testify

After the State rested, defense counsel informed the trial court outside the presence of the jury that she and defendant had been discussing whether defendant would testify at trial and that she thought defendant wanted to testify. Defendant's counsel asked the court to "just put that on the record." In response, the trial court conducted the following colloquy in which the court warned defendant that he would be subject to cross-examination if he testified at trial:

THE COURT: All right. Mr. Little, you have the right to remain silent.

BAILIFF: Stand up, sir.

THE COURT: You don't have to testify. You have the right to remain silent. That's your Fifth Amendment constitutional right that you not self-incriminate yourself. However, if you want to waive your right of silence and testify, you can do that also. Are you trying to determine which one you're going -- how you're going to proceed at this time, whether you're going to testify or not, is that correct?

DEFENDANT: Yes, sir.

THE COURT: Now you must understand that if you take the witness stand to testify, your attorney will ask you questions, but also the prosecutor will be able to ask you questions. The prosecutor also will be able to ask you about your prior record, and I instruct the jury about persons who have prior criminal convictions on their record, and if they feel like that conviction impacts the witness credibility, they can consider it for that purpose. They're not -- they're instructed they're not necessarily to convict you for something now just because you've been charged with something previously, but, as you can imagine, when they hear that you have criminal convictions, they're going

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to -- you take the witness stand, the State is going to ask you about it and they're going to hear that you have a criminal record, and do you understand that?

DEFENDANT: Yes, sir.

THE COURT: And the DA can ask you about convictions all the way back 10 years ago, and your convictions are within 10 years. Your oldest conviction is in 2010. So he'll be able to ask you about all of your prior criminal convictions. You have an attempted breaking and entering, possession of stolen property, another breaking and entering, a larceny, discharging a weapon into occupied property, and a possession of a firearm by a felon. The DA will be able to ask you and the jury will hear all of this criminal history if you take the witness stand. So it's up to you whether you want to take the witness stand or not. So I just wanted to advise you of your rights and let you know what will be allowed and what the jury will hear and how it may be perceived. I don't know exactly how it will be perceived, but I give them an instruction on how they're to consider it. All right. Anything else before we take our recess?

[1] On appeal, defendant argues that the trial court's instructions to defendant concerning defendant's exposure to cross-examination if he testified "impermissibly and unconstitutionally chilled" defendant's right to testify. Defendant contends that the trial court "misadvised the defendant" and "gave a coercive explanation of the law that evidenced judicial intimidation[.]" We do not agree.

We first observe that defendant did not object to the court's statements, which were made outside of the jury's presence, and did not ask the trial court to amplify or modify its comments to defendant. Assuming, without deciding, that this issue is nonetheless preserved for appellate review, we conclude that defendant's argument lacks merit.

N.C. Gen. Stat. § 8C-1, N.C. R. Evid. 611(b) (2015) provides that a witness "may be cross-examined on any matter relevant to any issue in the case, including credibility." "Moreover, a witness may be impeached on cross-examination by, among other things, evidence of prior convictions, opinion testimony as to reputation, and evidence of specific instances of conduct if probative of truthfulness or untruthfulness." *State v. Call*, 349 N.C. 382, 411, 508 S.E.2d 496, 514 (1998) (citing N.C. Gen. Stat. § 8C-1, Rules 404, 405, 608, 609). "In North Carolina, a 'trial

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court has broad discretion over the scope of cross-examination.’ ” *State v. Edmonds*, 236 N.C. App. 588, 597, 763 S.E.2d 552, 558 (2014) (quoting *Call*, 349 N.C. at 411, 508 S.E.2d at 514). Regarding impeachment by evidence of a witness’s prior criminal convictions, Rule 609 of the North Carolina Rules of Evidence provides that “for the purpose of attacking the credibility of a witness” evidence may be admitted that within the previous ten years, the witness was convicted of “a felony, or of a Class A1, Class 1, or Class 2 misdemeanor[.]”

The rules governing impeachment of a witness apply to a criminal defendant. “Once the defendant takes the stand, ‘his credibility may be impeached and his testimony assailed like that of any other witness.’ ” *State v. Fair*, 354 N.C. 131, 161, 557 S.E.2d 500, 521 (2001) (quoting *Brown v. United States*, 356 U.S. 148, 154, 2 L. Ed. 2d 589, 596 (1958)). In this case, the trial court limited its discussion with defendant to the possibility of impeachment by proof of prior convictions.

Defendant argues that the trial court erred in its statements to defendant regarding the scope of permissible cross-examination concerning defendant’s prior criminal convictions. We disagree. In its discussion with defendant, the trial court informed him, in relevant part, that:

THE COURT: Now you must understand that if you take the witness stand to testify, your attorney will ask you questions, but also the prosecutor will be able to ask you questions. The prosecutor also will be able to ask you about your prior record[.]

...

THE COURT: And the DA can ask you about convictions all the way back 10 years ago, and your convictions are within 10 years. Your oldest conviction is in 2010. So he’ll be able to ask you about all of your prior criminal convictions. . . . The DA will be able to ask you and the jury will hear all of this criminal history if you take the witness stand.

Defendant contends that the trial court erred by stating that the prosecutor would be able to cross-examine him regarding “all of your prior criminal convictions.” However, this statement was made in the context of the trial court’s determination that all of defendant’s prior convictions occurred within the past ten years. The court was not suggesting that defendant could be cross-examined about convictions that were more than ten years old. Defendant also asserts that the trial court “did not

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explain the limited scope” of cross-examination, and directs our attention to cases holding that a defendant may not be cross-examined about the factual details of the offense that led to a prior conviction. However, defendant identifies nothing in the trial court’s instructions to defendant suggesting that defendant would be subject to cross-examination beyond the permissible inquiry into the name of the crime, the time and place of conviction, and the punishment imposed. We conclude that defendant has failed to establish that the trial court gave an incorrect instruction as to the scope of permissible cross-examination regarding his prior criminal convictions.

In addition, defendant contends that the court’s comments were incorrect insofar as they addressed the limiting instruction that the court would give the jury on the purpose for which the jury could consider evidence of defendant’s prior convictions. The trial court made the following statements on this issue:

THE COURT: . . . I instruct the jury about persons who have prior criminal convictions on their record, and if they feel like that conviction impacts the witness credibility, they can consider it for that purpose. They’re not – they’re instructed they’re not necessarily to convict you for something now just because you’ve been charged with something previously, but, as you can imagine, when they hear that you have criminal convictions, they’re going to – you take the witness stand, the State is going to ask you about it and they’re going to hear that you have a criminal record, and do you understand that?

. . .

I don’t know exactly how it will be perceived, but I give them an instruction on how they’re to consider it.

We conclude that the trial court accurately informed defendant that, if he chose to testify, the court would instruct the jury that it could consider his prior convictions only to the extent that the jury found defendant’s criminal record relevant to his credibility. Defendant contrasts the trial court’s statements with the Pattern Jury Instruction that a trial court typically gives a jury on its duty to consider a defendant’s prior convictions only in regard to defendant’s credibility. It is true that, while the Pattern Jury Instruction expressly directs the jury that evidence of a defendant’s prior convictions may be considered “for one purpose only,” the trial court told defendant that the jury would be instructed that it should “not necessarily convict” defendant “just because you’ve been

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charged with something previously[.]” However, the trial court also told defendant that it would instruct the jury to consider defendant’s prior convictions as they pertained to defendant’s credibility.

We conclude that the court’s use of the word “necessarily,” even if technically erroneous, was insignificant in the context of the court’s entire discussion with defendant. Moreover, defendant was represented by counsel with whom he was able to consult. In *State v. Autry*, 321 N.C. 392, 404, 364 S.E.2d 341, 348 (1988), the defendant argued that the trial court had made an error of constitutional magnitude in its misstatements to the defendant about the effect of a defendant’s decision to testify at trial. Our Supreme Court held that:

[T]hough the trial court did misstate the law in its instruction to defendant concerning his decision as to whether to testify, the trial court repeatedly made very clear to defendant that he should consult his attorney before making any decision on the matter. . . . We hold that, here, where the trial court’s error in its instructions to defendant was insulated by defendant’s access to and actual conference with his attorney, the trial court’s instructional error is harmless beyond a reasonable doubt.

Id. at 404, 364 S.E.2d at 348. Defendant argues further that the trial court gave defendant “a slanted and negative explanation of the law” that “focused on the negative aspects of the right to testify” rather than “provid[ing] a balanced approach.” Defendant cites no authority for his view that the trial court had a duty to provide defendant with a comprehensive summary of the advantages and disadvantages of a decision to testify. “[W]e have never required trial courts to inform a defendant of his right not to testify and to make an inquiry on the record indicating that any waiver of this right was knowing and voluntary.” *State v. Carroll*, 356 N.C. 526, 533, 573 S.E.2d 899, 905 (2002). Given that the trial court had no obligation to inform defendant of the possible consequences of a decision to testify, we conclude that the trial court was not required to balance its discussion of impeachment with an instruction on the advantages of testifying.

For the reasons discussed above, we conclude that the trial court did not err in its warning to defendant that if he chose to testify he would be exposed to impeachment on cross-examination by evidence of his prior convictions. Defendant is not entitled to relief on the basis of this argument.

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III. Introduction of Photographs for Illustrative Purposes

[2] During trial, Mr. Garcia was shown four photographs, comprising State's Exhibits Nos. 1 through 4. Mr. Garcia identified Exhibit No. 1 as depicting his motorcycle, Exhibits Nos. 2 and 3 as photographs of defendant, and Exhibit No. 4 as depicting defendant holding the firearm with which he robbed Mr. Garcia. Defendant did not object to the prosecutor's questions to Mr. Garcia about the photographs. At the conclusion of his examination of Mr. Garcia, the prosecutor asked to introduce the photographs that he had shown the witness for illustrative purposes. Defendant objected on the grounds that no evidence had been introduced to establish who had taken the photographs and when they were taken. The trial court overruled defendant's objection and the jury was shown the photographs. The State also introduced State's Exhibit No. 5 for illustrative purposes, without objection. State's Exhibit No. 5 depicted defendant with an extended magazine handgun. On appeal, defendant argues that the trial court erred by admitting State's Exhibits Nos. 1 and 4, and committed plain error by admitting State's Exhibit No. 5. We conclude that defendant's argument lacks merit.

A. Admission of Photographs: Legal Principles

N.C. Gen. Stat. § 8-97 (2015) provides that

Any party may introduce a photograph, video tape, motion picture, X-ray or other photographic representation as substantive evidence upon laying a proper foundation and meeting other applicable evidentiary requirements. This section does not prohibit a party from introducing a photograph or other pictorial representation solely for the purpose of illustrating the testimony of a witness.

"Rule 901 of our Rules of Evidence requires authentication or identification 'by evidence sufficient to support a finding that the matter in question is what its proponent claims.' N.C. Gen. Stat. § 8C-1, Rule 901 [(2015)]." *State v. Murray*, 229 N.C. App. 285, 288, 746 S.E.2d 452, 455 (2013). "In order for a photograph to be introduced, it must first be properly authenticated by a witness with knowledge that the evidence is in fact what it purports to be." *State v. Lee*, 335 N.C. 244, 270, 439 S.E.2d 547, 560 (1994).

"Photographs are usually competent to be used by a witness to explain or illustrate anything that is competent for him to describe in

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words.’” *State v. Robinson*, 355 N.C. 320, 334, 561 S.E.2d 245, 254 (2002) (quoting *State v. Watson*, 310 N.C. 384, 397, 312 S.E.2d 448, 457 (1984)). See, e.g., *State v. Thibodeaux*, 341 N.C. 53, 63-64, 459 S.E.2d 501, 508 (1995) (upholding admission of photograph of the defendant “wearing a shoulder holster containing a .357-caliber revolver” that was used “to illustrate [a witness’s] testimony concerning defendant’s possession and control of the murder weapon”). Photographs are admissible for illustrative purposes if they fairly and accurately illustrate the subject of a witness’s testimony. *State v. Alston*, 91 N.C. App. 707, 713, 373 S.E.2d 306, 311 (1988) (“The trial court admitted the photographs for illustrative purposes only. . . . The officer clearly indicated that the photographs accurately portrayed what he had observed. Thus, the photographs were properly authenticated for illustrative purposes.”).

B. Discussion

In the present case, it is undisputed that the photographs challenged by defendant were introduced solely to illustrate the testimony of Mr. Garcia and other witnesses. The transcript includes the following dialogue, which took place prior to the admission of the photographs:

PROSECUTOR: Sir, if the jury were to see those photographs, 1 through 4, you looked at, would it help them understand what those people or items looked like at the time of this incident?

MR. GARCIA: Yes.

PROSECUTOR: If the jury were to see them, would it help them understand what those people or items looked like?

MR. GARCIA: Yes.

PROSECUTOR: Your Honor, I’d move to introduce State’s Exhibits 1 through 4 for illustrative –

THE COURT: Any objection?

DEFENSE COUNSEL: Yes, Your Honor. We don’t have – I don’t think there’s been any evidence about when they were taken or anything such as that, or who took them; who took the photographs, when they were taken.

THE COURT: Overruled. Allowed.

In its instructions to the jury, the trial court stated that: “Photographs were introduced into evidence in the case for the purpose of illustrating

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and explaining the testimony of the witness. These photographs may not be considered by you for any other purpose.” We also note that defendant has not argued on appeal that the photographs were introduced as substantive evidence. We conclude that State’s Exhibits Nos. 1, 4, and 5 were introduced to illustrate the testimony of the State’s witnesses. As previously noted, defendant does not challenge the admission of State’s Exhibits Nos. 2 and 3.

In his appellate brief, defendant does not argue that the photographs did not illustrate the testimony of the witnesses, or otherwise failed to meet the standard for introduction of a photograph solely to illustrate the testimony of a witness. Nor does defendant argue that the limiting instruction given by the trial court was insufficient to cure the prejudice arising from the use of the photographs as illustrative evidence. Instead, defendant contends that the photographs should not have been admitted, on the grounds that the State failed properly authenticate the exhibits. Defendant maintains that the State failed to introduce evidence establishing that the Facebook and Instagram accounts from which the photographs were downloaded were linked to defendant, or to introduce evidence identifying the photographer and the time and place where the photographs were taken. Defendant is essentially asking that the standard for authentication of a photograph to be admitted as substantive evidence be applied in the present case, in which the photographs were introduced only to illustrate the witnesses’ testimony. The cases cited by defendant are ones in which a party sought to introduce a photograph as substantive evidence, and defendant has failed to cite any cases in which a court required a party to provide the type of authentication that defendant contends was necessary in order to introduce a photograph as illustrative evidence. Defendant has also failed to cite any authority or offer a legal argument for the proposition that the requirements for admission of a photograph from a website as illustrative evidence should be any different from the use of a photograph from another source. We conclude that the trial court did not err by allowing the State’s witnesses to illustrate their testimony with State’s Exhibits Nos. 1, 4, and 5, and that defendant has failed to show that he is entitled to relief on the basis of this argument.

IV. Conclusion

For the reasons discussed above, we conclude that the trial court did not err in its colloquy with defendant regarding the implications of his decision on whether to testify at trial, or in its admission of photographs

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from social media sites as illustrative evidence, and that defendant had a fair trial, free of reversible error.

NO ERROR.

Judges INMAN concurs.

Judge BRYANT concurs in result only.

THE STATE OF NORTH CAROLINA
v.
TERANCE GERMAINE MALACHI, DEFENDANT

No. COA16-752

Filed 18 April 2017

1. Firearms and Other Weapons—possession of firearm by felon—constructive possession—disjunctive instruction

The trial court erred in a prosecution for possession of a firearm by a felon by instructing the jury that defendant could be found guilty based on constructive possession where the State presented no evidence of constructive possession. The analysis in *State v. Boyd*, 366 N.C. 548 (2013), applies only to plain error review and did not change the established presumption that the jury relied on an erroneous disjunctive review not supported by the evidence and objected to by defendant. Here, there was a reasonable possibility that the jury would have reached a different result without the erroneous instruction.

2. Appeal and Error—relief granted on other grounds—issue not heard

The question of whether the trial court erred in a prosecution for possession of a firearm by a felon resulting from the search of defendant by officers was not considered where the relief sought by defendant was granted on another issue.

Appeal by Defendant by writ of certiorari from judgment entered 28 January 2016 by Judge Yvonne M. Evans in Mecklenburg County Superior Court. Heard in the Court of Appeals 25 January 2017.

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[253 N.C. App. 170 (2017)]

Attorney General Joshua H. Stein, by Special Deputy Attorney General John R. Green, Jr., for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Constance E. Widenhouse, for Defendant-Appellant.

INMAN, Judge.

When a trial judge instructs the jury that it can find a criminal defendant guilty based upon alternative theories of a crime, including one theory not supported by the evidence, over the defendant's objection, precedent requires us to vacate and order a new trial.

Terance Germaine Malachi ("Defendant") appeals from his conviction for possession of a firearm by a felon following a jury trial and a related conviction for attaining habitual felon status. Defendant argues that the trial court erred by instructing the jury that it could find Defendant guilty if he constructively possessed the firearm, even though the State failed to present any evidence supporting that theory. Defendant also argues that the trial court committed plain error by allowing the jury to hear evidence obtained as a result of an unconstitutional stop and seizure of Defendant. After careful review, we vacate the judgment and award Defendant a new trial based on the trial court's erroneous jury instruction.

Factual and Procedural Background

Defendant was indicted on 16 November 2015 for one count of possession of a firearm by a felon, one count of carrying a concealed weapon, and one count of having attained habitual felon status.¹ Defendant was tried before a jury on 19 and 20 January 2016. The evidence at trial tended to show the following:

Shortly after midnight on 14 August 2014, the Charlotte-Mecklenburg Police Department received a 911 call from an anonymous caller. The caller told the dispatcher that in the rear parking lot of a gas station located at 3416 Freedom Drive in Charlotte, North Carolina, a black male wearing a red shirt and black pants had just placed a handgun in the waistband of his pants.

1. Defendant also was charged with resisting a public officer, but the State did not proceed on that charge and dismissed it following the trial.

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Officer Ethan Clark, in uniform and a marked car, first responded to the call. Officer Clark's arrival was followed almost immediately by Officer Jason Van Aken. Officer Clark saw about six to eight people standing in the parking lot, including a person who matched the description provided to the dispatcher and was later identified as Defendant.

When Officer Clark got out of his car, Defendant looked directly at him, "bladed, turned his body away, [and] started to walk away." Officer Clark immediately approached Defendant and took hold of his arm. Officer Van Aken held Defendant's other arm and the two officers walked Defendant away from the crowd of people. Defendant was squirming. Officer Clark told Defendant to relax. Prior to this, neither officer spoke with Defendant.

Officer Clark placed Defendant in handcuffs and told him that he was not under arrest. Officer Van Aken then frisked Defendant and pulled a revolver from his right hip waistband. Neither officer saw the weapon until after it was produced during the search. As the two officers were conducting the search, a third officer, Officer Kevin Hawkins, arrived. The officers then told Defendant he was under arrest and placed him in the back of Officer Clark's patrol vehicle.

The trial court instructed the jury on the elements of a felon in possession of a firearm, and, over defense counsel's objection, that Defendant could be convicted if he was found to have possessed a weapon by means of actual or constructive possession. During deliberations, the jury sought clarification of "possession of a firearm" to which the trial court, again over defense counsel's objection, responded with the definitions of both actual and constructive possession.

The jury returned a verdict of not guilty on the charge of carrying a concealed weapon and guilty of possession of a firearm by a felon. Defendant pleaded guilty, pursuant to *N.C. v. Alford*, 400 U.S. 25, 27 L. Ed.2d 162 (1970), to attaining habitual felon status. In sentencing, the trial court found two mitigating factors—that Defendant supported his family and that Defendant suffered injuries at the hands of the Charlotte-Mecklenburg Police Department that required hospitalization. The trial court sentenced Defendant in the mitigated range to 100 to 132 months of imprisonment.

Defendant gave notice of appeal in open court. Defendant filed a Petition of Writ of Certiorari with this Court on 30 August 2016. We granted Defendant's petition on 12 September 2016.

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Analysis

I. Jury Instructions

[1] Defendant argues that the trial court erroneously instructed the jury that Defendant could be found guilty of possession of a firearm by a felon based on the theory of constructive possession when the State had failed to present any evidence of constructive possession. We agree.

“This Court reviews assignments of error regarding jury instructions *de novo*.” *State v. Pender*, 218 N.C. App. 233, 243, 720 S.E.2d 836, 842 (2012) (citing *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009)). “Under a *de novo* review, [this C]ourt considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (internal quotation marks and citations omitted).

Pursuant to N.C. Gen. Stat. § 14-415.1, “[i]t shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm[.]” N.C. Gen. Stat. § 14-415.1(a) (2015). “[T]he State need only prove two elements to establish the crime of possession of a firearm by a felon: (1) [the] defendant was previously convicted of a felony; and (2) thereafter possessed a firearm.” *State v. Perry*, 222 N.C. App. 813, 818, 731 S.E.2d 714, 718 (2012) (citations omitted). Possession of a firearm “may be actual or constructive. Actual possession requires that a party have physical or personal custody of the [firearm]. A person has constructive possession of [a firearm] when the [firearm] is not in his physical custody, but he nonetheless has the power and intent to control its disposition.” *State v. Alston*, 131 N.C. App. 514, 519, 508 S.E.2d 315, 318 (1998) (citations omitted), *superseded in part on other grounds by statute as stated in State v. Gaither*, 161 N.C. App. 96, 587 S.E.2d 505 (2003), *disc. review denied*, 358 N.C. 157, 593 S.E.2d 83 (2004).

North Carolina’s appellate courts have consistently held that “a trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial.” *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973) (citations omitted). That is because the purpose of jury instructions is “the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence.” *Id.* An instruction related to a theory not supported by the evidence confuses the issues, introduces an extraneous matter, and does not declare the law applicable to the evidence.

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Our courts also have consistently held that a trial court's inclusion of a jury instruction unsupported by the evidence presented at trial is an error requiring a new trial. *State v. Lynch*, 327 N.C. 210, 219, 393 S.E.2d 811, 816 (1990) (holding that the defendant was entitled to a new trial because "the trial court erroneously submit[ed] the case to the jury on alternative theories, one of which [was] not supported by the evidence and . . . it cannot be discerned from the record upon which theory or theories the jury relied in arriving at its verdict"); *State v. Pakulski*, 319 N.C. 562, 574, 356 S.E.2d 319, 326 (1987) (holding that a defendant is entitled to a new trial where the trial court instructed the jury on an alternate theory that was unsupported by the evidence); *State v. Johnson*, 183 N.C. App. 576, 584-85, 646 S.E.2d 123, 128 (2007) (holding that the defendant was entitled to a new trial where the trial court instructed the jury on alternative theories, one of which was not supported by the evidence, and it could not be discerned from the record upon which theory the jury based its verdict); *State v. Hughes*, 114 N.C. App. 742, 746, 443 S.E.2d 76, 79 (1994) (ordering a new trial where the trial court instructed on a theory that was unsupported by the evidence and it could not be discerned from the record upon which theory the jury relied in arriving at its verdict); *State v. O'Rourke*, 114 N.C. App. 435, 442, 442 S.E.2d 137, 140 (1994) ("Where the trial court instructs on alternative theories, one of which is not supported by the evidence, and it cannot be discerned from the record upon which theory the jury relied in arriving at its verdict, the error entitles the defendant to a new trial.").

When a trial judge has instructed jurors on alternative theories of guilt, one of which is supported by the evidence and the other is unsupported, in keeping with the of the rule of lenity, we have presumed that the defendant was found guilty based on the theory that was not supported by the evidence. *Lynch*, 327 N.C. at 219, 393 S.E.2d at 816; *Pakulski*, 319 N.C. at 574, 356 S.E.2d at 326 ("[T]his Court will not assume that the jury based its verdict on the theory for which it received a proper instruction. Instead, we resolve the ambiguity in favor of the defendant."). Our courts previously applied this presumption regardless of whether a defendant properly objected to an extraneous instruction at trial, resulting in the erroneous instruction amounting to plain error *per se*. *O'Rourke*, 114 N.C. App. at 442, 442 S.E.2d at 140; *Pakulski*, 319 N.C. at 574, 356 S.E.2d at 326; *State v. Jefferies*, __ N.C. App. __, __, 776 S.E.2d 872, 880 (2015) (holding, in a case in which the defendant did not object at trial, that "we must resolve the ambiguity created by the erroneous instruction in favor of [the] defendant. [The d]efendant is entitled to a new trial . . .") (internal citations omitted).

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Recently however, our Supreme Court has declared that such instructional errors not objected to at trial are not plain error *per se*. In *State v. Boyd*, 366 N.C. 548, 742 S.E.2d 798 (2013), the Supreme Court, adopting a dissent from this Court, 222 N.C. App. 160, 730 S.E.2d 193 (2012) (Stroud, J., dissenting), declared an additional requirement for a defendant arguing an unpreserved challenge to a jury instruction as unsupported by the evidence. The Court in *Boyd* shifted away from the long standing assumption that “the jury based its verdict on the theory for which it received an improper instruction,” *State v. Petersilie*, 334 N.C. 169, 193, 432 S.E.2d 832, 846 (1993), and instead placed the burden on the defendant to show that an erroneous disjunctive jury instruction had a probable impact on the jury’s verdict. *Boyd*, 222 N.C. App. at 173, 730 S.E.2d at 201. The *Boyd* decision does not address erroneous disjunctive jury instructions given over the objection of a defendant’s trial counsel, *id.*, and this Court has continued to follow precedent on this issue when properly preserved. *See, e.g., Jefferies*, __ N.C. App. at __, 776 S.E.2d at 880; *State v. Dick*, __ N.C. App. __, 791 S.E.2d 873, COA15-1400, 2016 WL 5746395, *1, *4-5 (2016) (remanding for a new trial because “the trial court’s disjunctive instruction on the charge of first degree sexual offense was erroneous, and that error prejudiced [the d]efendant”) (citing *Pakulski*, 319 N.C. at 574, 356 S.E.2d at 326); *State v. Collington*, __ N.C. App. __, 775 S.E.2d 926, 2015 WL 4081786 *1, *4 (2015) (citing *Pakulski* for the proposition that “a trial court commits plain error when it instructs a jury on disjunctive theories of a crime, where one of the theories is improper . . .”).

It is not this Court’s duty to rewrite well settled law, so we must seek to reconcile *Boyd* with existing precedent. Accordingly, we hold that *Boyd*’s analysis, considered in the full context of that decision, applies only to plain error review and does not eliminate the long established presumption that the jury relied on an erroneous disjunctive instruction not supported by the evidence when given over an objection by the defendant’s trial counsel.

Here, the trial court twice instructed the jury, over Defendant’s objections, on the theory of constructive possession. Following the trial court’s initial instruction, the jury sought clarification of the “legal definition” of “possession of a firearm.” The trial court responded by repeating the definitions for both actual and constructive possession. The jury returned a verdict of not guilty on the charge of carrying a concealed weapon and guilty of possession of a firearm by a felon. The jury’s verdict did not indicate the theory under which it found Defendant guilty of the possession charge.

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Defendant argues, and we agree, that the State's evidence supported an instruction only for actual possession and that the trial court erroneously instructed the jury on constructive possession. The State's evidence at trial regarding possession was testimony by Officers Clark and Hawkins. Officer Clark testified that "[t]here was a chrome revolver with a black handle that was on [Defendant's] right hip." Officer Hawkins similarly testified that "[w]hen [he] arrived on the scene Officer Clark had [Defendant's] hands behind his back and [he] observed Officer Van Aken in the process of removing a large, silver revolver from [Defendant's] person." In response to Defendant's objection to the instruction on constructive possession, the trial court noted, "I think [the State] may have a good argument for actual, but nothing for constructive. And if the jury believes the witnesses, they're going to believe actual possession, right?" Yet the trial court denied Defendant's objection and instructed the jury on both actual and constructive possession.

The State asserts that the evidence was sufficient to support constructive possession because during the time after officers removed the revolver from Defendant, he theoretically could have broken free from the officers and taken hold of the revolver. We are unpersuaded. Although Defendant certainly was aware of the presence of the revolver taken from him by police, no evidence was presented that he had the power to control its disposition or use by the officers who had secured it.²

Because the trial court instructed the jury that it could find Defendant guilty based on either actual or constructive possession and because the State presented evidence supporting only actual possession, we hold the trial court erred. Further, because the record is silent regarding the theory of Defendant's guilt found by jurors, as required by precedent, we hold the error is reversible.

Even if *Boyd* were interpreted to eliminate the presumption of prejudice by jury instructions unsupported by the evidence and objected to at trial, it would not change the outcome of this decision because Defendant has demonstrated prejudicial error.

Properly preserved non-constitutional challenges to jury instructions are reviewed for prejudicial error. *See* N.C. Gen. Stat. § 15A-1443 (2015). Under prejudicial error, an error becomes reversible only where a defendant can show he was prejudiced, *i.e.*, that "there was 'a

2. Constructive possession requires that Defendant have "the intent and capability to maintain control and dominion over" the gun. *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986) (citations omitted).

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reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.’ ” *State v. Maske*, 358 N.C. 40, 50, 591 S.E.2d 521, 528 (2004) (citing N.C. Gen. Stat. § 15A-1443(a) (2003)).

Here, there is a reasonable possibility that the jury would have reached a different result had the trial court not provided instruction about the theory of constructive possession. The jury’s question about the legal definition of possession during its deliberations, combined with the jury’s acquittal of Defendant on the charge of carrying a concealed weapon, allows for a reasonable chance that jurors would not have found Defendant guilty if instructed on the single theory of actual possession.

II. Evidence Seized from Defendant

[2] Defendant also argues that the trial court committed plain error by allowing the jury to hear evidence resulting from the search of Defendant by officers, which Defendant asserts violated his Fourth Amendment rights. However, because the relief Defendant seeks for this claimed error is the same relief he is entitled to as a result of the erroneous jury instruction, we need not address this issue.

Conclusion

For the above reasons, we hold the trial court committed reversible error in instructing the jury that it could find Defendant guilty of possession of a firearm by a felon based on a theory of constructive possession. Because Defendant’s conviction for possession of a firearm by a felon was an essential element underlying his *Alford* plea of guilty to the charge of attaining the status of an habitual felon, we also vacate that conviction and remand for a new trial.

VACATED AND REMANDED.

Judges CALABRIA and McCULLOUGH concur.

STATE v. McNAIR

[253 N.C. App. 178 (2017)]

STATE OF NORTH CAROLINA

v.

ANTHONY LEE McNAIR

No. COA16-707

Filed 18 April 2017

1. Burglary and Unlawful Breaking or Entering—place of religious worship—storage building

In a case arising from a break-in at a barn behind a rented building used as a church, the trial court erred by denying defendant's motion to dismiss the charge of breaking or entering a place of religious worship. The barn was used to store equipment for the church, but the State presented no evidence that the barn was used as a place of worship. It is clear from the wording of N.C.G.S. § 14-54.1 that the specific building must have been a building regularly used and clearly identifiable as a place for religious worship.

2. Burglary and Unlawful Breaking or Entering—place of religious worship—curtilage

In a case arising from a break-in at a barn behind a rented building used as a church, the trial court erred by denying defendant's motion to dismiss the charge of breaking or entering a place of religious worship. Although the State argued that the barn was within the curtilage of the building used for church services, the term used in N.C.G.S. § 14-54 for "building" references "curtilage" solely by referring to a building within the curtilage of a dwelling house. The State did not argue that any portion of the portion of the property occupied by the church was used as a dwelling.

3. Sentencing—remand—lesser included offense

Where a conviction for breaking and entering a place of religious worship was reversed for insufficient evidence that the building was a place of worship, the matter was remanded for resentencing on the lesser-included offense of felony breaking or entering.

4. Burglary and Unlawful Breaking or Entering—possession of tools—control of area where tools found

The evidence was sufficient to support a finding that defendant had constructive possession of burglary tools that were found in a fenced area outside the building that was broken into. While defendant was not in exclusive control of the area where the tools were found, there were other incriminating circumstances.

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5. Indictments and Information—variance with evidence—possession of burglary tools

There was not a fatal variance between an indictment for the possession of burglary tools and the evidence where the indictment only identified two implements of housebreaking but the instruction was that the jury could find defendant guilty if he possessed either of those two tools or a pair of work gloves found at the scene. The trial court properly instructed the jury on the essential elements of the offense; the mere fact that the trial court mentioned three implements of housebreaking rather than two does not constitute error. Even if there was a variance, possession of either of the two items mentioned was sufficient to convict defendant.

6. Indictment and Information—stealing from church storage building—capable of owning property

An indictment for injury to personal property owned by a church did not have a facial invalidity where defendant contended that the indictment did not allege that the victim (Vision) was capable of owning property. The indictment identified Vision as “a place of religious worship” and then subsequently listed Vision as the owner of the personal property that defendant damaged.

7. Appeal and Error—issue not raised at trial—considered under Rule 2

Although defendant did not raise at trial the issue of whether there was a fatal variance between an indictment and the evidence, the Court of Appeals elected to hear the matter on the merits under Rule 2 of the N.C. Rules of Appellate Procedure. It is difficult to contemplate a more manifest injustice than a conviction without adequate evidentiary support.

8. Indictment and Information—damage to personal property—lock and hasp

There was no variance between the charge alleged in the indictment and the evidence at trial in a prosecution for damage to personal property based on breaking and entering and damage to a lock. Defendant contended that the hasp affixed to the barn door was not owned by the church (Vision), which was allowed to use the building for storage, and which rented the adjacent building for services. Viewing the evidence in the light most favorable to the State, there was sufficient evidence that Vision owned the lock and that the lock was damaged.

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[253 N.C. App. 178 (2017)]

9. Burglary and Unlawful Breaking or Entering—mere presence—contention rejected

Defendant's contention that the evidence merely showed his presence at the scene of a breaking and entering was rejected.

Appeal by defendant from judgments entered 19 August 2015 by Judge W. Russell Duke, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 26 January 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Michael T. Wood, for the State.

Kimberly P. Hoppin for defendant-appellant.

DAVIS, Judge.

This case presents a number of issues stemming from the defendant's act of breaking into a barn adjacent to a building that was being rented by a church for the purpose of holding religious services. Anthony Lee McNair ("Defendant") appeals from his convictions of breaking or entering into a place of religious worship, possession of burglary tools, and injury to personal property. On appeal, Defendant argues that the trial court erred in denying his motion to dismiss the charges against him due to (1) insufficiency of the evidence to support his convictions; (2) the existence of fatal variances between his indictment and both the evidence at trial and the trial court's jury instructions; and (3) the facial invalidity of the indictment. After careful review, we find no error in part, vacate in part, and remand.

Factual and Procedural Background

The State presented evidence at trial tending to show the following facts: In February of 2014, Vision Phase III International Outreach Center ("Vision") — a church "engaged in international missions" — was renting a building (the "Chapel") in Greenville, North Carolina owned by Sutton Amusement Company ("Sutton") for the purpose of conducting its church services. The Chapel and several other structures situated behind it were located on a half block along Raleigh Street. One of these structures was a small barn (the "Barn"), which was located approximately 50 feet behind the Chapel. Although Sutton owned the Barn, it allowed Vision to use the Barn to store equipment that it could not keep in the Chapel.

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A six-foot-tall chain link fence stood along the sidewalk adjacent to Raleigh Street beside the Chapel. A large building also owned by Sutton and used for its storage purposes was located behind the Chapel and the Barn along the back side of the half block. Directly behind the Chapel and to the right of the Barn stood a ten-foot brick wall, which closed off access to the premises such that entry was only possible through the main gate of the chain link fence. Both the Chapel and the Barn were located within the area enclosed by the chain link fence, Sutton's large storage building, and the ten foot brick wall.

A padlock secured the main gate of the chain link fence. A second padlock affixed to a hasp was used to secure the door of the Barn. One part of the hasp was screwed into the door frame and the other part was fastened to the door. The padlock was used to secure both parts of the hasp together in order to keep the Barn door locked.

At approximately 1:00 a.m. on 19 February 2014, Officer Adam Smith of the Greenville Police Department was notified by dispatch that a 911 caller had reported the presence of a person "inside the fence" on the Sutton property near the Chapel. Detective Joshua Smith and Officer Chad Bowen of the Greenville Police Department were also dispatched to the scene.

When Officer Smith arrived at the Raleigh Street side of the premises, he looked inside the fenced-in area and observed Defendant climbing over the ten-foot brick wall from the inside out. The officers discovered that the padlock securing the main gate at the front of the property had been cut off and was laying on the ground next to the gate. Outside the fenced-in area near the main gate, the officers discovered bolt cutters and an electrical cord.

Inside the fenced-in area, the officers also discovered that (1) the Barn door had been opened; (2) "the whole padlock assembly" had been "pried off" of the Barn door; and (3) a pry bar that had previously been stored inside the Barn was laying on the ground inside the fenced-in area. The officers also found a pair of work gloves in the fenced-in area near the ten-foot wall. Detective Smith noticed "a metal gate propped up against the wall . . . sort of like a ramp type, where [sic] somebody may have used to go up over" the brick wall.

Defendant was subsequently arrested, advised of his *Miranda* rights, and questioned by Detective Matt McKnight at the Greenville Police Department. Detective McKnight testified that Defendant had stated that he was homeless and that he had "illegally entered the premises of

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the church for the purpose of sleeping and that all he did was sleep on a bench near the courtyard of the church.”

Defendant was indicted on the charges of: (1) breaking or entering into a place of religious worship; (2) possession of burglary tools; (3) injury to the personal property of Vision; (4) breaking or entering a building occupied by Sutton; and (5) injury to the personal property of Sutton. A jury trial was held beginning on 18 August 2015 before the Honorable W. Russell Duke, Jr. in Pitt County Superior Court. At trial, the State presented testimony from Officer Smith, Detective Smith, Officer Bowen, William Harper (the pastor of Vision), and Jonathan Sutton (the owner of Sutton Amusement Company). Defendant and his brother, Lynwood Leon McNair, testified for the defense.

At the close of the State’s evidence, counsel for Defendant made a motion to dismiss, which was denied by the trial court. The jury found Defendant guilty of: (1) breaking or entering into Vision, a place of religious worship; (2) possession of burglary tools; (3) injuring the personal property of Vision; and (4) injuring the personal property of Sutton. The jury found him not guilty of breaking or entering into a building occupied by Sutton. Defendant was also found guilty of attaining the status of a habitual felon.

The trial court consolidated the judgments and sentenced Defendant to 146 to 188 months imprisonment. Defendant gave oral notice of appeal and also filed a written notice of appeal.

Analysis

On appeal, Defendant contends that the trial court erred by denying his motion to dismiss the charges against him. “When reviewing a defendant’s motion to dismiss, this Court determines only whether there is substantial evidence of (1) each essential element of the offense charged and of (2) the defendant’s identity as the perpetrator of the offense. Whether the evidence presented at trial is substantial evidence is a question of law for the court. Appellate review of a denial of a motion to dismiss for insufficient evidence is *de novo*.” *State v. Fisher*, 228 N.C. App. 463, 471, 745 S.E.2d 894, 900-01 (internal citations and quotation marks omitted), *disc. review denied*, 367 N.C. 274, 752 S.E.2d 470 (2013).

In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve. The

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test for sufficiency of the evidence is the same whether the evidence is direct or circumstantial or both. Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence.

State v. Fritsch, 351 N.C. 373, 378-79, 526 S.E.2d 451, 455 (internal citations and quotation marks omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

Our Supreme Court has held that “[i]f there is any evidence tending to prove guilt or which reasonably leads to this conclusion as a fairly logical and legitimate deduction, it is for the jury to say whether it is convinced beyond a reasonable doubt of defendant’s guilt.” *State v. Franklin*, 327 N.C. 162, 171-72, 393 S.E.2d 781, 787 (1990). However, “[i]f the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed.” *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002) (citation omitted).

I. Breaking or Entering into a Place of Religious Worship

[1] Defendant’s first argument is that the trial court erred in denying his motion to dismiss the charge of breaking or entering into a place of religious worship. Specifically, he contends that (1) the Barn was not a place of worship; and (2) the State presented insufficient evidence to support a finding that Defendant was guilty of the lesser-included offense of felony breaking or entering. We address each argument in turn.

A. “Place of Religious Worship” Element

N.C. Gen. Stat. § 14-54.1 states as follows:

(a) Any person who wrongfully breaks or enters any building that is a place of religious worship with intent to commit any felony or larceny therein is guilty of a Class G felony.

(b) As used in this section, a “building that is a place of religious worship” shall be construed to include any church, chapel, meetinghouse, synagogue, temple, longhouse, or mosque, or *other building that is regularly used, and clearly identifiable, as a place for religious worship.*

N.C. Gen. Stat. § 14-54.1 (2015) (emphasis added). Therefore, the elements of this offense are that a person “[1] wrongfully breaks or

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enters [2] any building that is a place of religious worship [3] with intent to commit any felony or larceny therein.” *State v. Campbell*, 234 N.C. App. 551, 557, 759 S.E.2d 380, 384 (2014) (citation omitted), *rev’d on other grounds*, 368 N.C. 83, 772 S.E.2d 440 (2015).

As an initial matter, it is important to note that the only building Defendant is alleged to have broken into was the Barn, and the State concedes that the Barn itself was not used for religious worship. However, the State asserts that Defendant’s act of breaking into the Barn nevertheless constituted breaking or entering a place of religious worship for purposes of N.C. Gen. Stat. § 14-54.1 because “[t]he church was more than just a single building.” Moreover, according to the State, the Barn was within the curtilage of the Chapel and, for this reason, the Barn should be deemed an extension of the Chapel for purposes of N.C. Gen. Stat. § 14-54.1. We reject the State’s arguments on this issue.

“The duty of a court is to construe a statute as it is written.” *Campbell v. First Baptist Church*, 298 N.C. 476, 482, 259 S.E.2d 558, 563 (1979) (citation omitted). N.C. Gen. Stat. § 14-54(c) defines the word “building” to include “any dwelling, dwelling house, uninhabited house, building under construction, building within the curtilage of a dwelling house, and any other structure designed to house or secure within it any activity or property.” N.C. Gen. Stat. § 14-54(c) (2015).

Based on the manner in which N.C. Gen. Stat. § 14-54.1 is worded, it is clear that in order for Defendant to have been convicted of violating this statute, the specific building Defendant is alleged to have broken into must have been a “building that is regularly used, and clearly identifiable, as a place for religious worship.” See N.C. Gen. Stat. § 14-54.1. Although both the Chapel and the Barn meet the statutory definition of “building,” it is clear that the Chapel and the Barn are separate structures. The State presented evidence at trial that the Chapel was used for religious services but presented no evidence that the Barn was used as a place of religious worship — a fact which the State also concedes in its brief.

Thus, because the Barn was not itself used for religious worship and because the General Assembly has limited the reach of this offense to “building[s] that [are] regularly used, and clearly identifiable, as a place for religious worship[,]” the State cannot establish that Defendant was guilty of violating N.C. Gen. Stat. § 14-54.1. This Court is not at liberty to broaden the statutory text to encompass structures *adjacent to* buildings being used as a place of religious worship. *State v. Wagner*, __ N.C. App. __, __, 790 S.E.2d 575, 582 (2016) (“Our courts lack the authority to

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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).

[2] We are also unable to accept the State’s argument that because the Chapel was a building that held religious services and the Barn was within the curtilage of the Chapel, the Barn was “clearly identifiable [] as a place for religious worship” as required by N.C. Gen. Stat. § 14-54.1(b). As quoted above, the definition of the term “building” contained in N.C. Gen. Stat. § 14-54 references the term “curtilage” solely by referring to a “building within the curtilage of a *dwelling house*.” See N.C. Gen. Stat. § 14-54 (emphasis added). Here, the State does not attempt to argue that any portion of the property occupied by Vision was being used as a dwelling house.

We observe that the language in N.C. Gen. Stat. § 14-54 linking the term “curtilage” to proximity to a dwelling house is consistent with case-law from North Carolina’s appellate courts defining curtilage. See, e.g., *State v. Fields*, 315 N.C. 191, 194, 337 S.E.2d 518, 520 (1985) (“The curtilage is the land around a *dwelling house* upon which those outbuildings lie that are commonly used with the dwelling house.” (citation and quotation marks omitted and emphasis added)).

Thus, the evidence presented by the State was not sufficient to convict Defendant of violating N.C. Gen. Stat. § 14-54.1. Accordingly, we must vacate Defendant’s conviction of that offense.

B. Sufficiency of Evidence as to Breaking or Entering

[3] Alternatively, the State contends that in the event we determine the evidence was insufficient to convict Defendant under N.C. Gen. Stat. § 14-54.1, this Court should remand to the trial court for entry of judgment on the lesser-included offense of breaking or entering. Defendant, conversely, argues that the State not only failed to introduce evidence showing a violation of N.C. Gen. Stat. § 14-54.1 but also failed to produce adequate evidence to support a charge of breaking or entering. Specifically, Defendant contends that his mere presence at the scene was insufficient to establish his guilt as to this offense.

The essential elements of felonious breaking or entering are (1) the breaking or entering (2) of any building (3) with the intent to commit any felony or larceny therein. The criminal intent of the defendant at the time of breaking or entering may be inferred from the acts he committed subsequent to his breaking or entering [into] the building.

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State v. Bowden, 216 N.C. App. 275, 278, 717 S.E.2d 230, 232-33 (2011) (internal citation and quotation marks omitted).

Defendant asserts that the only evidence connecting him to the break-in was his presence in the area when law enforcement officers arrived. It is well settled that “a defendant’s mere presence at the scene of the crime does not make him guilty” *Id.* at 279, 717 S.E.2d at 233 (citation and quotation marks omitted). However, the State presented the following evidence establishing that Defendant broke into the Barn: (1) Pastor Harper testified that on 18 February 2014 Vision had secured the Barn’s door with a lock; (2) at 1:00 a.m. on 19 February 2014, a 911 call was received stating that an individual was inside the fenced-in area; (3) Defendant was found by law enforcement officers scaling a ten-foot brick wall near the Barn; (4) officers discovered a pry bar on the ground next to the Barn; and (5) a broken lock was found beside the Barn door.

The evidence further supported an inference that Defendant intended to commit larceny when he entered the Barn. Upon their arrival at the scene, officers determined that the Barn “appeared to have been rummaged through” and “was kind of in disarray[.]” The officers also discovered that certain items, including a grill and a pressure washer, had been removed from the Barn and placed in the fenced-in area. Pastor Harper testified that these items had been present inside the Barn earlier that day. Thus, the State presented sufficient evidence that Defendant was guilty of breaking or entering into the Barn.

“When the actual instructions given are sufficient to sustain a conviction on a lesser included offense, we consider the conviction a verdict on the lesser charge and then remand for appropriate sentencing.” *State v. Stokes*, 367 N.C. 474, 479, 756 S.E.2d 32, 36 (2014). “There are two lesser-included offenses to [N.C. Gen. Stat. § 14-54.1]: felony breaking or entering under N.C. Gen. Stat. § 14-54(a) . . . which lacks the ‘place of religious worship’ element, and misdemeanor breaking or entering under N.C. Gen. Stat. § 14-54(b) . . . which lacks both the ‘place of religious worship’ element and the intent [to commit a felony or larceny therein] element.” *Campbell*, 234 N.C. App. at 557, 759 S.E.2d at 384-85.

Taking all the evidence in the light most favorable to the State, we are satisfied that although — as discussed above — the State did not put forth adequate evidence to satisfy the “place of religious worship” element of N.C. Gen. Stat. § 14-54.1, the State did present sufficient evidence for the jury to convict Defendant of the lesser-included offense of felony breaking or entering under N.C. Gen. Stat. § 14-54(a). Accordingly, we remand to the trial court for entry of judgment and resentencing on

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the lesser-included offense of felony breaking or entering. *See State v. Clark*, 137 N.C. App. 90, 97, 527 S.E.2d 319, 323 (2000) (remanding for entry of judgment and resentencing on lesser-included offense where evidence was insufficient to establish guilt of greater offense).

II. Possession of Burglary Tools

Defendant makes two arguments with respect to his conviction for possession of burglary tools: (1) he did not have either actual or constructive possession of the burglary tools at issue; and (2) a fatal variance existed between the indictment and the court's instructions to the jury because the jury instructions — unlike the indictment — referenced the work gloves found on the ground inside the fenced-in area.

A. Constructive Possession

[4] The State does not contend that Defendant had *actual* possession of the burglary tools, and there is no indication in the record that would support such an argument. However, the State does contend that Defendant had *constructive* possession of the pry bar and the bolt cutters at the time he was apprehended.

Under the theory of constructive possession, a person may be charged with possession of an item . . . when he has both the power and intent to control its disposition or use, even though he does not have actual possession. Where such materials are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession. However, unless the person has exclusive possession of the place where the [items] are found, the State must show other incriminating circumstances before constructive possession may be inferred.

State v. Davis, 325 N.C. 693, 697, 386 S.E.2d 187, 190 (1989) (internal citations and quotation marks omitted). Thus “[t]here must be more than mere association or presence linking the person to the item in order to establish constructive possession.” *State v. McNeil*, 209 N.C. App. 654, 663, 707 S.E.2d 674, 682 (2011) (citation and quotation marks omitted).

In the present case, burglary tools were found within the fenced-in area. While Defendant was not in exclusive possession of the area where the tools were found, the State presented the following other incriminating circumstances: (1) Defendant was found alone inside a privately-owned, fenced-in area at 1:00 a.m.; (2) as the officers entered

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the fenced-in area, they observed Defendant scaling a ten-foot brick wall in an apparent attempt to avoid apprehension; (3) the officers determined that someone had broken into the Barn, observing that toolboxes and cabinets in the Barn “appeared to [have been] rummaged through”; (4) padlocks were laying on the ground both next to the main gate and adjacent to the Barn door; and (5) several items, including a grill and pressure washer, that had previously been stored inside the Barn were found in the fenced-in area. These incriminating circumstances support a finding that Defendant had constructive possession of the burglary tools.

B. Fatal Variance Between Indictment and Jury Instructions

[5] Defendant also argues that a fatal variance existed between the indictment and the trial court’s instructions to the jury with respect to the charge of possession of burglary tools. Based upon our review of the trial transcript, it is clear that Defendant’s trial counsel did not specifically raise this issue at trial. Our appellate courts, however, have “chosen to review . . . unpreserved issues for plain error when the issue involves either errors in the trial judge’s instructions to the jury or rulings on the admissibility of evidence.” *State v. Holbrook*, 137 N.C. App. 766, 768, 529 S.E.2d 510, 511 (2000) (citation, quotation marks, and brackets omitted). This Court has expressly applied this rule to unpreserved arguments alleging a fatal variance between an indictment and the trial court’s jury instructions. *See State v. Ross*, __ N.C. App. __, __, 792 S.E.2d 155, 158 (2016) (“Our review of this issue on appeal is for plain error, as Defendant failed to object to the jury instruction at trial on the basis that it varied materially from the indictment.” (citations and emphasis omitted)).

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).

Defendant’s argument is premised on his assertion that although the indictment on the charge of possession of burglary tools only identified

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the pry bar and the bolt cutters as implements of housebreaking in Defendant's possession, the trial court nevertheless instructed the jury that it could find Defendant guilty if it found that he possessed either the pry bar, the bolt cutters, *or the work gloves*.

"Our Courts have found that a trial court's jury instructions which vary from the allegations of the indictment might constitute error where the variance is regarding an *essential element* of the crime charged." *State v. Lark*, 198 N.C. App. 82, 92, 678 S.E.2d 693, 700-01 (2009), *disc. review denied*, 363 N.C. 808, 692 S.E.2d 111 (2010). However, "[a]llegations beyond the essential elements of the crime sought to be charged are irrelevant and may be treated as surplusage." *State v. Bollinger*, 192 N.C. App. 241, 246, 665 S.E.2d 136, 139 (2008), *aff'd per curiam*, 363 N.C. 251, 675 S.E.2d 333 (2009).

We find instructive our decision in *Bollinger*. In that case, the defendant was charged with carrying a concealed weapon, and his indictment stated that the defendant was carrying a "set of metallic knuckles" whereas the evidence at trial showed that the defendant was also carrying "one or more knives." *Id.* at 243, 665 S.E.2d at 138 (quotation marks, brackets, and emphasis omitted). The trial court did not instruct the jury on the defendant's act of carrying a "set of metallic knuckles" and instead instructed on his carrying of "one or more knives." *Id.* (quotation marks, brackets, and emphasis omitted).

On appeal, we rejected the defendant's fatal variance argument, concluding that the indictment's language identifying the "metallic knuckles" was "mere surplusage." *Id.* at 246, 665 S.E.2d at 139-40. We reasoned that "[t]he gist of the offense [was] carrying a concealed *weapon*." *Id.* at 246, 665 S.E.2d at 140. Thus, we held that although "the indictment alleged metallic knuckles while the evidence introduced at trial showed defendant carried knives in addition to metallic knuckles, the trial court's instructions on carrying a concealed weapon were not erroneous." *Id.* Moreover, we noted that even assuming *arguendo* that the trial court had, in fact, erred, the "mention of 'knives' in the jury instructions as opposed to 'metallic knuckles' . . . did not affect the burden of proof required of the State or constitute a substantial change or variance from the indictment." *Id.* at 247, 665 S.E.2d at 140.

The essential elements of possession of burglary tools are "(1) the possession of an implement of housebreaking (2) without lawful excuse, and the State has the burden of proving both of these elements." *State v. Campbell*, 188 N.C. App. 701, 711, 656 S.E.2d 721, 728 (citation and quotation marks omitted), *appeal dismissed*, 362 N.C. 364, 664 S.E.2d

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311 (2008). The indictment charging Defendant with this offense stated as follows:

POSSESSION OF BURGLARY TOOLS

And the jurors for the State upon their oath present that on or about the 19th day of February, 2014, in the County named above the defendant named above unlawfully, willfully and feloniously did without lawful excuse have in the defendant's possession an implement of housebreaking, a wooden handle pry bar and 24" bolt cutters, in violation of G.S. 14-55.

As in *Bollinger*, the indictment charged the defendant with both of the essential elements of the offense by asserting that defendant "ha[d] in [his] possession an implement of housebreaking" and this possession was "without lawful excuse" Thus, the mention of specific tools was "mere surplusage." See *Bollinger*, 192 N.C. App. at 246, 665 S.E.2d at 139-40.

The trial court's instructions to the jury on this charge stated, in pertinent part, as follows:

The Defendant has also been charged with possession without lawful excuse of implements of housebreaking. For you to find the Defendant guilty of this offense the State must prove two things beyond a reasonable doubt.

First, that the *Defendant was in possession of implements of housebreaking*. A pry bar, bolt cutters and gloves are implements of house-breaking if you find from the evidence beyond a reasonable doubt that they are made and designed for the purpose of house-breaking or they are commonly carried and used by housebreakers or is [sic] reasonably adapted for such use.

. . . .

And, second, that there was *no lawful excuse* for the Defendant's possession. The State must prove beyond a reasonable doubt that the Defendant intended to use the implements to break into a house or building or did use them for that purpose.

(Emphasis added.)

The above-quoted instruction confirms that the trial court properly instructed the jury as to both essential elements of the offense. The mere

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fact that the court mentioned three implements of housebreaking rather than two does not constitute error.¹

Moreover, even assuming *arguendo* that there was a variance, the evidence — as discussed above — supported a finding that Defendant had constructive possession of the pry bar and the bolt cutters. Defendant's possession of either the pry bar or the bolt cutters was sufficient to convict him of possession of burglary tools, and both of these tools were expressly mentioned in the indictment. As in *Bollinger*, the discrepancy cited by Defendant “did not affect the burden of proof required of the State or constitute a substantial change or variance from the indictment.” See *Bollinger*, 192 N.C. App. at 246-47, 665 S.E.2d at 140. Thus, the trial court's instruction did not constitute plain error.

III. Injury to Personal Property

Finally, Defendant argues that the trial court erred in denying his motion to dismiss the two charges of injury to personal property for which he was convicted. Specifically, he contends that (1) the indictment charging injury to personal property of Vision was facially invalid because it did not identify Vision as an entity capable of owning property; (2) there was a fatal variance between the indictment and the evidence at trial as to the charge of injury to Vision's personal property because the State's evidence suggested that the damaged lock on the Barn door was actually owned by Sutton; and (3) his mere presence at the scene was insufficient to support a finding that Defendant was guilty of injury to the personal property of Sutton and Vision.

A. Facial Validity of Indictment

[6] Defendant contends that the portion of his indictment charging him with injury to Vision's personal property was facially invalid because the indictment did not allege that Vision was capable of owning property. Although Defendant did not assert this argument at trial, our Supreme Court has held that “where an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court.” *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341 (citations omitted), *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000). The Supreme Court has made clear that

1. Defendant does not dispute the fact that there was sufficient evidence presented at trial to allow the jury to find that he possessed the work gloves.

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[t]he identity of the owner of the property that the defendant allegedly injured is a material element of the offense of injury to personal property. For that reason, a criminal pleading seeking to charge the commission of crimes involving theft of or damage to personal property, including injury to personal property, must allege ownership of the property in a person, corporation, or other legal entity capable of owning property.

State v. Ellis, 368 N.C. 342, 345, 776 S.E.2d 675, 677 (2015) (internal citations and quotation marks omitted).

In *State v. Campbell*, 368 N.C. 83, 772 S.E.2d 440 (2015), our Supreme Court addressed the application of this principle in cases where the owner of the property at issue is a church. The Court held that “alleging ownership of property in an entity identified as a church or other place of religious worship, like identifying an entity as a ‘company’ or ‘incorporated,’ signifies an entity capable of owning property[.]” *Id.* at 87, 772 S.E.2d at 444 (citation omitted).

In the present case, the indictment issued on 13 October 2014 listed three charges and stated as follows:

BREAKING AND OR ENTERING A PLACE OF WORSHIP

The jurors for the State upon their oath present that on or about the 19th day of February, 2014, in the County named above the defendant named above unlawfully, willfully and feloniously did break and enter a building occupied by Vision Phase III International Outreach Center that is a *place of religious worship*, located at 208 Raleigh Ave., Greenville, NC, with the intent to commit a larceny therein, in violation of G.S. 14-54(A).

POSSESSION OF BURGLARY TOOLS

And the jurors for the State upon their oath present that on or about the 19th day of February, 2014, in the County named above the defendant named above unlawfully, willfully and feloniously did without lawful excuse have in the defendant’s possession an implement of housebreaking, a wooden handle pry bar and 24” bolt cutters, in violation of G.S. 14-55.

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INJURY TO PERSONAL PROPERTY

And the jurors for the State upon their oath present that on or about the 19th day of February, 2014, in the County named above the defendant named above unlawfully and willfully did wantonly injure personal property, a lock on the shed door of storage [sic] building, the property of Vision Phase III International Outreach Center, in violation of G.S. 14-160.

(Emphasis added.)

Thus, the first of the three charges contained in the indictment — the breaking or entering charge — identified Vision as “a place of religious worship[.]” The third charge — injury to personal property of Vision — stated that Defendant “unlawfully and willfully did injure personal property, a lock on the shed door of [a] storage building, the property of Vision Phase III International Outreach Center[.]” Therefore, by identifying Vision as a “place of religious worship” earlier in the indictment and then subsequently listing Vision as the owner of the personal property that Defendant damaged, the indictment comported with *Campbell*.

A converse ruling requiring the State to have expressly identified Vision as a place of public worship in *each* portion of the indictment containing a separate charge would constitute a hypertechnical interpretation of the requirements for indictments that we believe is inconsistent with applicable North Carolina caselaw on this issue. *See In re S.R.S.*, 180 N.C. App. 151, 153, 636 S.E.2d 277, 280 (2006) (“Our courts have recognized that while an indictment should give a defendant sufficient notice of the charges against him, it should not be subjected to hyper technical scrutiny with respect to form.”). Accordingly, the indictment here is properly construed as alleging that Vision — a place of religious worship — was an entity capable of owning property.

B. Fatal Variance Between Indictment and Evidence at Trial

[7] Defendant also argues that there was a fatal variance between the indictment and the evidence at trial as to the ownership of the lock mechanism forming the basis for the charge alleging injury to Vision’s personal property. The State asserts — and Defendant concedes — that this issue was not properly preserved because he failed to raise it in the trial court.

“In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion,

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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). “This Court repeatedly has held that a defendant must preserve the right to appeal a fatal variance.” *State v. Hill*, __ N.C. App. __, __, 785 S.E.2d 178, 182 (2016).

However, we elect to reach the merits of this argument pursuant to our authority under Rule 2 of the North Carolina Rules of Appellate Procedure. Rule 2 states as follows:

To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

N.C. R. App. P. 2.

In *State v. Gayton-Barbosa*, 197 N.C. App. 129, 676 S.E.2d 586 (2009), we invoked Rule 2 to review a similar fatal variance argument that had not been adequately preserved for appellate review. We reasoned that “it is difficult to contemplate a more ‘manifest injustice’ to a convicted defendant than that which would result from sustaining a conviction that lacked adequate evidentiary support, particularly when leaving the error in question unaddressed has double jeopardy implications.” *Id.* at 135, 676 S.E.2d at 590. Because this type of alleged error is “sufficiently serious to justify the exercise of our authority under Rule 2[,]” *State v. Campbell*, __ N.C. App. __, __, 777 S.E.2d 525, 530 (2015) (quotation marks and brackets omitted), we elect to exercise our discretion under Rule 2 and review this issue. *See Hill*, __ N.C. App. at __, 785 S.E.2d at 182 (invoking Rule 2 to address merits of defendant’s argument regarding fatal variance between indictment and evidence at trial).

[8] Defendant contends that the evidence presented at trial tended to show that the hasp affixed to the Barn door was owned by Sutton — rather than Vision — and that Vision merely owned a padlock securing the hasp. He further argues that although the evidence showed that the hasp was damaged, the evidence did not show that the padlock was injured as a result of the events of 19 February 2014.

At trial, multiple witnesses testified that they noticed the lock on the Barn door had been “busted into,” “pried open,” or “broken off.” Officer Bowen testified regarding his observation of the padlock assembly on the Barn door as follows:

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[OFFICER BOWEN:] As we were going back to the barn, there's a barn kind of in the center of this fenced-in area that we were at. We noticed that the door was open on this barn. Upon closer inspection of the door, you go up – and it was padlocked. You know, on a padlock usually you have one side that's screwed to the door frame and the other to the door. Well, it appeared that one side of the frame where the lock [sic] had been pried off. So basically you could open the door – the whole padlock assembly had come off with it. So it looked like it had been forced open based on what I could see.

The State also presented evidence from Detective Smith on this subject.

[PROSECUTOR:] What did you do next?

[DETECTIVE SMITH:] Continued to search around. There was a lock that appeared to be broken and we cleared the [Barn].

[PROSECUTOR:] Well, let me ask you about that. You mentioned a lock; where was the lock?

[DETECTIVE SMITH:] By one of [sic] doors to the [Barn].

. . . .

[PROSECUTOR:] Is this the same [Barn] where the lock appeared to have been broken?

[DETECTIVE SMITH:] Yes, sir.

Pastor William Harper also testified during direct examination regarding this lock.

[PROSECUTOR:] I'm showing you now what's been marked State's Exhibit 9. Can you identify that?

[PASTOR HARPER:] Yeah, that's the door of the barn that sits on the left as you look at it, and it's a lock that's been broken off.

. . . .

[PROSECUTOR:] Now, when is the last time you had seen the [Barn]?

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[PASTOR HARPER:] The day before; I normally do a normal check through the whole –

[PROSECUTOR:] And how do you normally secure that – or how is it normally secured?

[PASTOR HARPER:] Well, lock and key; it's a lock and key that we use.

Finally, Jonathan Sutton, the owner of Sutton Amusement Company, testified regarding the ownership of the lock on the door of the Barn.

[PROSECUTOR:] You mentioned the [Barn] that, I think you said, was jimmied or broken in – busted into, I think, is what you said; can you describe that building for me?

[SUTTON:] It's a small storage building on cinder blocks. I would estimate in size maybe, you know, twelve by ten, if even.

[PROSECUTOR:] And what do you keep in there?

[SUTTON:] The church – I allow the church to utilize that [Barn]. I don't know what would have been in that [Barn], the church uses it.

[PROSECUTOR:] Do you normally secure that or does somebody else secure that [Barn]?

[SUTTON:] Typically the church, you know, secures it.

While admittedly the evidence presented at trial regarding the damage to the lock on the door of the Barn was not a model of clarity, viewing the evidence in the light most favorable to the State — as we must — we believe that sufficient evidence was presented to allow the jury to find that Vision owned the lock that secured the Barn door and that this lock was damaged. Thus, we cannot say that a variance existed between the charge alleged in the indictment and the evidence at trial. Accordingly, this argument is overruled.

C. Sufficiency of Evidence as to Defendant's Convictions for Injury to Personal Property

[9] Finally, Defendant contends that his mere presence at the scene of the break-in was insufficient to support his conviction of injury to personal property. Once again, we disagree.

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The essential elements of injury to the personal property of another are “(1) that personal property was injured; (2) that the personal property was that of another, *i.e.*, someone other than the person or persons accused; (3) that the injury was inflicted wantonly and wil[l]fully; and (4) that the injury was inflicted by the person or persons accused.” *In re Meaut*, 51 N.C. App. 153, 155, 275 S.E.2d 200, 201 (1981) (quotation marks omitted).

As discussed above, the evidence at trial — when viewed in the light most favorable to the State — was that (1) Sutton secured the main gate with a padlock; (2) Vision secured the Barn door with a padlock of its own; (3) officers received a 911 call that an individual was inside the fenced-in area at 1:00 a.m.; (4) Defendant was found by officers apparently attempting to leave the premises by climbing the brick wall; (5) a pry bar was found on the ground next to the Barn and bolt cutters were located on the ground outside the main gate; and (6) broken locks were discovered on the ground next to the main gate and the Barn. Therefore, we reject Defendant’s argument that the evidence simply showed his mere presence at the scene. To the contrary, the evidence presented by the State was sufficient to allow the jury to find that he was guilty of injury to the personal property of both Vision and Sutton.

Conclusion

For the reasons stated above, we vacate Defendant’s conviction of felony breaking or entering into a place of religious worship under N.C. Gen. Stat. § 14-54.1 and remand for entry of judgment on the lesser-included offense of felony breaking or entering and resentencing. We conclude that Defendant received a fair trial free from error as to his remaining convictions.²

NO ERROR IN PART; VACATED IN PART; REMANDED WITH INSTRUCTIONS.

Chief Judge McGEE and Judge BERGER concur.

2. Defendant also argues in his brief that the trial court improperly added an extra point to his prior record level during sentencing, and the State concedes error on this issue. However, this argument was linked to Defendant’s conviction under N.C. Gen. Stat. § 14-54.1. Because we are vacating his conviction for that offense and remanding for resentencing, this argument is moot.

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STATE OF NORTH CAROLINA

v.

DANIEL MYLETT, DEFENDANT

No. COA16-816

Filed 18 April 2017

1. Criminal Law—continuance—time to prepare motion to dismiss—bodycam footage destroyed—no Brady violation

The trial court did not abuse its discretion by denying defendant's motion for a continuance in a prosecution for assaulting a government officer. The motion for a continuance was for the purpose of preparing a motion to dismiss based on the destruction of video footage from officers' body cameras. The recordings were erased in accordance with routine policy and had been reviewed by the prosecutor and defendant's original counsel. Defense counsel's decision not to preserve copies could not be the basis of a contention that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963). Moreover, defendant did not establish precisely how a continuance would have helped him prepare for trial.

2. Police Officers—assaulting a public officer—general intent crime—spitting at another—hitting officer

The trial court did not err by denying defendant's motion to dismiss a charge of assaulting a government officer where defendant said he spit at another but hit the officer. In accord with *State v. Page*, 346 N.C. 689 (1997), assault on a government official is a general intent crime and N.C.G.S. § 14-33(c)(4) was satisfied.

Appeal by defendant from judgment entered 31 March 2016 by Judge Alan Z. Thornburg in Watauga County Superior Court. Heard in the Court of Appeals 9 February 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Kevin G. Mahoney, for the State.

Arnold & Smith, PLLC, by Laura M. Cobb, for defendant-appellant.

MURPHY, Judge.

Daniel Mylett ("Defendant") appeals from his conviction for assault on a government officer. On appeal, he contends that the trial court

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erred by (1) denying his motion for a continuance; and (2) denying his motions to dismiss. Specifically, he argues that the trial court should have granted his motion for a continuance so that he could prepare a motion to dismiss on the basis that video footage of the assault recorded on officers' body cameras was destroyed prior to trial in violation of *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963).

He further asserts that, because he did not intend to assault a government officer, but instead intended to assault civilians standing behind the officer, the charge of assault on a government officer in violation of N.C.G.S. § 14-33(c)(4) (2015) was erroneously submitted to the jury as the State failed to establish the requisite intent element of the offense. After careful review, we reject Defendant's arguments and conclude that he received a fair trial free from error.

Factual Background

At 1:37 a.m. on 29 August 2015, Officer Jason Lolies ("Officer Lolies") and Officer Forrest ("Officer Forrest") with the Boone Police Department responded to a call regarding a male who was bleeding from his head at 200 Misty Lane in Boone, North Carolina. Upon arriving at the Misty Lane address, Officers Lolies and Forrest encountered several hundred individuals, most of whom were college-aged.

Officer Lolies recalled that "[a]s we got to the crest of the hill, the driveway, that's when we heard a commotion and it sounded like some arguments, some screaming, some fighting sort of" coming from a smaller group of approximately 30 individuals. Upon investigation, Officer Lolies observed "people pushing and shoving over top of [Defendant]" who was "laying on the ground." Officer Lolies continued that "[i]t appeared that some of the people were trying to defend [Defendant] and there was obviously people trying to attack him[.]"

The officers moved in to break up the altercation, and, after subduing the combatants, were approached by Defendant's girlfriend, Kathryn Palmer ("Palmer"), who informed them that Defendant was bleeding from his head. Officer Lolies then went over to Defendant and observed that both of Defendant's eyes were bleeding and that he had bruising and a large knot developing over his left eye.

Defendant then jumped up from the ground where he was lying, acted aggressively towards Officer Lolies, and told him "to do [his] motherfucking job." While Defendant was yelling at him, Officer Lolies detected a strong odor of alcohol on his breath. Defendant then explained

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to Officer Lolie that the reason he had been beaten was because he had tried to stop Palmer from dancing with another man.

Shortly thereafter, Officer Dennis O'Neal ("Officer O'Neal") arrived on the scene to assist Officers Lolie and Forrest. Officers Lolie and Forrest attempted to question several other individuals on hand, but were unable to do so because "[Defendant] was pretty erratically challenging people to fights. He would call them pussies, just very loud" and "[h]e charged at a couple of people a couple of different times and Officer Forrest, and eventually when Officer O'Neal arrived on the scene they would restrain him to prevent him from doing that." Defendant continued to verbally berate Officers Lolie, Forrest, and O'Neal by "telling [them] as law enforcement officers to do [their] . . . motherfucking jobs."

The officers called for an ambulance for Defendant, and, upon its arrival, Officer O'Neal directed Defendant into the back of the vehicle. Defendant initially complied, but proceeded to exit abruptly from the ambulance. Defendant resumed swearing at the officers and challenging nearby individuals to fight him.

Officer O'Neal positioned himself between Defendant and these individuals and at that point Defendant "attempted to spit at folks that were walking behind, behind [Officer O'Neal's] location, over [his] shoulder." Defendant's spit made contact with the left side of Officer O'Neal's face and shirt. Defendant spat two additional times, despite Officer O'Neal ordering him to stop, again hitting Officer O'Neal in his face and on his shirt.

Officer O'Neal ultimately corralled Defendant back into the ambulance and rode with him to Watauga Medical Center to receive treatment for his injuries. Defendant continued swearing at and verbally berating Officer O'Neal in the ambulance and at one point "stood up in the back of . . . the ambulance, off the gurney, and began punching the interior walls of the ambulance" prompting Officer O'Neal to restrain him until they reached the hospital. Later that day, a warrant was issued and Defendant was arrested for assault on a government officer in connection with his spitting on Officer O'Neal.

Prior to Defendant's district court trial, his original trial counsel received copies of video recordings taken on the officers' body-cams of the events surrounding the 29 August 2015 altercation at 200 Misty Lane. However, counsel opted not to obtain copies or use the footage at trial. After counsel's review, the original recordings were destroyed in accordance with the Boone Police Department's evidence retention schedule.

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On 9 November 2015, Defendant was tried before the Honorable Rebecca E. Eggers-Gryder in Watauga County District Court. That same day, Judge Eggers-Gryder found Defendant guilty of assault on a government officer and sentenced him to 60 days imprisonment, suspended sentence, and placed him on 12 months supervised probation. On 12 November 2015, Defendant appealed to superior court for a trial *de novo*.

A jury trial was held in Watauga County Superior Court before the Honorable Alan Z. Thornburg from 29 March 2016 through 31 March 2016. Prior to the jury being empaneled, Defendant's new trial counsel moved for a continuance on the ground that counsel wished to prepare a motion to dismiss since the video recordings of the events of 29 August 2015 taken on the officers' body cameras had been destroyed and were therefore unavailable for use by the defense. After hearing arguments from defense counsel and the State, the trial court ultimately denied the motion. Significantly, no motion was filed in District Court relating to the videos and defense counsel did not move to dismiss on this ground in the four and a half months prior to the trial in Superior Court.¹

At trial, the State proceeded on a theory of transferred intent as to the assault on an government officer charge. To this end, it elicited testimony from, among other witnesses, Officers Lolie and O'Neal.

Officer O'Neal testified as follows concerning the spitting incident:

Q. I'm sorry – but was he just talking loudly and a little bit of spit came out or was he actually projecting spit?

A. He was attempting – or projected, projecting spit attempting to hit folks that were walking behind me.

Q. And when it hit you was it just a little driplet (sic) or was it a lot of liquid?

A. If you know it was like the, you know, what a sneeze feels like, you know, a sneeze will make you feel the droplets on your face and you can see you got some stuff on your shirt.

Q. And how about the third time, did that hit you?

1. Although appellate counsel for Defendant argued for the first time at oral argument that Defendant's original counsel had subpoenaed the videos, the record is silent as to the issuance of any subpoenas by Defendant at any stage.

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A. Yes, sir, it did, but it was, there wasn't near as much, you know, liquid, or I couldn't feel as much on the third time.

....

Q. And what did you do at that point?

A. I asked him to stop. I said, please stop, you know, I commanded, you know, stop spitting.

Q. And the second time did you hear the sound beforehand?

A. Yes.

Q. All right. And where did you get hit?

A. It would have been right here on my uniform shirt.

Q. Did any of it actually go over your shoulder?

A. Sir, I don't know that.

Q. And the third time you said was it still –

A. Yes.

Q. And was he trying to kind of get around you to spit?

A. Yes, yes he was.

Officer Lories, in turn, testified as follows concerning the spitting incident:

Q. So I think I asked you, what happened, did anything draw your attention to Officer O'Neal and the Defendant at some point later, once the ambulance arrived?

A. Yes, sir. I had three people over here, basically detained at this point, but I intended on placing them under arrest when I got the chance. And I was dealing with them, especially the one that ran so much. But I heard Officer O'Neal, who was dealing with [Defendant] at the time, ask the question to the effect of, I don't remember the exact words, but did you just spit on me.

Q. And what did you do when you heard that?

A. I looked over at Officer O'Neal, made sure he was okay, I didn't go over there and assist him or anything, but I just kept my eye on them to watch them to make sure that they were okay. And I continued to deal with these three people here.

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Q. Did you see Officer O'Neal right after he said that do anything?

A. He made a gesture across the top of his uniform.

Q. And what did that gesture appear to you to be?

MR. ISAACS: Objection.

THE COURT: Overruled.

A. It appeared to me that he was wiping something off of his uniform.

Q. Could you tell if anyone else was around Officer O'Neal and the defendant when that incident occurred?

A. There was some other people around, I feel like it may have been his girlfriend and his brother, and there seemed to be two males who were giving this information in support of [Defendant's] statements and sort of his recollection of events, but there was also some people from the opposing party gathered around. And it seemed to me that these people in the background were taunting each other.

Q. And the people that you thought were taunting each other for the opposing party, where were they standing in relation to Officer O'Neal?

A. They were all around. We were intermingled with all these people.

Defendant moved to dismiss the charge of assault on a government officer at the close of the State's evidence and renewed his motion at the close of all the evidence. The trial court denied both motions.

The jury found Defendant guilty of assault on a government officer. The trial court sentenced Defendant to ten days imprisonment to be served over five consecutive weekends and ordered Defendant to pay costs in the amount of \$1,657.50. It is from this judgment that Defendant appeals.

Analysis**I. Motion for Continuance**

[1] Defendant initially argues on appeal that the trial court erred by denying his motion for a continuance. Specifically, Defendant claims he should have been allowed additional time to file a motion due to the destruction of the officers' body camera video recordings of the events

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of 29 August 2015 amounting to a *Brady* violation. We disagree. “A motion for a continuance is generally a matter within the trial court’s discretion, and a denial is not error absent an abuse of that discretion. Defendant, therefore, bears the burden of showing that the trial court’s ruling was so arbitrary that it could not have been the result of a reasoned decision.” *State v. Carter*, 184 N.C. App. 706, 711, 646 S.E.2d 846, 850 (2007) (internal citations and quotation marks omitted). The trial court did not abuse its discretion.

“In *Brady*, the United States Supreme Court held that suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. This includes evidence known only to police investigators and not to the prosecutor. The duty to disclose such evidence is applicable even though there has been no request by the accused.” *State v. Dorman*, 225 N.C. App. 599, 620, 737 S.E.2d 452, 466 (internal citations, quotation marks, and brackets omitted), *appeal dismissed and disc. review denied*, 366 N.C. 594, 743 S.E.2d 205 (2013).

To establish a *Brady* violation, a defendant must show (1) that the prosecution suppressed evidence; (2) that the evidence was favorable to the defense; and (3) that the evidence was material to an issue at trial. Favorable evidence can be either exculpatory or useful in impeaching the State’s evidence. Evidence is considered material if there is a reasonable probability of a different result had the evidence been disclosed. A reasonable probability is a probability sufficient to undermine confidence in the outcome. However, when the evidence is only potentially useful or when no more can be said of the evidence than that it could have been subjected to tests, the results of which might have exonerated the defendant, the State’s failure to preserve the evidence does not violate the defendant’s constitutional rights unless a defendant can show bad faith on the part of the State.

Id. at 620-21, 737 S.E.2d at 466 (internal citations, quotation marks, and brackets omitted).

In the present case, the record clearly establishes that the recordings at issue were erased in routine conformity with the Boone Police Department’s evidence retention schedule. It is undisputed that prior to their destruction, the recordings were reviewed by both Defendant’s

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original counsel² and the prosecutor. Defense counsel's decision not to make or preserve copies of the videos — regardless of counsel's reason for declining to do so — cannot serve as a basis for arguing a *Brady* violation was committed by the State. See *State v. Jennings*, 333 N.C. 579, 604, 430 S.E.2d 188, 200 (“The law is . . . clear, however, that ‘[a] defendant is not prejudiced . . . by error resulting from his own conduct.’” (quoting N.C.G.S. § 15A-1443(c))), *cert. denied*, 510 U.S. 1028, 126 L. Ed. 2d 602 (1993). Consequently, as nothing in the record tends to demonstrate that the Boone Police Department or the State suppressed evidence or otherwise acted in bad faith, Defendant has failed to carry his burden in establishing a due process violation under *Brady*.

In addition to Defendant's inability to demonstrate that a *Brady* violation occurred, it is also worth emphasizing that he has failed to establish precisely how a continuance would have enabled him to better prepare for trial given that it is undisputed that no copies of the videos remain in existence. Therefore, as a functional matter, the granting of a continuance by the trial court would have served no operative purpose. See *State v. Gray*, 234 N.C. App. 197, 201-02, 758 S.E.2d 699, 702-03 (2014) (“To establish that the trial court's failure to give additional time to prepare constituted a constitutional violation, defendant must show how his case would have been better prepared had the continuance been granted or that he was materially prejudiced by the denial of his motion.” (citation and quotation marks omitted)), *disc. review improvidently allowed*, 368 N.C. 324, 776 S.E.2d 681 (2015).

For all of these reasons, the trial court did not err in denying Defendant's motion for a continuance. Defendant's arguments on this issue are meritless.

II. Assault on a Government Officer

[2] Defendant's final argument on appeal is that the trial court erred by denying his motions to dismiss the charge of assault on a government officer. Specifically, Defendant contends that, because the evidence at trial tended to establish that he intended to assault civilians standing behind Officer O'Neal and not Officer O'Neal himself, the State failed to establish the knowledge element of N.C.G.S. § 14-33(c)(4). We disagree.

The trial court's denial of a motion to dismiss is reviewed *de novo* on appeal. Upon defendant's motion for dismissal,

2. Although the record is vague on this point, it appears that Defendant's original counsel, Shannon Aldous, was replaced as counsel by Kenneth D. Isaacs sometime after Defendant was found guilty in District Court and prior to his trial *de novo* in Superior Court.

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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. Williams, __ N.C. App. __, __, 784 S.E.2d 232, 233 (citation omitted), *disc. review denied*, __ N.C. __, 792 S.E.2d 503 (2016).

N.C.G.S. § 14-33(c)(4) provides that

(c) Unless the conduct is covered under some other provision of law providing greater punishment, any person who commits any assault, assault and battery, or affray is guilty of a Class A1 misdemeanor if, in the course of the assault, assault and battery, or affray, he or she:

....

(4) Assaults an officer or employee of the State or any political subdivision of the State, when the officer or employee is discharging or attempting to discharge his official duties[.]

"It is well established that this Court's principal aim when interpreting statutes is to effectuate the purpose of the legislature in enacting the statute, and that statutory interpretation properly begins with an examination of the plain words of the statute." *State v. Williams*, 232 N.C. App. 152, 158, 754 S.E.2d 418, 423 (internal citations, quotation marks, and brackets omitted), *appeal dismissed and disc. review denied*, 367 N.C. 784, 766 S.E.2d 846 (2014).

It is fundamental that

[t]he primary objective of statutory interpretation is to ascertain and effectuate the intent of the legislature. If the language of the statute is clear and is not ambiguous, we must conclude that the legislature intended the statute to be implemented according to the plain meaning of its terms. Thus, in effectuating legislative intent, it is our duty to give effect to the words actually used in a statute and not to delete words used or to insert words not used.

Lunsford v. Mills, 367 N.C. 618, 623, 766 S.E.2d 297, 301 (2014) (internal citations and quotation marks omitted). Moreover, "[w]here . . . the General Assembly includes particular language in one section of a statute but omits it in another section of the same Act, it is generally

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presumed that the legislative body acts intentionally and purposely in the disparate inclusion or exclusion.” *Comstock v. Comstock*, __ N.C. App. __, __, 780 S.E.2d 183, 186 (2015) (citation, quotation marks, and brackets omitted).

Significantly, the Legislature did not choose to include a reference to intent in authoring N.C.G.S. § 14-33(c)(4) despite the fact that it did so in other sections of Article 8, Subchapter III of Chapter 14 of the North Carolina General Statutes concerning criminal assaults. *See, e.g.*, N.C.G.S. § 14-32(a) (2015) (“Any person who assaults another person with a deadly weapon with *intent* to kill and inflicts serious injury shall be punished as a Class C felon.” (emphasis added)). Nor has this Court specifically delineated a scienter requirement in its discussion of the offense of assault on a government officer. Instead, we have simply stated that “[t]he essential elements of a charge of assault on a government official are: (1) an assault (2) on a government official (3) in the actual or attempted discharge of his duties.” *State v. Noel*, 202 N.C. App. 715, 718, 690 S.E.2d 10, 13, *disc. review denied*, 364 N.C. 246, 699 S.E.2d 642 (2010).

Defendant concedes that he did, in fact, commit an assault and that Officer O’Neal was a law enforcement officer discharging his duty. Therefore, we need only address whether assault on a government officer in violation of N.C.G.S. § 14-33(c)(4) is a general intent or, alternatively, a specific intent crime.

Nonetheless, Defendant maintains that, even assuming he knew that Officer O’Neal was a police officer discharging a duty of his office at the time of the assault, the State failed to provide sufficient evidence that he *intended* to assault Officer O’Neal. Essentially, he asserts that all of the evidence tended to show that he intended to assault one or more civilians standing behind Officer O’Neal, and not Officer O’Neal himself, thereby precluding him from being found guilty of the offense of assault on a government officer.

We find our Supreme Court’s decision in *State v. Page*, 346 N.C. 689, 488 S.E.2d 225 (1997), *cert. denied*, 522 U.S. 1056, 139 L. Ed. 2d 651 (1998), instructive on this point. In *Page*, the defendant was convicted of first-degree murder and assault with a deadly weapon on government officers for firing a high-powered rifle at several officers, one of whom was hit and subsequently died from his gunshot wound. *Id.* at 692-94, 488 S.E.2d at 228. At trial, Page asserted that he was suffering from post-traumatic stress disorder at the time he shot at the officers and requested a jury instruction on diminished capacity in order to attempt to repudiate the knowledge element of N.C.G.S. § 14-34.2. *Id.* at 694, 488

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S.E.2d at 229. The trial court declined to provide such an instruction and Page was ultimately sentenced to death. *Id.* at 698, 488 S.E.2d at 231.

On direct appeal to our Supreme Court, Page argued that the jury should have been instructed on diminished capacity in order to negate the knowledge element of N.C.G.S. § 14-34.2. The Court rejected this argument stating the following:

This Court has held that knowledge that the victim is an officer or employee of the State is an essential element of this offense. *State v. Avery*, 315 N.C. 1, 31, 337 S.E.2d 786, 803 (1985).

[Page] argues that the diminished-capacity defense should be available to negate the knowledge element required by *Avery*. This argument is without merit. We allow defendants to assert diminished mental capacity as a defense to a charge of premeditated and deliberate murder because we recognize that some mental conditions may impede a defendant's ability to form a specific intent to kill. *See Shank*, 322 N.C. at 250-51, 367 S.E.2d at 644. *This reasoning is not applicable to the knowledge element of the felony of assault with a deadly weapon on a government officer. Knowledge of the victim's status as a government officer is simply a fact that the State must prove; it is not a state of mind to which the diminished-capacity defense may be applied.* In this case, the State presented evidence tending to prove this fact. The trial court properly instructed the jury that, in order to convict [Page] of these charges, it must find that [Page] "knew or had reasonable grounds to know" that the victims were officers performing official duties. The State's evidence indicated that uniformed police officers and marked police cars were directly in [Page's] line of vision. Several officers testified that defendant shot in their direction. Also, defendant's ex-girlfriend testified that she received a telephone call from [Page] in which he stated that his apartment was surrounded by police officers. This evidence was sufficient to support the jury's conclusion that the knowledge element of assault with a deadly weapon on a government officer was satisfied.

[Page] argues further that the diminished-capacity defense should be available to negate the state of mind required

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for defendant to be convicted of a violation of N.C.G.S. 14-34.2. “In order to return a verdict of guilty of assault with a firearm upon a law enforcement officer in the performance of his duties, the jury is not required to find the defendant possessed any intent beyond the intent to commit the unlawful act, and this will be inferred or presumed from the act itself.” *State v. Mayberry*, 38 N.C. App. 509, 513, 248 S.E.2d 402, 405 (1978). *Thus, this felony may be described as a general-intent offense.*

Id. at 699-700, 488 S.E.2d at 232 (emphasis added).

While *Page* concerns an assault with a deadly weapon on a government officer, we find its reasoning to be equally applicable to the offense of assault on a government officer. Indeed, the only substantive difference between N.C.G.S. § 14-33(c)(4) and N.C.G.S. § 14-34.2 is that the latter requires that the assault be committed with a firearm. We therefore hold, in accordance with *Page*, that assault on a government officer is a general intent crime. As such, we are satisfied that when Defendant spat at members of the crowd and Officer O’Neal was struck by Defendant’s spit, the requirements of N.C.G.S. § 14-33(c)(4) were satisfied as, for the reasons stated above, the State clearly established — and indeed Defendant conceded at oral argument — that Defendant knew Officer O’Neal was a law enforcement officer and Defendant intended to commit an assault.

Were we to endorse Defendant’s argument and construe N.C.G.S. § 14-33(c)(4) as necessitating specific intent — as opposed to general intent — the intrinsic purpose of the statute would necessarily be defeated. Therefore, we expressly hold that the knowledge element of assault on a government officer in violation of N.C.G.S. § 14-33(c)(4) is satisfied whenever a defendant while in the course of assaulting another individual instead assaults an individual he knows, or reasonably should know, is a government officer. Defendant’s argument on this issue is consequently dismissed.

Conclusion

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

NO ERROR.

Chief Judge McGEE and Judge DAVIS concur.

STATE v. THORPE

[253 N.C. App. 210 (2017)]

STATE OF NORTH CAROLINA

v.

EDWARD THORPE, DEFENDANT

No. COA16-1008

Filed 18 April 2017

Constitutional Law—right to counsel—prior conviction—clerk’s electronic records

The trial court did not err by denying defendant’s motion to suppress a prior conviction used for habitual offender status. Defendant contended that the prior conviction was obtained in violation of his right to counsel, but there were no written records of the trial court’s order. The presumption of correctness was applied to the clerk’s electronic records, which supported the trial court’s findings and conclusion that the prior conviction was not obtained in violation of defendant’s right to counsel.

Appeal by defendant from judgment entered 9 February 2016 by Judge A. Graham Shirley in Wake County Superior Court. Heard in the Court of Appeals 22 February 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sharon Patrick-Wilson, for the State.

Mary McCullers Reece, for defendant-appellant.

BERGER, Judge.

Edward Thorpe, a.k.a. Marquis Tayshawn Evans, (“Defendant”) pleaded guilty to felony breaking and entering, larceny after breaking and entering, felony possession of stolen goods, two counts of habitual misdemeanor assault, and having attained habitual felon status. Defendant’s appeal arises from the trial court’s denial of a motion to suppress a prior conviction. Defendant alleges that the trial court erred in denying his motion to suppress because said conviction was obtained in violation of his right to counsel. We disagree.

Factual and Procedural Background

On January 26, 2015, a Wake County Grand Jury indicted Defendant for breaking and entering in violation of N.C. Gen. Stat. § 14-54(a), larceny after breaking and entering in violation of N.C. Gen. Stat. § 14-72(b)(2),

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and possession of stolen goods in violation of N.C. Gen. Stat. § 14-71.1. On January 27, 2015, the Grand Jury issued a True Bill of Indictment alleging that Defendant had attained habitual felon status pursuant to N.C. Gen. Stat. § 14-7.1. Subsequently, on July 7, 2015, Defendant was indicted for two counts of assault on a female in violation of N.C. Gen. Stat. § 14-33(c)(2), and one count of habitual misdemeanor assault in violation of N.C. Gen. Stat. § 14-33.2. Indictments for two additional counts of assault on a female and habitual misdemeanor assault were handed down by the Grand Jury on August 4, 2015. An additional habitual felon indictment was issued against Defendant on September 29, 2015.

On February 9, 2016, Defendant pleaded guilty to felony breaking and entering, larceny after breaking and entering, felony possession of stolen goods, two counts of habitual misdemeanor assault, and having attained habitual felon status. These charges were consolidated into one judgment, and Defendant was sentenced to 77 to 105 months in prison.

Prior to the trial court accepting his plea, however, Defendant filed a motion to suppress, pursuant to N.C. Gen. Stat. § 15A-980, relating to an underlying assault inflicting serious injury conviction utilized in the two indictments for habitual misdemeanor assault. Defendant argued that this conviction should be suppressed because it “was obtained in violation of his right to Counsel.” Defendant filed an affidavit with his motion to suppress and asserted that, when he pleaded guilty to the charges of assault inflicting serious injury and resisting a public officer in Wake County District Court file number 99 CR 57226, he was not represented by counsel, was indigent, and did not waive his right to counsel. Defendant also alleged that he had other pending charges at the time for which he requested and received court-appointed counsel.

On February 8, 2016, a hearing on the motion to suppress was held. Defendant’s only evidence was his own testimony. Defendant testified that when the charge at issue was pending, he was living with his father and brother, was not employed, owned no property, and was therefore indigent.

Defendant also stated that he would not have gone to court without an attorney representing him. Defendant asserted that he had representation for other charges during that time period, but claimed he had no representation on the charge at issue. When asked by his attorney if he would have gone to court without an attorney during that time period, Defendant testified, “absolutely not.”

Ms. Tonya Woodlief, Assistant Clerk of Wake County Superior Court, was called by the State to testify. Ms. Woodlief stated that

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she has processed and maintained records for the Criminal Division for thirteen years, and, at the time of her testimony, was head of the Criminal Division.

Ms. Woodlief testified that the Clerk's Office keeps records of case events for misdemeanor cases by hand-written notes directly on the shuck.¹ In Wake County, the physical files of misdemeanor criminal records are maintained for five years and then destroyed. The electronic summaries of these records are retained after the physical files are destroyed.

The electronic records kept and maintained by the Clerk showed that Defendant had retained an attorney and had pleaded guilty to the charges of assault inflicting serious injury and resisting a public officer in criminal case file 99 CR 57226. Ms. Woodlief testified that the designation "R" was utilized in the Clerk's Office to reflect that a defendant had retained counsel. In addition, "N/A" was used when the handwritten notes on the shuck were not legible or the attorney's name was unknown to the clerk. The designation "N/A" was never used when a defendant did not have counsel. Ms. Woodlief also testified that the designations "R" and "N/A" appeared in the electronic record for 99 CR 57226, indicating that the name of Defendant's retained attorney was not able to be determined because either the defense attorney neglected to write his or her name on the shuck, or the handwriting was illegible and the name could not be ascertained.

The trial court denied the motion to suppress, making oral findings of fact that even though he was indigent and did not waive his right to counsel, Defendant was represented by counsel in his prior conviction for assault inflicting serious injury. Defendant timely filed notice of appeal.

Standard of Review

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982) (citation omitted). The trial court's "conclusions of law are reviewable *de novo*." *State v. Hensley*, 201 N.C. App. 607, 609, 687 S.E.2d 309, 311 (2010) (citation omitted).

1. A shuck is an envelope that contains documents filed in district court criminal cases.

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Analysis

Defendant's motion to suppress was filed pursuant to N.C. Gen. Stat. § 15A-980, which provides:

(a) A defendant has the right to suppress the use of a prior conviction that was obtained in violation of his right to counsel if its use by the State . . . will:

- (1) Increase the degree of crime of which the defendant would be guilty; or
- (2) Result in a sentence of imprisonment that otherwise would not be imposed; or
- (3) Result in a lengthened sentence of imprisonment.

(b) A defendant who has grounds to suppress the use of a conviction in evidence at a trial or other proceeding as set forth in (a) must do so by motion made in accordance with the procedure in this Article. A defendant waives his right to suppress use of a prior conviction if he does not move to suppress it.

(c) When a defendant has moved to suppress use of a prior conviction under the terms of subsection (a), he has the burden of proving by the preponderance of the evidence that the conviction was obtained in violation of his right to counsel. To prevail, he must prove that at the time of the conviction he was indigent, had no counsel, and had not waived his right to counsel. If the defendant proves that a prior conviction was obtained in violation of his right to counsel, the judge must suppress use of the conviction at trial or in any other proceeding if its use will contravene the provisions of subsection (a).

N.C. Gen. Stat. § 15A-980 (2016). Thus, when seeking to suppress prior convictions pursuant to N.C. Gen. Stat. § 15A-980(c), to prevail a defendant must prove that for the purposes of the adjudication of the prior conviction: "(1) he was indigent, (2) he had no counsel, and (3) he did not waive his right to counsel." *State v. Jordan*, 174 N.C. App. 479, 482, 621 S.E.2d 229, 231 (2005) (citations omitted).

In *State v. Jordan*, the defendant sought to suppress prior convictions pursuant to N.C. Gen. Stat. § 15A-980. He alleged that the convictions used to calculate his prior record level, thereby lengthening his sentence, were obtained in violation of his right to counsel. The

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Clerk's records of the prior convictions were destroyed, and the defendant's only evidence was his own testimony that he did not have representation and he could not afford an attorney. This Court held that a trial court's final judgment, such as the defendant's prior convictions, is entitled to a "presumption of regularity" and that the presumption applied to prior convictions challenged under N.C. Gen. Stat. § 15A-980. *Id.* at 484-85, 621 S.E.2d at 233.

Official actions taken by public officers in North Carolina are accorded the presumption of regularity. Accordingly, the official actions of clerks of court are afforded this presumption of regularity. . . . The presumption is only one of fact and is therefore rebuttable. But in order for the [defendant] to rebut the presumption he must produce 'competent, material and substantial' evidence. . . .

State v. Belton, 169 N.C. App. 350, 356, 610 S.E.2d 283, 287 (2005) (internal citations, parentheticals, and quotation marks omitted).

In the case *sub judice*, the trial court denied Defendant's motion to suppress pursuant to N.C. Gen. Stat. § 15A-980 in open court, providing findings of fact and conclusions of law orally, which are found in the record. The trial court requested the State reduce that order to writing, but no written order appears in the record.

In determining whether evidence should be suppressed, the trial court shall make findings of fact and conclusions of law which shall be included in the record. A written determination setting forth the findings and conclusions is not necessary, but it is the better practice. . . . Thus, our cases require findings of fact only when there is a material conflict in the evidence and allow the trial court to make these findings either orally or in writing.

State v. Bartlett, 368 N.C. 309, 312, 776 S.E.2d 672, 674 (2015) (internal citations, parentheticals, and quotation marks omitted). The trial court found that Defendant met his burden of proof that he was indigent and had not waived counsel. However, the trial court also found Defendant had failed to carry his burden of proof that he had no counsel, the second *Jordan* factor and essential for him to prevail. Defendant testified that he would not have proceeded if he did not have counsel. The court specifically found that, "[i]f he says he wouldn't have done something if a condition had not existed and he did that thing, then . . . it's clear that the condition did exist and that is supported by the records of the State"

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The trial court found that the Wake County Clerk of Superior Court's records demonstrated that Defendant had representation for the assault inflicting serious injury conviction. The designations "R" and "N/A" in the electronic record for Defendant's conviction indicated he had retained an attorney whose name was illegible or unknown to the clerk entering the data. Applying the presumption of regularity to the clerk's electronic records, we presume that the information contained in these records to be accurate, and Defendant failed to rebut said presumption with "competent, material and substantial evidence."

The trial court's findings of fact are supported by the competent evidence presented at the suppression hearing and included in the record, and are, thus, conclusively binding on this Court. These findings of fact support the legal conclusion that Defendant's conviction for assault inflicting serious injury was not obtained in violation of his right to counsel and was properly utilized in his indictment for habitual misdemeanor assault.

Conclusion

Based upon a thorough and careful review of the record, transcripts, and briefs, we conclude there was no error in the trial court's denial of Defendant's motion to suppress.

NO ERROR.

Judges CALABRIA and HUNTER, JR. concur.

TERRY v. CHEESECAKE FACTORY RESTS., INC.

[253 N.C. App. 216 (2017)]

LEE K. TERRY AND KRISTEN TERRY, INDIVIDUALLY AND AS PARENTS AND
GENERAL GUARDIANS FOR KARRYNE TERRY, A MINOR, PLAINTIFFS

v.

THE CHEESECAKE FACTORY RESTAURANTS, INC., DEFENDANT

No. COA16-549

Filed 18 April 2017

1. Appeal and Error—change of venue—interlocutory—substantial right

An order changing venue as a matter of right was interlocutory because it did not dispose of the case, but it was immediately appealable as affecting a substantial right.

2. Venue—chain restaurant—multiple counties

The trial court erred by transferring venue from Durham County to Wake County as a matter of right in a negligence action involving a restaurant that served cheesecake which contained nuts. Defendant, though formed in California, maintained a registered office in N.C. and was thus a domestic corporation, and defendant did business in both counties. Durham County was a proper venue and the trial court erred by changing venue as a matter of right.

Appeal by plaintiffs from order entered 2 March 2016 by Judge Henry W. Hight, Jr. in Superior Court, Durham County. Heard in the Court of Appeals 3 November 2016.

Law Offices of Thomas F. Loflin III, by Thomas F. Loflin III, for plaintiff-appellants.

Hedrick Gardner Kincheloe & Garofalo, LLP, by M. Duane Jones and Kristie Hedrick Farwell, for defendant-appellee.

STROUD, Judge.

Plaintiffs appeal an order transferring venue of their negligence claim from Durham County to Wake County. Because the pleadings and discovery show that defendant maintains a place of business in Durham County, Durham County was *a* proper venue under North Carolina General Statute § 1-83, and the trial court erred by transferring venue as a matter of right. Therefore, we reverse and remand.

TERRY v. CHEESECAKE FACTORY RESTS., INC.

[253 N.C. App. 216 (2017)]

I. Background

In March of 2015, plaintiffs filed a complaint in Superior Court, Durham County seeking damages for negligent injury to their minor daughter. The complaint alleged that the plaintiffs “are citizens and residents of North Carolina” but did not mention their county of residence. The complaint alleged that defendant was incorporated in California but is “engaged in commerce within the state of North Carolina under a Certificate of Authority from the Department of the Secretary of State of North Carolina” and “does business with the general public in Durham County, North Carolina, as well as other counties” in North Carolina.

Plaintiffs alleged they ordered “a one-half regular cheesecake and a one-half ultimate red velvet cheesecake” for their daughter’s birthday from defendant’s restaurant at Crabtree Valley Mall; plaintiff Kristen Terry specifically informed defendant her daughter had a “severe allergy to nuts.” Plaintiffs further alleged that the type of cheesecake plaintiff Kristen ordered did not contain nuts, but defendant’s employee mistakenly gave plaintiff Kristen “a one-half low carb cheesecake instead of a one-half regular cheesecake[;]” and though the two cheesecakes looked the same, the low carb cheesecake contained nuts. Plaintiffs alleged their daughter became violently ill due to her exposure to nuts and required hospitalization after eating cheesecake from defendant, The Cheesecake Factory Restaurants, Inc. (“Cheesecake Factory”).

In April of 2015, defendant filed a motion to dismiss pursuant to Rule 12(b)(3) alleging that Durham County was not a proper venue and thus the complaint should be dismissed or, in the alternative, the case should be transferred to Wake County. Defendant’s motion alleged that the plaintiffs’ “last known address” was in Cary, North Carolina, and that defendant’s registered office is in Wake County, North Carolina.¹ On 2 March 2016, after a hearing on the matter, the trial court denied the motion to dismiss and allowed the request to transfer the case to Wake County. Plaintiffs appeal.

II. Venue

[1] Plaintiffs’ only argument on appeal is that “the trial court committed reversible error in granting the defendant’s motion to change venue to Wake County pursuant to N.C.R.Civ.P 12(b)(3).” (Original in all caps.) Though plaintiffs appeal from an interlocutory order, because the trial

1. Defendants argue that plaintiffs’ residence is in Wake County, although our record does not say. Plaintiffs’ brief acknowledges, “it is true that Plaintiffs reside in Wake County[.]”

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court found plaintiffs filed their complaint in an improper venue, this affects a substantial right which we will consider. *See Snow v. Yates*, 99 N.C. App. 317, 319, 392 S.E.2d 767, 768 (1990) (“When a defendant asserts improper venue in a timely writing, the question of removal is a matter of substantial right, and the court of original venue must consider and determine the motion before it takes any other action. An appeal of an order disposing of such a motion is interlocutory because it does not dispose of the case. However, grant or denial of a motion asserting a statutory right to venue affects a substantial right and is immediately appealable.” (citations and quotation marks omitted)).

According to N.C. Gen. Stat. § 1–82, a civil action must be tried in the county in which the plaintiffs or the defendants, or any of them, reside at its commencement. As a practical matter, the plaintiff generally gets to make an initial choice as to the venue in which a particular civil action should be litigated. However, a number of statutory provisions authorize efforts to seek a change of venue. First, according to N.C. Gen. Stat. § 1–83:

If the county designated is not the proper one, the action may, however, be tried therein, unless the defendant, before the time of answering expires, demands in writing that the trial be conducted in the proper county, and the place of trial is thereupon changed by consent of parties, or by order of the court. The court may change the place of trial in the following cases:

- (1) When the county designated for that purpose is not the proper one.
- (2) When the convenience of witnesses and the ends of justice would be promoted by the change.
- (3) When the judge has, at any time, been interested as party or counsel.

N.C. Gen. Stat. § 1–83. A motion challenging an improper venue or division should be asserted pursuant to N.C. Gen. Stat. § 1A–1, Rule 12(b)(3) and must be advanced within the time limits specified in N.C. Gen. Stat. § 1A–1, Rule 12. It is well settled that a court’s decision upon a motion for a change of venue pursuant to G.S. 1–83(2) will not

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be disturbed absent a showing of a manifest abuse of discretion. However, when the venue where the action was filed is not the proper one, and N.C. Gen. Stat. § 1-83(1) is applicable, the trial court does not have discretion, but must upon a timely motion and upon appropriate findings transfer the case to the proper venue.

Carolina Forest Ass'n, Inc. v. White, 198 N.C. App. 1, 9-10, 678 S.E.2d 725, 731-32 (2009) (citations, quotation marks, ellipses, and brackets omitted).

[2] Defendant's motion to dismiss for improper venue was based only upon North Carolina Rule of Civil Procedure 12(b)(3) and sought dismissal or transfer to Wake County solely based upon the residence of the parties. North Carolina General Statute § 1-83 states four bases for a change of venue, two of which are plainly not applicable here as there are no allegations the judge has "been interested as a party or counsel" nor is the action "for divorce[.]" N.C. Gen. Stat. § 1-83(3-4) (2015). Defendant did not allege or argue any grounds for a discretionary change of venue such as "[w]hen the convenience of witnesses and the ends of justice would be promoted by the change." N.C. Gen. Stat. § 1-83(2) (2015); *Carolina Forest Ass'n*, 198 N.C. App. at 10; 678 S.E.2d at 732. So although the trial court's order did not state a particular reason for the change of venue, the only ground in the motion before the trial court was that none of the parties were residents of Durham County; this is most appropriately characterized as an argument based on North Carolina General Statute § 1-83(1) because defendant was essentially contending "the county designated . . . is not the proper one" due to no party being a resident as is required pursuant to North Carolina General Statute § 1-82. N.C. Gen. Stat. §§ 1-82; 1-83(1) (2015); *Carolina Forest Ass'n*, 198 N.C. App. at 10; 678 S.E.2d at 732. "A determination of venue under N.C. Gen. Stat. § 1-83(1) is . . . a question of law that we review de novo." *Stern v. Cinoman*, 221 N.C. App. 231, 232, 728 S.E.2d 373, 374 (2012).

Plaintiffs' initial brief argued that defendant is a foreign corporation because it was formed in California, and thus plaintiffs based their argument on North Carolina General Statute § 1-80, entitled "foreign corporations[.]" and case law regarding foreign corporations. See generally N.C. Gen. Stat. § 1-80 (2015). But since defendant maintains a registered office in North Carolina and has a certificate of authority from the Secretary of State, defendant is actually a domestic corporation. See N.C. Gen. Stat. § 1-79(b) (2015) ("[T]he term 'domestic' when applied to an entity means: (1) An entity formed under the laws of this State, or (2) An entity that (i) is formed under the laws of any jurisdiction other than

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this State, and (ii) maintains a registered office in this State pursuant to a certificate of authority from the Secretary of State.”)

Defendant argues that “[w]hen reviewing a decision on a motion to transfer venue, the reviewing court must look to the allegations of the plaintiff’s complaint.” *Ford v. Paddock*, 196 N.C. App. 133, 135, 674 S.E.2d 689, 691 (2009).” Defendant’s brief at least implies that we may look no further than the complaint, which is incorrect since both this Court and the trial court may consider other verified parts of the record. *See Construction Co. v. McDaniel*, 40 N.C. App. 605, 608, 253 S.E.2d 359, 361 (1979) (“We find that the rule which has been long followed in this jurisdiction still prevails and that the trial court in ruling upon a motion for change of venue is entirely free to either believe or disbelieve affidavits such as those filed by the defendants without regard to whether they have been controverted by evidence introduced by the opposing party.”); *see also Kiker v. Winfield*, 234 N.C. App. 363, 365, 759 S.E.2d 372, 373-74 (2014) (considering plaintiff’s verified answers to defendant’s interrogatories in determining proper venue), *aff’d per curiam*, 368 N.C. 33, 769 S.E.2d 837 (2015). But since most of defendant’s arguments are based upon the complaint, we first turn there.

Defendant argues that the complaint does not identify plaintiffs’ county of residence, which is true, although defendant asks us to assume that plaintiffs reside in Wake County and plaintiffs’ brief admits as much. Defendant also argues that “the Complaint specifically states an actual place of business in Wake County, the restaurant where the alleged tort occurred – Defendant’s restaurant at Crabtree Valley Mall.” But the complaint actually mentions only the restaurant in Crabtree Valley Mall; it does *not* identify the county of the restaurant or Crabtree Valley Mall. Defendant’s brief seems to assume that the court is aware of the location of Crabtree Valley Mall, and indeed we are.

In fact, we will take judicial notice that Crabtree Valley Mall is in Wake County and further that the Cheesecake Factory was operating in Crabtree Valley Mall as of the date of commencement of the action. *See* N.C. Gen. Stat. § 8C-1, Rule 201 (2015) (“(b) Kinds of facts. — A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. (c) When discretionary. — A court may take judicial notice, whether requested or not.”). What defendant’s brief fails to mention is the fact that there is also a Cheesecake Factory restaurant in Durham County, but we need not take judicial notice of that particular location, since

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defendant responded to plaintiffs' request for admissions and admitted that "[t]he Cheesecake Factory Restaurants, Inc. conducts business activities in Durham County, North Carolina at 8030 Renaissance Parkway, Suite 950, and has done so since March 1, 2012."² Thus, the answers to the request for admissions establish that defendant was conducting business activities in Durham County at a specific address.

Plaintiffs contend in their reply brief that even if defendant is a domestic corporation, venue is proper in Durham County pursuant to North Carolina General Statute § 1-79 which provides that a domestic corporation is deemed to reside and thus may be sued: "(1) Where the registered or principal office of the corporation, limited partnership, limited liability company, or registered limited liability partnership is located, or (2) Where the corporation, limited partnership, limited liability company, or registered limited liability partnership maintains a place of business[.]" N.C. Gen. Stat. § 1-79(b). Plaintiffs argue that because defendant "maintains a place of business" in Durham County, it is a proper venue. *Id.* It is clear from defendant's answers to the request for admissions that defendant "conducts business activities in Durham County" and that defendant "owns some equipment, fixtures and furnishings located in Durham County[;]" thus, defendant "[m]aintain[s] a place of business" in Durham County. *Id.* As defendant maintains a place of business in Durham County, Durham County was a proper venue for plaintiffs' lawsuit, *see id.*, and thus the trial court erred in changing venue as a matter of right. *See id.*; *see also* N.C. Gen. Stat. § 1-83(1).

III. Conclusion

For the foregoing reasons, we reverse and remand.

REVERSED AND REMANDED.

Judges McCULLOUGH and ZACHARY concur.

2. We will take judicial notice that this is the street address of the Streets at Southpoint. *See* N.C. Gen. Stat. § 8C-1, Rule 201.

WASCO LLC v. N.C. DEP'T OF ENV'T & NAT. RES.

[253 N.C. App. 222 (2017)]

WASCO LLC, PETITIONER

v.

N.C. DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES,
DIVISION OF WASTE MANAGEMENT, RESPONDENT

No. COA16-414

Filed 18 April 2017

**Environmental Law—industrial contamination—post-closure
clean-up—multiple successive owners**

In a case involving the determination of who was responsible for the current clean-up of a closed industrial chemical storage site that had changed ownership multiple times, the trial court was correct to look for guidance in federal law when interpreting the term “operator” in the context of the State Hazardous Waste Rules and, specifically, the hazardous waste permit program. An “operator” is the person responsible for, or in charge of the facility subject to regulation; moreover, “operator” includes those parties in charge of or directing post-closure activities under the State Hazardous Waste Program and the federal Resource Conservation and Recovery Act. Petitioner WASCO was the party responsible for and directly involved in the post-closure activities subject to regulation.

Appeal by petitioner from order and judgment entered 23 October 2015 by Judge G. Bryan Collins, Jr., in Wake County Superior Court. Heard in the Court of Appeals 6 October 2016.

King & Spalding LLP, by Cory Hohnbaum and Adam G. Sowatzka, pro hac vice, for petitioner-appellant.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Daniel Hirschman, for respondent-appellee.

McCULLOUGH, Judge.

Petitioner WASCO LLC (WASCO) appeals from the final order and judgment in which the trial court affirmed the administrative law judge’s (ALJ) denial of WASCO’s motion for continuance and affirmed the ALJ’s grant of summary judgment in favor of respondent North Carolina Department of Environment and Natural Resources (the “Department”), Division of Waste Management (the “Division”). For the following reasons, we affirm.

WASCO LLC v. N.C. DEP'T OF ENV'T & NAT. RES.

[253 N.C. App. 222 (2017)]

I. Background

This appeal is the result of a petition for a contested case hearing filed by WASCO in the Office of Administrative Hearings on 27 September 2013. In the petition, WASCO sought a declaration that it was not an “operator” of a former textile manufacturing facility located at 850 Warren Wilson Road in Swannanoa, North Carolina (the “Site”), and, therefore, not responsible for remedial cleanup efforts required by federal and state laws governing the management of hazardous wastes. Those laws include portions of the Resource Conservation and Recovery Act, as amended (RCRA), 42 U.S.C. §§ 6901-6992, federal regulations, and North Carolina’s Hazardous Waste Program (the “State Hazardous Waste Program”).

As the United States Supreme Court clearly explained,

RCRA is a comprehensive environmental statute that empowers [the Environmental Protection Agency (EPA)] to regulate hazardous wastes from cradle to grave, in accordance with the rigorous safeguards and waste management procedures of Subtitle C, 42 USC §§ 6921-6934. (Nonhazardous wastes are regulated much more loosely under Subtitle D, 42 USC §§ 6941-6949.) Under the relevant provisions of Subtitle C, EPA has promulgated standards governing hazardous waste generators and transporters, *see* 42 USC §§ 6922 and 6923, and owners and operators of hazardous waste treatment, storage, and disposal facilities (TSDF’s), *see* § 6924. Pursuant to § 6922, EPA has directed hazardous waste generators to comply with handling, recordkeeping, storage, and monitoring requirements, *see* 40 CFR pt 262 (1993). TSDF’s, however, are subject to much more stringent regulation than either generators or transporters, including a 4 to 5-year permitting process, *see* 42 USC § 6925; 40 CFR pt 270 (1993); US Environmental Protection Agency Office of Solid Waste and Emergency Response, *The Nation’s Hazardous Waste Management Program at a Crossroads, The RCRA Implementation Study 49-50* (July 1990), burdensome financial assurance requirements, stringent design and location standards, and, perhaps most onerous of all, responsibility to take corrective action for releases of hazardous substances and to ensure safe closure of each facility, *see* 42 USC § 6924; 40 CFR pt 264 (1993).

WASCO LLC v. N.C. DEP'T OF ENV'T & NAT. RES.

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City of Chicago v. Envtl. Def. Fund, 511 U.S. 328, 331-32, 128 L. Ed. 2d 302, 307-308 (1994).

In lieu of the federal program, RCRA allows states to develop, administer, and enforce their own hazardous waste programs, subject to authorization by EPA. *See* 42 U.S.C. § 6926 (2016). State programs must meet the minimum requirements of RCRA. *Id.* (requiring state programs to be “equivalent” to the federal hazardous waste program). EPA granted North Carolina final authorization to operate the State Hazardous Waste Program in 1984. *See* 49 Fed. Reg. 48694-01 (Dec. 14, 1984).

The State Hazardous Waste Program is administered by the Division’s Hazardous Waste Section (the “Section”). *See* 15A N.C. Admin. Code 13A.0101(a) (2016). The State Hazardous Waste Program consists of portions of the North Carolina Solid Waste Management Act (the “State Solid Waste Management Act”), Article 9 of Chapter 130A of the General Statutes, and related state rules and regulations. Specifically, Part 2 of the State Solid Waste Management Act concerns “Solid and Hazardous Waste Management” and requires that rules establishing a complete and integrated regulatory scheme in the area of hazardous waste management be adopted and enforced. *See* N.C. Gen. Stat. § 130A-294(c) (2015). North Carolina’s Hazardous Waste Management Rules (the “State Hazardous Waste Rules”) are found in Title 15A, Subchapter 13A of the N.C. Administrative Code. The State Hazardous Waste Rules largely incorporate the federal regulations under RCRA by reference.

Pertinent to the present case, the State Hazardous Waste Rules adopt closure and post-closure standards for owners and operators of hazardous waste TSDFs from subpart G of the federal regulations. *See* 15A N.C. Admin. Code 13A.0109(h) (incorporating by reference 40 C.F.R. §§ 264.110 through 264.120). The State Hazardous Waste Rules also implement a hazardous waste permit program, which incorporates much of the federal hazardous waste permit program, with added “Part B” information requirements. *See* 15A N.C. Admin. Code 13A.0113 (incorporating by reference portions of 40 C.F.R. Ch. 1, Subch. I, Pt. 270,).

40 C.F.R. § 270.1(c) is one of those sections of the federal hazardous waste permit program incorporated by reference in 15A N.C. Admin. Code 13A.0113(a). That section provides, in pertinent part, that

[o]wners and operators of surface impoundments, landfills, land treatment units, and waste pile units that received waste after July 26, 1982, or that certified closure (according to § 265.115 of this chapter) after January 26, 1983, must have post-closure permits, unless they demonstrate

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closure by removal or decontamination as provided under § 270.1(c)(5) and (6), or obtain an enforceable document in lieu of a post-closure permit, as provided under paragraph (c)(7) of this section. If a post-closure permit is required, the permit must address applicable 40 CFR part 264 groundwater monitoring, unsaturated zone monitoring, corrective action, and post-closure care requirements of this chapter.

40 C.F.R. § 270.1(c) (2017). It is WASCO's responsibility to obtain a post-closure permit for the Site that is at issue in the present case.

As mentioned above, the Site is a former textile manufacturing facility located at 850 Warren Wilson Road in Swannanoa, North Carolina. Years before WASCO became involved with the Site, Asheville Dyeing & Finishing (AD&F), a division of Winston Mills, Inc., operated a knitwear business on the Site. During the operation of the knitwear business, underground tanks were used to store virgin and waste perchloroethylene (PCE), a dry cleaning solvent. At some point prior to 1985, PCE leaked from the tanks and contaminated the soil. The storage tanks were excavated by Winston Mills in 1985 and the resulting pits were backfilled with the contaminated soil left in place.

In 1990, Winston Mills and the Section entered into an Administrative Order on Consent that set forth a detailed plan to close the Site. Winston Mills completed the closure plan to close the Site as a landfill in 1992 and the Section accepted certifications of closure in a 1993 letter to Winston Mills.

Winston Mills and its parent corporation, McGregor Corporation, sold the site to Anvil Knitwear, Inc., in 1995. In connection with the sale, Winston Mills provided Anvil Knitwear indemnification rights for "environmental requirements." Culligan International Company (Culligan) co-guaranteed Winston Mills' performance of indemnification for environmental liabilities.

WASCO became involved in 1998 when its predecessor in interest, United States Filter Corporation, acquired stock of Culligan Water Technologies, Inc., which owned Culligan. Thereafter, WASCO provided financial assurances to the Section on behalf of Culligan in the form of a trust fund to the benefit of the Department and an irrevocable standby letter of credit for the account of AD&F.

WASCO divested itself of Culligan in 2004. As part of the sale of Culligan, WASCO agreed to indemnify the buyer as to identified

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environmental issues at the Site. At that time, a letter from Culligan to the Section represented that WASCO was assuming Culligan's remediation responsibilities at the Site and directing further communications to WASCO's director of environmental affairs. Subsequent communications between WASCO and the Section show that WASCO did intend to take on those responsibilities and that the Section identified WASCO as the responsible party. Additionally, Part A permit applications signed by WASCO's director of environmental affairs identified WASCO as the operator and WASCO continued to pay consultants and take action at the Site.

In 2007, WASCO received a letter from the Section that the Site was included on a list of facilities needing corrective action. A follow-up letter from the Section soon thereafter indicated that additional action was needed to develop a groundwater assessment plan to address the migration of hazardous waste in the groundwater. This expanded the size of the area with which WASCO was dealing to off-site locations. WASCO, its consultant, and the Section continued to work together to address a groundwater plan.

In 2008, Anvil Knitwear sold the property to Dyna-Diggr, LLC. Thereafter, responsibility for compliance with the State Hazardous Waste Program became an issue, with both WASCO and Anvil disclaiming responsibility. WASCO asserted it participated in post-closure actions on a voluntary basis.

In an 16 August 2013 letter, the Section detailed its positions that Dyna-Diggr is liable as an owner and that WASCO is independently liable as an operator. The Section sought cooperation between all parties and suggested it "would be willing to enter into a modified Joint Administrative Order on Consent in Lieu of a Post-Closure Permit pursuant to which the two parties agree to undertake part of the post-closure responsibilities[.]" However, in the alternative, the Section reminded the parties that it "always has the option of issuing a Compliance Order with Administrative Penalty to both parties for violation of 40 CFR 270.1(c) and associated post-closure regulations." This action resulted in WASCO filing the 27 September 2013 petition.

Following the filing of the petition, on 25 September 2014, the Section filed a motion for summary judgment on all claims raised in WASCO's petition. After the ALJ denied WASCO's motion for a continuance regarding the summary judgment motion by order filed 28 October 2014, the ALJ filed his final decision granting the Section's motion for summary judgment on 2 January 2015.

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On 2 February 2015, WASCO filed a petition for judicial review (the “PJR”) of both orders. After both parties filed briefs regarding the PJR, the matter came on for hearing in Wake County Superior Court on 12 October 2015 before the Honorable G. Bryan Collins, Jr.

On 23 October 2015, the court filed its “Final Order and Judgment on Rule 56(f) Motion and Petition for Judicial Review.” The court concluded, “[a]s a matter of law, WASCO is an operator of a landfill for purposes of the State Hazardous Waste Program’s post-closure permitting requirement.” Therefore, the court affirmed the 2 January 2015 final decision of the ALJ granting summary judgment in favor of the respondent and denied WASCO’s PJR. In the decretal portion of the court’s order, the court reiterated that “WASCO is an ‘operator’ for purposes of 40 C.F.R. § 270.1(c) (adopted by reference in 15A [N.C. Admin. Code] 13A.0113(a)) and must comply with all attendant responsibilities and regulatory requirements.”

Wasco filed notice of appeal to this Court on 20 November 2015.

II. Discussion

The issue on appeal is whether the trial court erred in entering summary judgment in favor of the Section on the basis that, “[a]s a matter of law, WASCO is an operator of a landfill for purposes of the State Hazardous Waste Program’s post-closure permitting requirement.” WASCO contends that it is not, and has never been, an operator of any facility at the Site.

Under the Administrative Procedure Act, when a party to a review proceeding in a superior court appeals to the appellate division from the final judgment of the superior court, “[t]he scope of review to be applied by [this Court] . . . is the same as it is for other civil cases.” N.C. Gen. Stat. § 150B-52 (2015). “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)).

Citing *In re Appeal of N.C. Sav. & Loan League*, 302 N.C. 458, 276 S.E.2d 404 (1981), WASCO asserts that in our *de novo* review, the Section’s interpretation of the law is entitled to no deference. However, this Court has stated that “an agency’s interpretation of its own regulations will be enforced unless clearly erroneous or inconsistent with the regulation’s plain language.” *Hillian v. N.C. Dep’t of Corr.*, 173 N.C. App.

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594, 598, 620 S.E.2d 14, 17 (2005). In fact, in *N.C. Sav. & Loan League*, the Court explained as follows,

[w]hen the issue on appeal is whether a state agency erred in interpreting a statutory term, an appellate court may freely substitute its judgment for that of the agency and employ *de novo* review. Although the interpretation of a statute by an agency created to administer that statute is traditionally accorded some deference by appellate courts, those interpretations are not binding. The weight of such [an interpretation] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

302 N.C. at 465-66, 276 S.E.2d at 410 (internal citations and quotation marks omitted). Thus, the Section's interpretation is afforded some deference.

"Operator" is defined in various places throughout the State Solid Waste Management Act and the State Hazardous Waste Rules. First, the general definitions in Part 1 of the State Solid Waste Management Act define "operator" to mean "any person, including the owner, who is principally engaged in, and is in charge of, the actual operation, supervision, and maintenance of a solid waste management facility and includes the person in charge of a shift or periods of operation during any part of the day." N.C. Gen. Stat. § 130A-290(a)(21) (2015). This definition applies broadly to the entire State Solid Waste Management Act, including those portions relevant to hazardous waste management. The definition's application to hazardous waste management is evident from the definition provision in the State Hazardous Waste Rules, which provides that both the definition of "operator" in N.C. Gen. Stat. § 130A-290 applies to the State Hazardous Waste Rules, *see* 15A N.C. Admin. Code 13A.0102(a) (providing "[t]he definitions contained in [N.C. Gen. Stat. §] 130A-290 apply to this Subchapter[.]"), and that the definition of "operator" in 40 C.F.R. § 260.10, "[o]perator means the person responsible for the overall operation of a facility[.]" is incorporated by reference, *see* 15A N.C. Admin. Code 13A.0102(b). Yet, most specific to the post-closure permit requirement at issue in this case, the State Hazardous Waste Rules concerning the hazardous waste permit program incorporate by reference Subpart A of the federal regulations providing general information about the hazardous waste permit program, *see* 15A N.C. Admin. Code 13A.0113(a), including the definitions in 40 C.F.R. § 270.2, which provides that "[o]wner or operator means the owner or operator

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of any facility or activity subject to regulation under RCRA.” 40 C.F.R. § 270.2 (2017).

In this case, the court determined WASCO was an “operator” under the two definitions specifically dealing with hazardous waste management adopted from 40 C.F.R. §§ 260.10 and 270.2. The court, however, noted that the result would be the same applying the definition of “operator” in N.C. Gen. Stat. § 130A-290(a)(21). In conclusion number 42, the court explained its analysis of the definitions as follows,

[b]ased on the federally delegated nature of the State Hazardous Waste Program, the Section’s Memorandum of Agreement with the EPA, the fact that the obligation at issue arises under a federal regulation – 40 C.F.R. § 270.1(c) – and not Chapter 130A, and because both parties have identified no state case law on point and have cited to federal law, [the court] concludes it is appropriate here to look to federal case law and administrative EPA documents for guidance.

The federal case law considered by the court included cases analyzing operator liability under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601 to 9675 (CERCLA), which, similar to the State Hazardous Waste Rules, defines “operator” as “any person owning or operating such facility[.]” 42 U.S.C. § 9601(20)(A) (2016). Specifically, the court looked to *United States v. Bestfoods*, 524 U.S. 51, 141 L. Ed. 2d 43 (1998), in which the Court explained that,

under CERCLA, an operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility. To sharpen the definition for purposes of CERCLA’s concern with environmental contamination, an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.

Id. at 66-67, 141 L. Ed. 2d at 59. The court in the present case then concluded that “[c]onsistent with *Bestfoods* and its progeny, . . . post-closure operatorship is based on an examination of the totality of the circumstances.”

On appeal, WASCO’s first contention is that the court erred in basing its decision exclusively on CERCLA without considering the elements of the operator definition in N.C. Gen. Stat. § 130A-290(a)(21).

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WASCO contends that the definition in N.C. Gen. Stat. § 130A-290(a)(21) sharpened the definition of operator for purposes of the State Solid Waste Management Act and, citing *R.J. Reynolds Tobacco Co. v. N.C. Dep't of Environment & Natural Resources*, 148 N.C. App. 610, 616, 560 S.E.2d 163, 167-68 (looking to the plain meaning of N.C. Gen. Stat. § 130A-290(35) and determining that tobacco scrap, stems, and dust did fall within the definition of “solid waste”), *disc. review denied*, 355 N.C. 493, 564 S.E.2d 44 (2002), contends the definition in N.C. Gen. Stat. § 130A-290(a)(21) is controlling over other definitions to the extent the definitions differ. Thus, WASCO contends to be an operator, it must be “principally engaged in, and is in charge of, the actual operation, supervision, and maintenance of a solid waste management facility[.]” N.C. Gen. Stat. § 130A-290(a)(21).

We are not persuaded by WASCO’s arguments that the court is limited to an analysis of the definition of “operator” in N.C. Gen. Stat. § 130A-290(a)(21). Moreover, we note that it is clear the court did not look exclusively to CERCLA, but instead looked to CERCLA only for guidance on how to interpret the definitions of operator in the State Hazardous Waste Rules adopted from the federal regulations. Despite differences in the framework of RCRA and CERCLA, the definitions of “operator” in both acts are similar and CERCLA case law does provide persuasive guidance. Furthermore, and not contested by WASCO on appeal, the court also looked to EPA documents providing guidance on RCRA and concluded that those documents support the conclusion that WASCO was an operator.

We hold the court was correct to look for guidance in federal law while interpreting the term “operator” in the context of the State Hazardous Waste Rules and, specifically, the hazardous waste permit program. Those portions of the State Hazardous Waste Rules deal specifically with the post-closure permit requirement at issue in the present case. *See* 40 C.F.R. § 270.1(c) (incorporated by reference in 15A N.C. Admin. Code 13A.0113(a)). In contrast, the terms of N.C. Gen. Stat. § 130A-290(a)(21) make clear that the definition of operator therein is for an operator of any “solid waste management facility.” Although that definition is more detailed than the definitions in the State Hazardous Waste Rules, that definition was intended to apply to the management of all solid wastes, not just the control of hazardous wastes of a facility post-closure.

Nevertheless, although the three definitions of “operator” applicable to the State Hazardous Waste Program differ slightly, the definitions seem to be in accord that, in general terms, an “operator” is the person

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responsible for, or in charge of, the facility subject to regulation. In the present case, that facility is the pit that was certified closed as a landfill in 1993.

WASCO's next contention on appeal is that the court erred in holding that WASCO was an operator even though WASCO did not become involved with the Site until after the Site was certified closed by the Section. Citing N.C. Gen. Stat. § 130A-290(a)(2), which defines "closure" to mean "the cessation of operation of a solid waste management facility and the act of securing the facility so that it will pose no significant threat to human health or the environment[.]" WASCO asserts that it is impossible to operate a facility that has ceased operation. Thus, WASCO contends it cannot be an operator of the Site.

WASCO, however, recognizes that both RCRA and the State Hazardous Waste Program impose duties on operators to provide post-closure care, but contends that those duties can only be imposed on those owning and operating the facility before the time that the facility ceases to operate. WASCO asserts that the Section has created the concept of "post-closure operator" for purposes of this case without any basis in the law. Again, we disagree with WASCO's arguments.

As the Section points out, and as we noted above,

[o]wners and operators of . . . landfills . . . must have post-closure permits, unless they demonstrate closure by removal or decontamination as provided under § 270.1(c)(5) and (6), or obtain an enforceable document in lieu of a post-closure permit, as provided under paragraph (c)(7) of this section.

See 40 C.F.R. § 270.1(c) (incorporated by reference in 15A N.C. Admin. Code 13A.0113(a)).

In this case, the pit where the underground storage tanks were located on the Site was not designated a landfill for purposes of the State Hazardous Waste Program until the time that it was closed with hazardous waste in place, after the time the facility ceased to operate. *See* 40 C.F.R. § 265.197(b) (incorporated by reference in 15A N.C. Admin. Code 13A.0110(j)). Thus, there were no "operators" of a landfill when the facility was in operation, as WASCO limits the term. Yet, the hazardous waste permit program clearly applies to operators of landfills and those facilities closed as landfills.

Moreover, although the definition of "closure" cited by WASCO is clear that the closure of a solid waste management facility is the time it

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ceases to operate, that definition also makes clear closure includes the act of securing the facility to prevent future harm. Thus, it is not just those parties in charge of the actual operation of a solid waste management facility that are subject to the post-closure permitting requirement.

Guided by the same federal law relied on by the trial court, including *Bestfoods*, its progeny, and EPA documents, we hold “operator,” as it is defined in the State Hazardous Waste Rules, includes those parties in charge of directing post-closure activities under the State Hazardous Waste Program and RCRA.

In the present case, the trial court issued detailed findings as to WASCO’s involvement at the Site that demonstrate it was the operator for purposes of the post-closure permitting requirement. WASCO does not challenge the factual findings, but instead asserts arguments that those findings do not lead to the conclusion that it is an operator as that term is defined in N.C. Gen. Stat. § 130A-290(a)(2). We are not convinced by WASCO’s arguments.

The court’s pertinent findings, which this Court has reviewed and determined to be supported by the documentary exhibits, are as follows:

15. WASCO became involved with the Facility in a limited capacity following its 1998 acquisition of Culligan Water Technologies, Inc. and its affiliate, Culligan International Company (“Culligan”).
16. At the time WASCO acquired Culligan, Culligan had been performing post-closure operations related to the Facility.
17. Between 1999 and 2004, Petitioner provided financial assurance to the Section on behalf of Culligan for post-closure care associated with the Facility, including a Trust Agreement and Irrevocable Standby Letter of Credit in 2003.
18. The Culligan Group, including Culligan, was divested from WASCO in 2004 in a \$610-million transaction that included WASCO’s agreement to indemnify Culligan’s buyer “as to certain matters associated at the Facility as they relate to specific Culligan obligations.”
19. Following the 2004 divestiture, Culligan represented in a letter to the Section that WASCO was “assuming responsibility” for the Facility. The letter indicated

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that copies were transmitted to John Coyne, the Director of Environmental Affairs for WASCO.

20. The Section followed-up with Mr. Coyne by email, referencing Culligan's representation that WASCO "is now responsible for RCRA issues" at the Facility, and asking for WASCO to complete a new Part A permit application as the Facility's operator.
21. Mr. Coyne responded that (a) he was "very familiar with this project," (b) he would "attend to the Part A application in the very near future," and (c) WASCO "intend[ed] on keeping the same consultants . . . and doing everything else we can to maintain continuity and keep the project headed in the right direction."
22. An updated Part A permit application was submitted to the Section in December 2004 naming WASCO as operator. Mr. Coyne signed the Part A permit application for WASCO "under penalty of law" as to the truth of its contents.
23. Mr. Coyne signed another updated Part A "under penalty of law" in 2006, which was submitted to the Section and continued to identify WASCO as operator.
24. Rodney Huerter—who had assumed the role of WASCO's Director of Environmental Affairs after Mr. Coyne—signed a third Part A permit application "under penalty of law" in 2008, which was submitted to the Section and which again identified WASCO as the Facility's operator.
25. After the divestiture of Culligan, WASCO continued to provide financial assurance for the Facility under the 2003 Trust Agreement, Standby Trust Fund, and Irrevocable Standby Letter of Credit, which it amended in the Section's favor for inflation 10 times between the divestiture of Culligan and the initiation of the 2013 contested case. WASCO has communicated directly with the Section throughout this time period concerning financial requirements for the Facility.
26. The language of the Trust Agreement identifies WASCO as the "Grantor," and the agreement's purpose to "establish a trust fund . . . for the benefit of

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[the Department].” Specifically, the Trust Agreement recites that:

. . . “DENR” . . . has established certain regulations applicable to the Grantor, requiring that an owner or operator of a hazardous waste management facility shall provide assurance that funds will be available when needed for closure and/or post-closure care of facility. . . .

The Trustee shall make payments from the fund as the Secretary of [the Department] . . . shall direct, in writing, to provide for the payment of the cost of closure and/or post-closure care of facilities covered by this agreement

“this Trust shall be irrevocable and shall continue until terminated at the written agreement of the Grantor, the Trustee, and the Secretary”

27. The Irrevocable Standby Letter of Credit, as amended, is subject to automatic renewal in one-year increments unless cancelled by the bank.
28. The most recent amendment to the Irrevocable Standby Letter of Credit submitted prior to the filing of the contested case is in the amount of \$443,769.88.
29. Internal WASCO communications concerning financial assurance reference “the statutory/regulatory requirements relating to one of our environmental legacy sites in Swannanoa, NC.”
30. After the divestiture of Culligan, WASCO entered into a Master Consulting Services Agreement with Mineral Springs Environmental, P.C. (“Mineral Springs”) for Mineral Springs to perform work at the Facility.
31. A total of 51 invoices from Mineral Springs to WASCO shows that Mineral Springs or its subcontractors performed a variety of post-closure activities at the Facility or related to the Facility, between November 2004 and August 2013, which fell into the following categories:
 - operation and maintenance of an air sparge/soil vapor extraction groundwater remediation system, including use of a subcontractor

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- for supplies such as air filters, oil filters, oil, and separators;
- groundwater sampling and analysis, including use of laboratory subcontractors;
 - preparation of quarterly and semi-annual reports analyzing sampling results;
 - project management;
 - assessment of two potential sources of contamination at the Facility in addition to the former tank site—specifically, an old dump site and a French drain—including use of an excavation subcontractor and a bush hog subcontractor; and
 - payment of utility bills based [on] one meter labeled as “pump” and one meter labeled as “environmental cleanup.”
32. Mr. Coyne or Mr. Huerter personally approved payment to Mineral Springs for work in the above categories, and approved payment directly to the utility company for additional bills, totaling \$235,984.43.
33. In particular, Mineral Springs submitted 33 reports associated with the invoiced post-closure activities to the Section on WASCO’s behalf between February 2005 and May 2013, including 16 groundwater monitoring reports that expressly identified WASCO as the “responsible party for the site.”
34. The Section communicated directly with WASCO, or with both WASCO and Mineral Springs, in numerous matters related to environmental compliance, including but not limited to requests for preparation of a work plan for the investigation of the former dump site and French drain, and responses to Mineral Springs’s monitoring reports.
35. After Mineral Springs and/or its sub-contractors performed the French drain and dump assessment but before drafting the Assessment Report, Kirk Pollard of Mineral Springs notified Mr. Huerter of preliminary findings concerning the volume and nature of drums

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discovered. Mr. Pollard identified liquid in one drum that tested at a pH of 14, which is considered hazardous based on corrosivity. Mr. Pollard expressed concern for health and safety, recommended that Mr. Huerter notify the Section, and expressed his belief that an immediate response and a more thorough evaluation could be necessary. No such concerns are reflected in the final report.

36. Mr. Huerter instructed Mr. Pollard not to remove “any of the drums, containers, or anything else,” and asked to conduct an “advanced review” of the dump Assessment Report before its submission to the Section. Mr. Huerter commented on Mr. Pollard’s first draft, including by providing two “reviewed and revised blackline document[s].”
37. Additional communications between Mr. Huerter and Mr. Pollard included (a) Mr. Pollard’s requests for Mr. Huerter’s guidance or authorization on matters related to the Facility, including changes to a Part A form, communications with the property owner, whether groundwater sampling should continue, and whether to advise the Section about the sale of the property; (b) Mr. Pollard’s practice of updating Mr. Huerter, copying him on communications with the Section, or forwarding such communications to him; and (c) Mr. Huerter’s requests for copies of utility bills to compare with Mineral Springs’s invoices, and annual cost projections.

(Citations and footnote omitted).

It is clear that the pit at the Site that was certified closed as a landfill in 1993 is subject to post-closure regulation under the State Hazardous Waste Program and RCRA. Considering the above facts, we hold WASCO was the party responsible for and directly involved in the post-closure activities subject to regulation. Even under the definition of operator in N.C. Gen. Stat. § 130A-290(a)(21), when that definition is viewed through the lens of post-closure regulatory activities at issue in this case, since 2004, WASCO has been the party principally engaged in, or in charge of the post-closure operation, supervision, and maintenance of the Site for purposes of the hazardous waste permit program. WASCO’s arguments to the contrary are overruled.

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III. Conclusion

For the reasons stated above, we hold WASCO is an operator of a landfill for purposes of the post-closure permitting requirement at the Site. Therefore, we affirm the final order and judgment of the trial court.

AFFIRMED.

Judges STROUD and ZACHARY concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 18 APRIL 2017)

ARNOLD v. UNIV. OF N.C. AT CHAPEL HILL No. 16-573	Mecklenburg (15CVS3520)	Affirmed
GILREATH v. CUMBERLAND CTY. BD. OF EDUC. No. 16-927	Cumberland (15CVS8061)	AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.
IN RE A.G. No. 16-1066	Rowan (12JT55)	Affirmed
IN RE M.J. No. 16-957	Alleghany (12JA16) (12JA17)	Affirmed
IN RE R.M. No. 16-746	Cumberland (15JB20)	Vacated and Remanded
JONES v. DEP'T OF PUB. SAFETY No. 16-617	Johnston (15CVS2402)	Affirmed
LOVELACE v. B & R AUTO SERV., INC. No. 16-1045	N.C. Industrial Commission (13-709807)	Affirmed
MANIYA v. NEIGHBORHOOD ASSISTANCE CORP. OF AM. No. 16-706	Mecklenburg (15CVS22003)	Affirmed
ROSSO-SCHNEIDER v. SCHNEIDER No. 16-980	Watauga (14CVD363)	Vacated and Remanded.
STATE v. BARRERA No. 16-1049	Mecklenburg (10CRS257813) (11CRS31992)	Affirmed
STATE v. BOYD No. 16-715	Mecklenburg (14CRS214700-02)	No plain error in part, no prejudicial error in part.
STATE v. CASTRUITA No. 16-1007	Guilford (10CRS24506) (10CRS73782-84)	Affirmed
STATE v. CRAIG No. 16-1027	Stanly (12CRS52496) (15CRS524)	Vacated in Part, No Error in Part

STATE v. HAUGABOOK No. 16-471	New Hanover (12CRS55898) (12CRS56031) (12CRS6990)	No error in part, dismissed in part.
STATE v. HILL No. 16-744	Pender (13CRS51596-98) (15CRS466)	No Error
STATE v. HOEUN No. 16-888	Mecklenburg (12CRS247825-27)	No Error
STATE v. JONES No. 16-797	Mecklenburg (14CRS213365) (14CRS213366) (14CRS26413)	NO ERROR IN PART; VACATED AND REMANDED IN PART.
STATE v. JONES No. 16-842	Wayne (10CRS52098) (11CRS145) (11CRS147)	No Plain Error in Part; No Error in Part
STATE v. LANE No. 16-764	Forsyth (15CRS57442)	No Error; Dismissed without Prejudice in Part
STATE v. MASSEY No. 16-868	Mecklenburg (15CRS208782) (15CRS208784) (15CRS209678)	No Error
STATE v. McDOUGALD No. 16-574	Guilford (14CRS75083) (14CRS75085)	No Error
STATE v. SIMMONS No. 16-861	Gaston (14CRS63016-17)	NO ERROR IN PART; DISMISSED IN PART; VACATED AND REMANDED IN PART.
STATE v. SMITH No. 16-718	Iredell (14CRS55945) (15CRS3903)	AFFIRMED; REMANDED FOR CORRECTION OF CLERICAL ERROR.
STATE v. TALBERT No. 16-389	Henderson (14CRS55331) (14CRS55332)	No Error
STATE v. WILLIAMS No. 16-1162	Durham (15CRS3955) (16CRS69)	Affirmed

WALKER v. PHARR
No. 16-1029

Wake
(16CVD4089)
(16CVD4872)

Vacated

WHEELER v. CENT. CAROLINA
SCHOLASTIC SPORTS, INC.
No. 16-827

Cumberland
(15CVS3328)

Affirmed

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[253 N.C. App. 241 (2017)]

CAPEN TRUCER CARL ANDERS, II, EMPLOYEE, PLAINTIFF

v.

UNIVERSAL LEAF NORTH AMERICA, EMPLOYER, AND ESIS, CARRIER, DEFENDANTS

No. COA16-910

Filed 2 May 2017

1. Workers' Compensation—additional medical treatment claim—time barred

The Industrial Commission did not commit prejudicial error in a workers' compensation case by concluding that a claim for additional medical treatment was time-barred by N.C.G.S. § 97-25.1. The right to medical compensation terminates two years after the employer's last payment of medical or indemnity compensation.

2. Workers' Compensation—causation—additional medical and indemnity benefits—failure to give Parsons presumption

The Industrial Commission did not commit prejudicial error in a workers' compensation case by denying plaintiff employee's claims for additional medical and indemnity benefits related to bilateral hernias where they were not causally related to his prior compensable hernia injury. Although the Commission failed to give plaintiff the benefit of the *Parsons* presumption, a reversal on that issue would not change the outcome.

Appeal by plaintiff from opinion and award entered 5 July 2016 by the North Carolina Industrial Commission. Heard in the Court of Appeals 8 February 2017.

Kellum Law Firm, by J. Kevin Jones, for plaintiff-appellant.

Wilson & Ratledge, PLLC, by James E. R. Ratledge and Scott J. Lasso, for defendants-appellees.

ZACHARY, Judge.

Plaintiff-employee Capen Trucer Carl Anders, II (Anders) appeals from an Opinion and Award of the Industrial Commission denying his claims for additional medical and indemnity benefits related to bilateral hernias allegedly caused by an earlier, compensable hernia injury that plaintiff suffered while employed by defendant-employer Universal Leaf North America (Universal Leaf). Anders' primary argument on appeal is

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that the Commission erred in concluding that the subsequent bilateral hernias that Anders suffered after Universal Leaf terminated his employment were not causally related to his prior compensable hernia injury. Anders also challenges the Commission's conclusion that his claim for additional medical treatment related to the subsequent bilateral hernias was time-barred by N.C. Gen. Stat. § 97-25.1. For the reasons that follow, although the Commission committed an error in its causation analysis, we conclude that no remand is necessary in this case, and that the Commission's Opinion and Award should be affirmed.

I. Background

This case arises out of an admittedly compensable bilateral inguinal hernia injury that Anders suffered while employed as a seasonal employee by Universal Leaf. At the time of the work-related accident, which occurred on 20 November 2010, Anders was working on the "blending line" removing wires from bales of tobacco. After a tobacco-bale wire became stuck, Anders "yanked on the wire and felt a pain in his groin." On 22 November 2010, Universal Leaf sent Anders to Carolina Quick Care, where he was diagnosed with an inguinal hernia and referred to a surgeon. However, defendants refused to authorize a surgeon's visit at that time. Anders worked under light-duty restrictions for several days.

On 28 November 2010, Anders sought treatment for his hernia in the emergency department at Halifax Regional Medical Center, where he was again diagnosed with an inguinal hernia and referred to a surgeon. When Anders returned to work on 29 November 2010, he learned that he had been fired for violating Universal Leaf's attendance policy. The record reveals that a specific absentee policy applied to Anders' position and that Universal Leaf had an established process for handling workers' compensation claims. According to Universal Leaf's absentee policy, a seasonal worker could be terminated for accruing six "occurrences"—i.e., "a day out of work, an early leave, or a late entry into work"—in a twelve-month period. Anders had accumulated at least six occurrences between 17 September 2010 and 29 October 2010. When Anders sought medical treatment on 28 November 2010, his absence from work counted as an occurrence because Anders did not contact Universal Leaf's first aid office and receive authorization for the hospital visit.

Shortly after Universal Leaf terminated Anders, he found work at a local Waffle House. On 22 March 2011, Dr. Robert Vire performed a bilateral inguinal repair surgery on Anders. That same day, Anders was discharged from the hospital with the temporary restriction that he not

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lift more than 10 pounds. Although Anders returned to Dr. Vire on 7 April 2011 with “soreness” at the incision site, Dr. Vire found no evidence of any hernia. Dr. Vire released Anders to full-duty work and instructed him to report for further treatment as needed. Anders then returned to his position at Waffle House.

In late May 2011, Anders experienced ongoing pain in his right groin and he returned to Dr. Vire, who ordered that Anders undergo an ultrasound and CT scan of the abdomen, pelvis, and chest. The ultrasound was performed on 8 June 2011 and Anders underwent CT scans on 20 June 2011 and 7 July 2011. Dr. Vire found no evidence of a recurring hernia, but the ultrasound revealed that Anders suffered from a “small right hydrocele with superficial edema around the right scrotum.” It does not appear that the CT scans revealed any further concerns.

Anders’ original claim for workers’ compensation benefits related to the work-related hernia was accepted by defendants’ filing a Form 60 on 13 May 2011. That same day, defendants also filed a Form 28 Return to Work report, which indicated that Anders was released to work on 15 April 2011,¹ and a Form 28B, which reported that Anders had received medical compensation and 2.2 weeks of temporary total disability benefits for the period from 29 March 2011 until 14 April 2011. The Form 28B established that Anders received his last disability payment on 8 April 2011. Anders received his last medical compensation payment on 19 January 2012; that payment covered the ultrasound and the CT scans ordered by Dr. Vire.

Based on the results from the June 2011 ultrasound, Dr. Vire referred Anders to Dr. Fred Williams, a surgeon at ECU Physicians. Dr. Williams examined Anders on 11 August 2011 and found no recurrent hernias, but Dr. Williams did “appreciate[] a small hydrocele, with tenderness in the . . . ilioinguinal nerve.” As a result, Anders was prescribed the medication Neurontin for nerve pain. Anders began working for Hardee’s in August 2011.

When Anders sought treatment for bilateral groin pain in May 2013, he was referred to general surgeon Dr. James Ketoff, who diagnosed a small, recurrent right inguinal hernia. Dr. Ketoff surgically repaired this hernia on 6 June 2013, and he ordered Anders out work until 9 July 2013.

1. Although the Form 28 indicated that Anders returned to work for Universal Leaf on 15 April 2011, it is clear that Anders returned to work at Waffle House, as Anders was terminated from his employment with Universal Leaf in November 2010.

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Between July 2013 and August 2014, Anders sporadically sought medical treatment for groin pain.

On 27 January 2014, Anders initiated the present action by filing a Form 33 request for hearing, seeking medical and indemnity compensation for his recurring hernias. Following defendants' Form 33R response, which asserted that Anders had received all benefits to which he was entitled, the matter was heard before Deputy Commissioner Theresa Stephenson on 10 September 2014. On 9 April 2015, Deputy Commissioner Stephenson filed an Opinion and Award that, *inter alia*, concluded that Anders' subsequent recurring hernias were not related to his November 2010 work-related injury, awarded certain indemnity compensation to Anders, and denied other indemnity compensation and any medical compensation.

Anders reported to Dr. Ketoff, who diagnosed a left-sided, recurrent hernia on 21 August 2014. Dr. Ketoff surgically repaired Anders' left-sided hernia on 24 September 2014. Dr. Ketoff ordered Anders out of work from the date of the surgery until 9 December 2014, when Anders was released to work and instructed to ease into full activity.

Anders appealed Deputy Commissioner Stephenson's decision to the Full Commission. After hearing the matter in September 2015, the Commission entered an Opinion and Award on 5 July 2016 and found, *inter alia*, that Anders' work-related hernia had "fully healed" after it was repaired on 22 March 2011; that defendants' last payments of indemnity and medical payments occurred on 8 April 2011 and 19 January 2012, respectively; that Anders did not request additional medical compensation until 27 January 2014; that Anders had not suffered any permanent damage to any organs or body parts as a result of the work-related injury; and that Anders failed to produce evidence of his earnings from the work he performed after Universal Leaf terminated him, which included positions at Waffle House, Hardee's, and landscaping and construction work.

Based on these findings, the Commission concluded that Anders had failed to prove that his November 2010 work-related injury was causally related to his subsequent recurring hernias, and that Anders' request for additional medical compensation was time-barred by N.C. Gen. Stat. § 97-25.1. Because Anders had failed to prove that he was "disabled" as defined by the Workers' Compensation Act during the period following his termination, the Commission further concluded that Anders was not entitled to additional indemnity compensation for his subsequent recurring hernias. Consequently, Anders' claims for additional compensation were denied. Anders now appeals the Commission's Opinion and Award.

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II. Standard of Review

“Appellate review of an award from the Industrial Commission is generally limited to two issues: (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). The “ ‘Commission is the sole judge of the credibility of the witnesses and the [evidentiary] weight to be given their testimony.’ ” *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965)). “Thus, if the totality of the evidence, viewed in the light most favorable to the complainant, tends directly or by reasonable inference to support the Commission’s findings, these findings are conclusive on appeal even though there may be plenary evidence to support findings to the contrary.” *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 166, 265 S.E.2d 389, 390 (1980). The Commission’s conclusions of law are subject to *de novo* review. *Boney v. Winn Dixie, Inc.*, 163 N.C. App. 330, 331, 593 S.E.2d 93, 95 (2004).

III. Discussion

On appeal, Anders’ primary argument is that the Commission improperly decided the causation issue. Anders contends that the Commission erred in determining that his subsequent bilateral hernias were not compensable as natural and direct results of the earlier compensable bilateral hernia he suffered while employed by Universal Leaf. However, the Commission’s Opinion and Award also contains conclusions of law that present separate and distinct bars—which are unaffected by the causation issue—to Anders’ claims for additional medical and indemnity benefits. Accordingly, we begin by addressing the Commission’s conclusions that Anders’ claim for medical benefits was time-barred, and that his claim for indemnity benefits should be denied because he failed to prove that he was “disabled” as defined by the Workers’ Compensation Act during the period following his termination from employment by Universal Leaf.

A. Overview

In 1929, the legislature created our Workers’ Compensation Act, “[t]he underlying purpose of [which] is to provide compensation for work[ers] who suffer disability by accident arising out of and in the course of their employment.” *Henry v. A.C. Lawrence Leather Co.*, 234 N.C. 126, 127, 66 S.E.2d 693, 694 (1951). As the plan is designed, “[a]n award under the Act has two distinct components: (1) payment of ‘*medical compensation*’ pursuant to G.S. § 97-25 for expenses

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incurred as a direct result of the work-related injury, and (2) payment of *general 'compensation'* pursuant to G.S. §§ 97-29 through 97-31 for financial loss suffered as a direct result of the work-related injury.” *Collins v. Speedway Motor Sports Corp.*, 165 N.C. App. 113, 118, 598 S.E.2d 185, 189 (2004) (emphasis added and citations omitted); see *Cash v. Lincare Holdings*, 181 N.C. App. 259, 264, 639 S.E.2d 9, 14 (2007) (recognizing that “the legislature always has provided for, and continues to provide for, [these] two distinct components of an award under the Workers’ Compensation Act”) (citation and internal quotation marks omitted).

The term medical compensation is defined as

medical, surgical, hospital, nursing, and rehabilitative services, including, but not limited to, attendant care services prescribed by a health care provider authorized by the employer or subsequently by the Commission, vocational rehabilitation, and medicines, sick travel, and other treatment, including medical and surgical supplies, as may reasonably be required to effect a cure or give relief and for such additional time as, in the judgment of the Commission, will tend to lessen the period of disability; and any original artificial members as may reasonably be necessary at the end of the healing period and the replacement of such artificial members when reasonably necessitated by ordinary use or medical circumstances.

N.C. Gen. Stat. § 97-2(19) (2015). In contrast, indemnity benefits (general compensation) may be awarded to address “financial loss other than medical expenses.” *Hyley v. GTE Prod. Co.*, 333 N.C. 258, 267, 425 S.E.2d 698, 704 (1993), *superseded in part on other grounds by statute as recognized by Lunsford v. Mills*, 367 N.C. 618, 623, 766 S.E.2d 297, 301 (2014). Because “the Commission’s determination that an employer must pay an injured employee medical compensation pursuant to N.C.G.S. § 97-25 is a separate determination from whether an employer owes [general] compensation as a result of an employee’s disability[,] . . . [n]either determination is a necessary prerequisite for the other.” *Cash*, 181 N.C. App. at 264, 639 S.E.2d at 14.

With this statutory scheme in mind, we turn to Anders’ claim for additional medical compensation.

[1] B. Limitations Period on Anders’ Claim for Medical Compensation

As noted above, the Commission concluded that Anders’ claim for additional medical compensation for treatment related to his subsequent

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recurrent hernias was time-barred pursuant to the provisions of N.C. Gen. Stat. § 97-25.1. The Commission's conclusion cited to this Court's decisions in *Busque v. Mid-Am. Apartment Communities*, 209 N.C. App. 696, 707 S.E.2d 692 (2011) and *Harrison v. Gemma Power Systems, LLC*, 234 N.C. App. 664, 763 S.E.2d 17, 2014 WL 2993853 (2014) (unpublished), and was based on the following findings:

15. A Form 28B, *Report of Employer or Carrier/Administrator of Compensation and Medical Compensation Paid and Notice of Right to Additional Medical Compensation*, was filed by Defendants on May 16, 2011, reflecting indemnity compensation payments from March 29, 2011 through April 14, 2011, with the last compensation check forwarded on April 8, 2011.

16. The Form 28B further reflected that the last payment of medical compensation was paid on May 5, 2011. However, Defendants' claims payment history reflects that the actual last payment by Defendants of medical compensation was made on January 19, 2012, for the ultrasound and CT scans performed in June and July 2011.

...

19. . . . [T]he last payment of medical compensation made by Defendants was January 19, 2012.

20. Plaintiff did not seek any medical treatment from March 15, 2012 until May 18, 2013. There is no evidence Plaintiff sought authorization for medical treatment from Defendants during this time period. Plaintiff did not file a request to the Commission for additional medical compensation until January 27, 2014, when he filed a Form 33, *Request that Claim be Assigned for Hearing*. This request was made more than two years following the last payment of indemnity and medical compensation.

Section 97-25.1 imposes a limitation period upon an injured employee's right to seek medical compensation:

The right to medical compensation shall terminate two years after the employer's last payment of medical or indemnity compensation unless, prior to the expiration of this period, either: (i) the employee files with the Commission an application for additional medical

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compensation which is thereafter approved by the Commission, or (ii) the Commission on its own motion orders additional medical compensation.

In *Busque*, this Court applied section 97-25.1 in a “straight-forward” manner, holding that the plaintiff’s right to medical compensation for an ankle injury was barred because her 2007 application for additional medical treatment was filed more than two years after the defendants’ last payment of medical compensation in 2003. 209 N.C. App. at 707, 707 S.E.2d at 700.

Here, the Commission’s unchallenged findings establish that Anders’ 27 January 2014 request for additional medical compensation was filed more than two years after defendants’ last payments of indemnity and medical compensation, which occurred, respectively, on 8 April 2011 and 19 January 2012. Accordingly, the Commission properly concluded that section 97-25.1 stands as a bar to plaintiff’s claims for additional medical treatment.

Nevertheless, Anders argues that if the “Commission [had] properly considered the evidence and the law controlling that evidence, there would have been, at minimum, an indemnity award for [the period during which defendant was allegedly disabled], which would in turn render defendants’ [section] 97-25.1 defense inapplicable as the indemnity benefits would restart the clock on said statute’s limitations period.” This argument utilizes the notion of a “hypothetical” indemnity award to prevent section 97-25.1 from barring Anders’ claim for additional medical treatment. However, this Court recently rejected a similar contention in *Harrison*.

The *Harrison* Court relied on *Busque* and held that “because the last payment of medical compensation made by [the d]efendant was more than two years prior to [the p]laintiff’s current Form 33 filing, . . . [the p]laintiff’s right to additional medical compensation [was] time-barred pursuant to N.C. Gen. Stat. § 97-25.1.” *Harrison*, 2014 WL 2993853, at *4. Even so, the *Harrison* Court addressed the plaintiff’s argument that that “ ‘the last payment of compensation in the claim has not yet taken place’ because ‘[the p]laintiff is still owed payment for temporary total disability and/or permanent partial impairment.’ ” *Id.* “Stated differently,” the Court explained, “[the p]laintiff argues that the two-year statute of limitations period found in N.C. Gen. Stat. § 97-25.1 has not yet begun and will not begin until [the p]laintiff receives a payment from [the d]efendant for indemnity benefits.” *Id.* In rejecting this argument, the Court explained:

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First, [the p]laintiff's argument ignores the plain language of the statute. "The right to medical compensation shall terminate two years after the employer's *last* payment of medical or indemnity compensation. . . ." N.C. Gen. Stat. § 97-25.1 (emphasis added). In context, the word "last" does not refer to a *hypothetical future payment* that [the p]laintiff may be entitled to receive after presenting a claim to the Industrial Commission. On its face, the "last" payment refers to the most recent payment of medical or indemnity benefits that has actually been paid. Second, [the p]laintiff's argument assumes the certainty of a future indemnity payment before the right to such payment has been decided by the Industrial Commission. Third, accepting Plaintiff's interpretation of the statute would allow claimants seeking additional medical compensation to obviate the statute of limitations in any case by asserting a valid claim for indemnity benefits alongside a claim for additional medical compensation. Such an expansive interpretation ignores the clear intent of our legislature to limit claims for additional medical compensation to a specified time period.

Id. (emphasis added). Although clearly not controlling, we find *Harrison's* reasoning persuasive and apply it to the instant case.

Harrison makes it clear that the "last" payments referred to in section 97-25.1 denote the most recent, "actual" payments of medical or indemnity benefits, not hypothetical payments the Commission *might* award in the future. *Harrison*, 214 WL 2993853, at *4. At the time when the Commission issued its Opinion and Award in the present case, the last *actual* payment of indemnity compensation was made on 8 April 2011. Anders received his last *actual* payment of medical compensation on 19 January 2012. Consequently, defendants had not made any indemnity or medical payments within two years of Anders' request for additional medical compensation, which occurred when Anders filed the Form 33 on 27 January 2014. The evidence, therefore, supports the Commission's findings and the findings support the Commission's conclusion that section 97-25.1 bars Anders' request for additional medical compensation.

C. Indemnity Compensation

[2] Separate from Anders' claim for medical compensation is his claim for indemnity benefits for periods of disability allegedly caused by his

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original, compensable hernia injury. “An employee seeking indemnity benefits pursuant to the Workers’ Compensation Act has, at the outset, two very general options.” *Knight v. Wal-Mart Stores, Inc.*, 149 N.C. App. 1, 10, 562 S.E.2d 434, 441 (2002), *aff’d*, 357 N.C. 44, 577 S.E.2d 620 (2003). First, an injured employee may seek indemnity benefits by showing either a total disability pursuant to N.C. Gen. Stat. § 97-29 (2015) or a partial disability pursuant to N.C. Gen. Stat. § 97-30 (2015). “[D]isability is defined by a diminished capacity to earn wages, not by physical infirmity.” *Saums v. Raleigh Community Hospital*, 346 N.C. 760, 764, 487 S.E.2d 746, 750 (1997); N.C. Gen. Stat. § 97-2(9) (2015) (“The term ‘disability’ means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.”). “The second option available to an employee seeking indemnity benefits is to show that the employee has a specific physical impairment that falls under the schedule set forth in N.C. Gen. Stat. § 97-31 [(2015)], regardless of whether the employee has, in fact, suffered” a partial or total disability. *Knight*, 149 N.C. App. at 11, 562 S.E.2d at 442.² Particularly relevant here, an employee is entitled to compensation under N.C. Gen. Stat. § 97-31(24) if “he [produces] . . . medical evidence that he has loss of or permanent injury to an important external or internal organ or part of his body for which no compensation is payable under any other subdivision of [N.C. Gen. Stat. §] 97-31.” *Porterfield v. RPC Corp.*, 47 N.C. App. 140, 142-43, 266 S.E.2d 760, 762 (1980).

1. *Disability Benefits Pursuant to N.C. Gen. Stat. §§ 97-29 and 30*

As to Anders’ right to total and temporary disability benefits under sections 97-29 and 97-30 following his termination, Universal Leaf was required to demonstrate initially that: (1) Anders was terminated for misconduct or other fault; (2) a nondisabled employee would have been terminated for the same misconduct or fault; and (3) the termination was unrelated to Anders’ compensable injury. *Seagraves v. Austin Co. of Greensboro*, 123 N.C. App. 228, 234, 472 S.E.2d 397, 401 (1996).

The Commission addressed the circumstances of Anders’ termination in the following unchallenged findings of fact:

6. When Plaintiff began working for Defendant-Employer in 2010, he was provided an employee handbook and

2. If an employee is either partially or totally disabled and also has a specific physical impairment that falls under N.C. Gen. Stat. § 97-31, the employee may pursue benefits under the statutory section which affords the most favorable remedy. *Whitley v. Columbia Lumber Mfg. Co.*, 318 N.C. 89, 90, 348 S.E.2d 336, 340 (1986).

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underwent an orientation process. Plaintiff was instructed on how workers' compensation claims would be handled and was instructed on the absentee policy for seasonal employees. Plaintiff was aware of the absentee policy and that, as a seasonal employee, he could be terminated if he accrued six occurrences within a 12-month period.

7. From September 17, 2010 through October 29, 2010, Plaintiff had missed six work shifts. For three of those shifts, Plaintiff failed to report to work or notify the employer. Plaintiff missed one shift for personal business and the remaining shifts were missed due to illness and occurred prior to his November 20, 2010 incident. Plaintiff received warnings from his supervisor as he accumulated occurrences.

...

34. Based upon a preponderance of the competent, credible evidence, Defendant terminated Plaintiff for misconduct and the reason for Plaintiff's termination was a reason for which a non-disabled employee would be terminated. While Plaintiff's last absence which led to his termination was due to medical treatment he sought for his hernia condition, Plaintiff did not obtain proper authorization for his absence, despite knowledge of the attendance policy, knowledge of the proper procedure for requesting medical treatment and time off for his work-related injury, and knowledge that he had accumulated occurrences and was on warning for his excessive absences.

These unchallenged findings support the Commission's conclusion that defendants met their initial burden of showing that the first three elements of the *Seagraves* test were satisfied.

"An employer's successful demonstration of . . . evidence [that satisfies the initial part of the *Seagraves* test] is 'deemed to constitute a constructive refusal' by the employee to perform suitable work, a circumstance that would bar benefits for lost earnings, 'unless the employee is then able to show that his or her inability to find or hold other employment . . . at a wage comparable to that earned prior to the injury[] is due to the work-related disability.' " *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 493-94, 597 S.E.2d 695, 699 (2004) (quoting *Seagraves*, 123 N.C. App. at 234, 472 S.E.2d at 401). In other words, "the burden shift[ed] to [Anders] to re-establish that he suffer[ed] from a disability" during

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the time periods in question. *Williams v. Pee Dee Electric Membership Corp.*, 130 N.C. App. 298, 303, 502 S.E.2d 645, 648 (1998). An employee must prove all three of the following factual elements in order to support a conclusion of disability:

- (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment,
- (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and
- (3) that this individual's incapacity to earn was caused by plaintiff's injury.

Hilliard v. Apex Cabinet Co., 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). Therefore, "[t]he burden is on the employee to show that he is unable to earn the same wages he had earned before the injury, either in the same employment or in other employment." *Russell v. Lowes Prod. Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993). As recognized by our Supreme Court in *Medlin v. Weaver Cooke Constr., LLC*, 367 N.C. 414, 422, 760 S.E.2d 732, 737 (2014), the first two elements announced in *Hilliard* may be proven in one of four ways:

- (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment;
- (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment;
- (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or
- (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Russell, 108 N.C. App. at 765, 425 S.E.2d at 457 (citations omitted). "[A] claimant must also satisfy the third element, as articulated in *Hilliard*, by proving that his inability to obtain equally well-paying work is because of his work-related injury." *Medlin*, 367 N.C. at 422, 760 S.E.2d at 737.

The Commission found the following facts as to whether Anders had satisfied any of *Russell's* prongs:

35. Except for the short period of time following his surgeries, Plaintiff has failed to produce evidence that he was unable to work due to his injuries, that he conducted a

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reasonable job search, or that it would have been futile for him to look for work, after November 28, 2010. While Plaintiff returned to work at Waffle House, earning a lower hourly rate than that earned with Defendant-Employer, Plaintiff has failed to produce competent evidence that he earned less than his average weekly wage at any point during his employment with Waffle House or Hardee's. Plaintiff also failed to produce evidence that any partial incapacity to work or any decrease in earnings was a result of his November 20, 2010 injuries and any subsequent physical impairments.

. . .

37. Plaintiff quit his job at Hardee's in October 2011 due to lack of hours. From approximately October 2011 through May 2013, Plaintiff mainly performed landscaping and construction work in the form of framing houses and was paid in cash. Plaintiff did not present evidence of his earnings from his work performed with Waffle House or Hardee's, or his jobs in landscaping and construction.

38. According to his sworn discovery answers served on July 21, 2014, since the date of his injury, Plaintiff sought work at Coca-Cola, Lowe's, Smithfield Genetics, and Georgia Pacific. Plaintiff indicated he also sought work through the Employment Security Commission but did not provide any further details as to the number or types of positions for which he applied.

39. At the evidentiary hearing held on September 10, 2014, Plaintiff presented a one-page job search log detailing contact with various employers from August 2014 through September 2014. Given the manner in which it was completed and Plaintiff's failure to explain the unusual format, it is likely that Plaintiff constructed this sheet at one time rather than over the period of one month as alleged. The timing of this job search documentation is suspect since the calendar for setting the hearing in this matter would have been sent out the first of August, 2014. Plaintiff testified, and there is no evidence to the contrary, that he is physically able to perform all the positions to which he applied.

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40. Plaintiff has not conducted a reasonable job search. The records do not reflect the types of positions for which Plaintiff applied and whether he met any necessary qualifications for the positions. Furthermore, the evidence reveals Plaintiff contacted approximately 12 employers total over a three-year period in an effort to obtain suitable employment.

These unchallenged findings support the Commission's conclusion that Anders failed to meet his burden of establishing that he was "disabled as defined by the [Workers' Compensation] Act, except for [the] period from March 22, 2011 through April 7, 2011[,]" during which time defendants *did pay* indemnity benefits.

2. Indemnity Compensation Pursuant to N.C. Gen. Stat. § 97-31(24)

As to Anders' right to indemnity compensation pursuant to section 97-31(24), the Commission found:

28. . . . Dr. Williams testified he treated Plaintiff for nerve-type pain in his right groin and Plaintiff got better. Further, Dr. Williams could not provide the opinion that Plaintiff suffered an injury to a nerve.

. . .

30. Dr. Ketoff indicated there was no permanent damage to the muscles making up Plaintiffs abdominal muscular floor or to Plaintiff's spermatic blood vessels or cord. Dr. Ketoff opined that the right-sided numbness Plaintiff is experiencing is from the inguinal nerve and is probably permanent. As to the left side, Dr. Ketoff could not provide an opinion on whether Plaintiff would have permanent numbness. Dr. Ketoff did not provide evidence or testimony of the importance of the inguinal nerve to the body's general health and well-being.

These unchallenged findings support the Commission's conclusions that Anders "failed to establish through competent medical evidence that he suffered loss or permanent damage to any important organs or body parts[,] and that it would be "[im]proper to issue an award under N.C. Gen. Stat. § 97-31(24)."

3. Application

We are mindful that the Commission's causation analysis, which is discussed in more detail below, was a component of its decision to deny

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Anders' claim for additional indemnity compensation. However, as demonstrated in Section III. C. 1. above, Anders failed to produce evidence of how his earning capacity following his termination was impaired in any way. Without establishing wage loss in the first instance, there was no way for Anders to prove that *any* wage loss was connected to the work-related, compensable injury. See *Medlin v. Weaver Cooke Const., LLC*, 229 N.C. App. 393, 396, 748 S.E.2d 343, 346 (2013) ("The purpose of the four-pronged *Russell* test is to provide channels through which an injured employee may demonstrate the required 'link between wage loss and the work-related injury.' ") (citing *Fletcher v. Dana Corp.*, 119 N.C. App. 491, 494-99, 459 S.E.2d 31, 34-36 (1995)), *aff'd*, 367 N.C. 414, 760 S.E.2d 732 (2014). Because this required link was not established, Anders failed to prove that he was partially or totally disabled during the periods for which he seeks compensation. Furthermore, Anders failed to establish that he suffered permanent loss or injury to an important organ or body part. Accordingly, based on the analysis above, and the crucial fact that Anders does not challenge the Commission's findings or conclusions concerning the periods of disability he allegedly suffered as a result of the work-related accident, the Commission's ultimate conclusion that Anders was not "entitled to any additional indemnity compensation under N.C. Gen. Stat. §§ 97-29, 30, or 31" remains undisturbed.

D. The Commission's Causation Analysis and the Parsons Presumption

On appeal, Anders' primary arguments are that the facts of *Bondurant v. Estes Express Lines, Inc.*, 167 N.C. App. 259, 606 S.E.2d 345 (2004)³ are distinguishable from this case, and that the Commission

3. In *Bondurant*, the plaintiff suffered three compensable hernias, two of which were surgically repaired. 167 N.C. App. at 261, 606 S.E.2d at 346-47. The plaintiff later suffered three additional hernias while he was no longer in the employ of the defendant. *Id.* at 261-62, 606 S.E.2d at 347. On appeal to this Court, the plaintiff challenged the Commission's conclusion that his three subsequent hernias were not compensable because they were not causally related to the prior compensable hernias and were therefore governed by the statutory test for the compensability of hernias. *Id.* at 265, 606 S.E.2d at 349; see N.C. Gen. Stat. § 97-2(18) (requiring, *inter alia*, that a hernia be the immediate and direct result of a work-related accident or specific traumatic incident of work assigned by the defendant-employer). This Court rejected the plaintiff's argument that the Commission erred by applying the test set out in section 97-2(18) instead of applying the rule recognized in *Heatherly v. Montgomery Components, Inc.*, 71 N.C. App. 377, 379, 323 S.E.2d 29, 30 (1984) ("When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury arises out of the employment, unless it is the result of an independent intervening cause attributable to claimant's own intentional conduct.") (citation omitted), reasoning that "even if [we] . . . were to conclude that

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erred in relying on *Bondurant* to support its conclusion that Anders' subsequent bilateral hernias were not compensable because they were not the direct and natural result of the earlier, compensable hernia that he sustained while employed by Universal Leaf. Anders supplements these arguments with his assertion that the Commission erroneously placed on him the burden of proving that his subsequent recurrent hernias were causally related to his compensable 20 November 2010 injury. According to Anders, the Commission failed to give him the benefit of the evidentiary presumption enunciated in *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 485 S.E.2d 867 (1997).

The Commission found that Dr. Vire “determined that Plaintiff’s bilateral hernias caused by the November 22, 2010 [compensable] injury would have been fully healed by May 18, 2013[,]” and that “Dr. Ketoff agreed that the medical records from Dr. Vire and Dr. Williams indicated that Plaintiff has recovered from his March 22, 2011 hernia repairs.” Based on these and other findings, and applying “the reasoning in *Bondurant*” and “the statutory test enumerated in [section] 97-2(18)[,]” the Commission concluded that because “[t]he competent, credible evidence establishes that Plaintiff had fully healed from his initial hernia surgery with Dr. Vire [on] March 22, 2011 when he subsequently sustained acute injuries to his bilateral groin in 2013 and 2014,” Anders’ recurrent hernias were not compensable.

It is well established that an employee who seeks workers’ compensation benefits must prove that a causal relationship exists between the injury suffered and the work-related accident. *Hedges v. Wake Cty. Pub. Sch. Sys.*, 206 N.C. App. 732, 734, 699 S.E.2d 124, 126 (2010), *disc. review denied*, 365 N.C. 77, 705 S.E.2d 746 (2011). But in *Parsons*, this Court held that where the Commission has determined that an employee has suffered a compensable injury, a rebuttable presumption arises that additional medical treatment is causally related to the original injury. 126 N.C. App. at 542, 485 S.E.2d at 869. In this context, the burden of proof is shifted from the employee to the employer “to prove the original finding of compensable injury is unrelated to [the employee’s] present discomfort.” *Id.* If the employer, however, “rebutts the *Parsons* presumption, the burden of proof shifts back to the [the employee].” *Miller v. Mission Hosp., Inc.*, 234 N.C. App. 514, 519, 760 S.E.2d 31, 35 (2014) (citation omitted).

Heatherly controls, plaintiff’s argument nevertheless fails as [expert medical testimony established] that just because a person has undergone a hernia repair, it does not necessarily follow that the person will have another hernia.” *Bondurant*, 167 N.C. App. at 266, 606 S.E.2d at 350.

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In the present case, Anders sought additional medical treatment for recurring hernias allegedly caused by his 2010 work-related injury. By filing a Form 60, defendants admitted the compensability of the 2010 injury. *See Perez v. Am. Airlines/AMR Corp.*, 174 N.C. App. 128, 136, 620 S.E.2d 288, 293 (2005) (holding that the *Parsons* presumption applies when an employer has admitted compensability of the original injury by filing a Form 60). As a result, the burden had shifted to defendants on the issue of whether Anders was entitled to additional compensation. Deputy Commissioner Stephenson correctly applied the *Parsons* presumption in her Opinion and Award before concluding that defendants had “successfully rebutted Plaintiff’s presumption that the recurrent hernias are related to the original compensable hernias.” The Commission, however, clearly failed to give Anders the benefit of the *Parsons* presumption.

Ordinarily, the Commission’s error would require us to reverse its determination of causation and remand for a new hearing on that issue. *See, e.g., King v. Kelly Springfield Tire Co.*, 159 N.C. App. 466, 583 S.E.2d 426 (2003) (remanding for new findings where the Commission failed to place the burden on the defendant to prove that the additional medical treatment sought by the plaintiff was not related to his original compensable injury); *Reininger v. Prestige Fabricators, Inc.*, 136 N.C. App. 255, 260, 523 S.E.2d 720, 724 (1999) (“[T]he Commission[’s findings indicate that it] failed to give Plaintiff the benefit of the [*Parsons*] presumption that his medical treatment now sought was causally related to his 1995 compensable injury. . . . Because Plaintiff was entitled to such a presumption, we remand this case to the Commission for a new determination of causation.”). But that is not necessary in this case because Anders’ claim for medical compensation is barred by the provisions of section 97-25.1, and the Commission’s conclusion that Anders is not entitled to any additional indemnity compensation due to his failure to prove that he suffered any period of “disability” following his termination from employment with Universal Leaf remains undisturbed. Accordingly, Anders’ claims for medical and indemnity compensation are barred for reasons independent of the causation issue.

IV. Conclusion

Anders’ claim for additional medical compensation is barred by the provisions of N.C. Gen. Stat. § 97-25.1. In addition, because Universal Leaf met its initial burden of showing that Anders’ termination satisfied the *Seagraves* test, the burden shifted to Anders to prove that he was incapable of earning his pre-injury wages in the same employment or any other employment *and* that the inability to earn such wages was linked to his November 2010, work-related injury. *Hilliard*, 305 N.C. at

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595, 290 S.E.2d at 683. Because Anders failed to produce evidence establishing that his pre-injury earning capacity was affected, it is inconsequential whether his subsequent recurring hernias were caused by the original compensable hernia. Although the Commission failed to give Anders the benefit of the *Parsons* presumption, a reversal on that issue would not change the outcome for Anders, so we need not reach this issue or remand for a new causation determination. As a result, the Commission's Opinion and Award is affirmed.

AFFIRMED.

Judges ELMORE and DILLON concur.

THE CITY OF ASHEVILLE, PETITIONER
v.
ROBERT H. FROST, RESPONDENT

No. COA16-577

Filed 2 May 2017

1. Appeal and Error—appealability—interlocutory orders—demand for jury trial

An order denying petitioner's motion to strike respondent's demand for a jury trial was addressed on appeal because it affected a substantial right.

2. Trials—civil—request for jury trial—Asheville Civil Service Board

Only the petitioner, the City of Asheville, had the right to request a jury trial in an appeal from the Asheville Civil Service Board to the Buncombe County Superior Court, and the trial court erred by not dismissing respondent's request for a jury trial. Applying the statutory construction rule that the specific is favored over the general, the language in N.C. Session Law 2009-401 naming petitioner as the only party who may request a jury trial controlled the more general language that the matter shall proceed to trial as any other civil action.

Judge DIETZ concurring.

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Judge HUNTER, Jr. dissenting.

Appeal by petitioner from order entered 22 December 2015 by Judge William H. Coward in Buncombe County Superior Court. Heard in the Court of Appeals 10 January 2017.

McGuire, Wood & Bisette, P.A., by Sabrina Presnell Rockoff, and Asheville City Attorney Robin Currin, Deputy City Attorney Kelly Whitlook, and Assistant City Attorney John Maddux, for petitioner-appellant.

John C. Hunter for respondent-appellee.

BRYANT, Judge.

Where North Carolina Session Law 2009-401 specifically provides that a petitioner may request a trial by jury and then provides that the matter shall proceed “as any other civil action,” the specificity of the session law controls and the trial court erred in denying petitioner’s motion to strike respondent’s demand for a jury trial.

This matter was first brought before the Civil Service Board of the City of Asheville (“the Civil Service Board”) as a quasi-judicial matter on 9 September 2014. The Civil Service Board was tasked with a review of the process by which Senior Police Officer Robert H. Frost had been terminated from employment on 12 March 2014. Officer Frost’s termination resulted from an accusation of excessive force.

In an order entered 25 September 2014, the Civil Service Board made findings of fact which indicated that on 2 February 2014, Officer Frost was in uniform, driving a marked police vehicle, working as a patrol officer for the Asheville Police Department when he was “flagged down” by a store clerk for the “Hot Spot” located at 70 Asheland Avenue. The clerk directed Officer Frost’s attention to a woman, Amber Banks, who had previously been banned from the store. As Banks was leaving the area, Officer Frost yelled for her to stop and ran to catch up with her as she kept walking away. Officer Frost arrested Banks for trespassing.

As he escorted Banks back toward his vehicle, a struggle ensued. Officer Frost took Banks to the ground with a leg sweep, called for backup, and placed Banks in handcuffs. As they again proceeded toward the police vehicle, it appeared to Officer Frost that Banks was getting ready to kick him. In order to defend himself, he began running with

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Banks and then pushed her onto the hood of his police vehicle. On the car hood, Banks rolled over and Officer Frost believed she was attempting to bite him. So, he took her to the pavement, admitting that he lost his grip and that Banks landed harder than he had intended. Banks laid still and quiet on the ground until another officer arrived. Emergency Medical Services also arrived, checked Banks at the scene, and cleared her to go to the detention facility.

The same day of the incident, Officer Frost completed an “Asheville PD Use of Force Report.” The report was reviewed by Officer Frost’s chain of command, and ultimately, the incident was investigated by the State Bureau of Investigation and Office of Professional Standards. On 14 February 2014, Officer Frost was placed on paid non-disciplinary investigative suspension. Following a 28 February 2014 panel hearing convened upon a supervisor’s recommendation of disciplinary action, a recommendation was made that Officer Frost be terminated from employment. On 12 March 2014, Officer Frost was terminated from employment with the City of Asheville Police Department. Officer Frost timely appealed the termination to the Civil Service Board. The Civil Service Board found that termination of Officer Frost was improper and in violation of city policies as Officer Frost was not provided adequate due process protection. Therefore, the Civil Service Board concluded that the City’s termination of Officer Frost was not justified, that the termination should be rescinded, and that Officer Frost should be reinstated with back pay and all benefits.

On 3 October 2014, the City of Asheville filed a civil summons and a petition for trial de novo in Buncombe County Superior Court. Shortly thereafter, on the same day, Officer Frost likewise filed with Buncombe County Superior Court a petition for a trial de novo.

In his petition for a trial de novo, Officer Frost requested a trial by jury pursuant to Section 8(g) of the Asheville Civil Service Law. In its petition, the City of Asheville did not request a trial by jury. However, on 12 November 2014, in response to Officer Frost’s petition for trial de novo, the City filed an answer, a motion to dismiss, and a motion to strike. The City challenged Officer Frost’s standing to appeal, given that the order he attempted to appeal ruled in his favor—that his termination was not justified and he was to be reinstated with full back pay. The City further challenged that due to the City’s appeal—filed before Officer Frost’s appeal—involving the same parties and relating to the same subject matter, Officer Frost’s petition was unlawful and “wholly unnecessary.”

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Following a hearing in Buncombe County Superior Court, the Honorable Mark E. Powell entered a 25 February 2015 order granting the City's motion to dismiss with prejudice Officer Frost's petition for a de novo trial by jury, as Officer Frost lacked standing and his petition was abated by the doctrine of prior pending action.

On 30 November 2015, a hearing was held on Officer Frost's demand for a jury trial in response to the City of Asheville's petition for a trial de novo, the Honorable William H. Coward, Judge presiding. On 22 December 2015, Judge Coward entered an order noting that the City of Asheville filed a 9 November 2015 motion to strike Officer Frost's demand for a jury trial "on the grounds that the [Asheville Civil Service Law, 1953 N.C. Session Laws Chapter 747, as amended by 2009 N.C. Session Law Chapter 401 ("the Act")] only allows the 'petitioner' to request a jury trial." The court acknowledged the language of the Act, stating "either party may appeal to the Superior Court Division . . . for a trial de novo. . . . If the petitioner desires a trial by jury, the petitioner shall so state. . . . [And] [t]here[after], the matter shall proceed to trial as any other civil action." The court reasoned that because the Act directs "the matter shall proceed . . . as any other civil action," Rule 38 of our Rules of Civil Procedure ("Jury trial of right"), allows Officer Frost, as the respondent, to request a trial by jury. Thus, the trial court denied petitioner City of Asheville's motion to strike respondent Officer Frost's demand for a jury trial. Petitioner City of Asheville appeals.

Interlocutory Appeal

[1] Judgments and orders of the Superior Court are divisible into these two classes: (1) Final judgments; and (2) interlocutory orders. . . . An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.

Veazey v. Durham, 231 N.C. 357, 361–62, 57 S.E.2d 377, 381 (1950) (citations omitted). "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[.]" N.C. Gen. Stat. § 1-277(a) (2015). "[A]ppel lies of right directly to the Court of Appeals . . . (3) [f]rom any interlocutory order or judgment of a superior court or district court in a civil action or proceeding that . . . : a. Affects a substantial right." *Id.* § 7A-27(b)(3)a.

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Our Supreme Court has held that a trial court order denying “the defendant’s motion that the plaintiffs’ demand for a jury trial be invalidated as an interlocutory order which does not affect a substantial right” is properly overruled, as “an order denying a jury trial is appealable, an order requiring a jury trial should be appealable.” *Faircloth v. Beard*, 320 N.C. 505, 506–07, 358 S.E.2d 512, 513–14 (1987)¹ (citing *In re McCarroll*, 313 N.C. 315, 327 S.E.2d 880 (1985); *In re Ferguson*, 50 N.C. App. 681, 274 S.E.2d 879 (1981)). See generally *In re Foreclosure of Elkins*, 193 N.C. App. 226, 227, 667 S.E.2d 259, 260 (2008) (“[A]n order denying a motion for a jury trial . . . affects a substantial right.”). Therefore, we address this appeal.

Analysis

[2] On appeal, petitioner City of Asheville argues that the trial court erred by denying its motion to strike respondent Officer Frost’s demand for a jury trial. The City of Asheville contends that N.C. Session Law 2009-401, governing appeals from the Asheville Civil Service Board, allows only the petitioner to request a jury trial. We agree.

“[W]here an appeal presents a question of statutory interpretation, this Court conducts a *de novo* review of the trial court’s conclusions of law.” *Ennis v. Henderson*, 176 N.C. App. 762, 764, 627 S.E.2d 324, 325 (2006) (citation omitted).

Pursuant to the North Carolina Constitution, “[t]he General Assembly shall provide for the organization and government . . . and, except as otherwise prohibited by this Constitution, may give such powers and duties to counties, cities and towns, and other governmental subdivisions as it may deem advisable.” N.C. Const. art. VII, § 1.

The General Assembly delegates express power to municipalities by adopting an enabling statute

. . . If the language of [the enabling] statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning. A statute clear on its face must be enforced as written.

Quality Built Homes Inc. v. Town of Carthage, ___ N.C. ___, ___, 789 S.E.2d 454, 457 (2016) (alteration in original) (citations omitted).

1. *Faircloth* was distinguished on other grounds by *Kiser v. Kiser*, 325 N.C. 502, 385 S.E.2d 487 (1989), but as the Court noted, the *Kiser* decision “does not disturb the result in *Faircloth*.” *Kiser*, 325 N.C. at 510, 385 S.E.2d at 491.

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“We preface our analysis by noting that statutory interpretation begins with the plain meaning of the words of the statute. Where the plain meaning of the statute is clear, no further analysis is required. Where the plain meaning is unclear, legislative intent controls.” *Sharpe v. Worland*, 137 N.C. App. 82, 85, 527 S.E.2d 75, 77 (2000) (citations omitted).

“First, it is a well established principle of statutory construction that a section of a statute dealing with a specific situation controls, with respect to that situation, [over] other sections which are general in their application.” *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 354 N.C. 298, 304, 554 S.E.2d 634, 638 (2001) (citations omitted). “In such situation the specially treated situation is regarded as an exception to the general provision.” *Utilities Comm’n v. Elec. Membership Corp.*, 275 N.C. 250, 260, 166 S.E.2d 663, 670 (1969) (citation omitted).

The rule of statutory construction *ejusdem generis* provides that:

where general words follow a designation of particular subjects or things, the meaning of the general words will ordinarily be presumed to be, and construed as, restricted by the particular designations and as including only things of the same kind, character and nature as those specifically enumerated.

Knight v. Town of Knightdale, 164 N.C. App. 766, 769, 596 S.E.2d 881, 884 (2004) (quoting *State v. Lee*, 277 N.C. 242, 244, 176 S.E.2d 772, 774 (1970)).

North Carolina Session Law 1953-757 established a Civil Service Board as part of the government of the City of Asheville. 1953 N.C. Sess. Law 757 § 1. As amended in 2009 by Session Law 2009-401, entitled “An act to revise the laws relating to the Asheville Civil Service Board,” our General Assembly provided the following:

Within ten days of the receipt of notice of the decision of the Board, *either party may appeal to the Superior Court Division of the General Court of Justice for Buncombe County for a trial de novo*. The appeal shall be effected by filing with the Clerk of the Superior Court of Buncombe County a petition for trial in superior court, setting out the fact upon which the petitioner relies for relief. *If the petitioner desires a trial by jury, the petition shall so state. . . .* Therefore, the matter shall proceed to trial as any other civil action.

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2009 N.C. Sess. Laws 401 § 7(g) (emphasis added). While “either party may appeal . . . for a trial de novo,” the session law names the petitioner as the party to designate whether a trial by jury is desired. *Id.* However, the superior court in its 22 December 2015 order and respondent Officer Frost in his argument before this Court contend that the last sentence of the session law, “[t]here[after], the matter shall proceed to trial as any other civil action,” gives rise to a respondent’s right to request a trial by jury.²

Respondent argues that “proceed[ing] to trial as any other civil action” invokes our Rules of Civil Procedure, specifically Rule 38, “Jury trial by right.” Per Rule 38, “[a]ny party may demand a trial by jury of any issue triable of right by a jury . . .” N.C. Gen. Stat. § 1A-1, Rule 38(b) (2015). And thus, respondent Officer Frost, as a party to a civil action filed in Buncombe County Superior Court may demand a trial by jury on the issues appealed from the Civil Service Board. For the following reasons, we disagree with respondent’s argument.

“The primary objective of statutory interpretation is to ascertain and effectuate the intent of the legislature.” *Lunsford v. Mills*, 367 N.C. 618, 623, 766 S.E.2d 297, 301 (2014) (citation omitted). Where one rule is more specific in describing the rights afforded a party in action than another rule, we are guided by the construction “that a section of a statute dealing with a specific situation controls, with respect to that situation, [over] other sections which are general in their application.” *Westminster Homes, Inc.*, 354 N.C. at 304, 554 S.E.2d at 638 (citation omitted). Moreover, “it is a fundamental principle of statutory interpretation that courts should evaluate [a] statute as a whole and . . . not construe an individual section in a manner that renders another provision of the same statute meaningless.” *Lunsford*, 367 N.C. at 628, 766 S.E.2d at 304 (alteration in original) (citation omitted).

Session Law 2009-401 specifically provides for appeals to Buncombe County Superior Court from orders entered by the Asheville Civil Service Board and states that either party may appeal the decision of the Civil Service Board. But the session law designates only the petitioner as a party who may request a jury trial. This designation, that a petitioner may request a jury trial in appeals from decisions of the Civil Service Board to the Buncombe County Superior Court, is more specific than the right more generally conferred in Civil Procedure Rule 38, allowing

2. We note that Officer Frost did not appeal from the 25 February 2015 order of Judge Powell granting the City’s motion to dismiss with prejudice Officer Frost’s petition for a trial by jury.

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any party to a civil action to demand a jury trial. Thus, pursuant to the construction favoring the rule tailored to a specific circumstance as controlling over a more generally applicable rule, the language of Session Law 2009-401 naming only the petitioner as the party who may request a jury trial is controlling over the more generally applicable right of any party to demand a jury trial, as provided in Civil Procedure Rule 38. *See Westminster Homes, Inc.*, 354 N.C. at 304, 554 S.E.2d at 638. Moreover, to read Session Law 2009-401's language that "the matter shall proceed to trial as any other civil action" as an incorporation of the Rules of Civil Procedure, including the right of any party to demand a jury trial, would render the language designating only the petitioner as the party who may request a jury trial meaningless. This, too, violates our rules of statutory interpretation. *See Lunsford*, 367 N.C. at 628, 766 S.E.2d at 304. Therefore, based on our well-established rules of statutory construction, only petitioner City of Asheville had the right to request a jury trial. Accordingly, we hold the trial court erred in failing to dismiss respondent Officer Frost's request for a jury trial, and the trial court's 22 December 2015 order is

REVERSED.

Judge DIETZ concurs in a separate opinion.

Judge HUNTER, Jr., dissents in a separate opinion.

DIETZ, Judge, concurring.

The dissent's reasoning demonstrates that this is a difficult case with issues about which reasonable jurists can disagree. I write separately to highlight what are, in my view, three key reasons why the dissent is unpersuasive.

First, the fact that Rule 38 of the Rules of Civil Procedure applies to the trial court's review below (and I agree that it does), says nothing of whether Frost, as the respondent, has a right to a jury trial. Rule 38 does not create a substantive right to a jury trial—it merely creates the procedure to request a jury trial where there is a right to one. N.C. Gen. Stat. § 1A-1, Rule 38(a), (b). Were it otherwise, there would be a right to a jury trial in every civil action; there is not. *See Kiser v. Kiser*, 325 N.C. 502, 508, 385 S.E.2d 487, 490 (1989).

Instead, the right to a jury trial in a civil action is conferred in one of two ways: by statute or by our State constitution. A statutory right

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to a jury trial exists if the right is conferred “in the express language of the statute itself.” *Id.* at 509, 385 S.E.2d at 490. A constitutional right to a jury trial exists if the right “existed by statute or at common law at the time the Constitution of 1868 was adopted.” *Id.* at 507, 385 S.E.2d at 490.

Neither means of conveying a right to jury trial is present here. As explained in the majority opinion, the express language of the statute only confers a right to jury trial on the petitioner, not the respondent. And this Civil Service Act claim, like the claim for equitable distribution in *Kiser*, “did not exist prior to 1868, but was newly created by the General Assembly”—in this case, by the Civil Service Act of 1953. *Id.* at 508, 385 S.E.2d at 490. Thus, the respondent in these Civil Service Act proceedings does not have a right to demand a jury trial.

Second, I do not agree that the majority opinion reads the term “only” into the statute where it does not exist. The statute says “either party may appeal,” “[t]he appeal shall be effected by filing . . . a petition for trial in superior court,” and “[i]f the petitioner desires a trial by jury, the petition shall so state.” 2009 N.C. Sess. Laws ch. 401, § 7. Thus, the reason that only the petitioner may request a jury trial is not because this Court inserted the word “only” into the text, but because the statute’s plain language only gives that right to the petitioner, not the respondent.

Third, while I acknowledge that we must interpret statutes in a manner that avoids absurd results, the majority’s interpretation does not lead to absurd results. The absurdity canon applies “[w]here the plain language of the statute would lead to patently absurd consequences” that the legislature “could not *possibly* have intended.” *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 470, (1989) (Kennedy, J., concurring). Permitting only the losing side to request a jury trial in an administrative proceeding is unusual, but it is something the General Assembly certainly *could* have intended. Thus, I do not believe we can invoke the absurdity canon to ignore the statute’s plain language in this case.

HUNTER, JR., Robert N., Judge, dissenting.

The majority concludes North Carolina Session Law 2009-401 allows for a petitioner, and only a petitioner, seeking a trial *de novo*, the right to a trial by jury. Under the majority’s construction, the option to request a trial by jury is a unilateral right extended only to one party. Because the majority’s textual construction resolves a statutory ambiguity in a manner which misapplied the canons of statutory construction achieves an “absurd” result, I respectfully dissent.

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This case concerns an ambiguity created by the Asheville's Civil Service Act. The ambiguity is whether the statute grants a right to have facts determined by a jury to only the party whom petitions for judicial review from a ruling by the Asheville Civil Service Board or whether that right is also given to the respondent or the other party whom may also cross petition from a ruling.

The General Assembly first codified Asheville's Civil Service Act ("the Act") in 1953. The Act's purpose was to protect the City of Asheville's employees. *City of Asheville v. Aly*, 233 N.C. App. 620, 623, 757 S.E.2d 494, 498 (2014). The Act established the Asheville Civil Service Board ("the Board") and charged it with the "duty to make rules for 'the appointment, promotion, transfer, layoff, reinstatement, suspension and removal of employees in the qualified service.'" *Id.* at 623, 757 S.E.2d at 498 (quoting 1953 N.C. Sess. Laws ch. 757, § 4). Although the Act did not provide a mechanism for judicial review of the Board's determinations, our Supreme Court concluded a discharged City employee could petition a trial court to review the Board's decision:

[i]n view of the provisions of the statute creating the Civil Service Board of the City of Asheville, and the procedure outlined in Section 14 thereof, we hold that a hearing pursuant to the provisions of the Act with respect to the discharge of a classified employee of the City of Asheville by said Civil Service Board, is a quasi-judicial function and is reviewable upon a writ of certiorari issued from the Superior Court.

Id. at 623, 757 S.E.2d at 498 (quoting *In re Burris*, 261 N.C. 450, 453, 135 S.E.2d 27, 30 (1964)).

In 1977, our Legislature codified a party's right to a judicial review of the Board's decision by enacting the following provision which is at issue on this appeal:

Within ten days of the receipt of notice of the decision of the Board, *either party* may appeal to the Superior Court Division of the General Court of Justice for Buncombe County for a trial *de novo*. The appeal shall be effected by filing with the Clerk of the Superior Court of Buncombe County a petition for trial in superior court, setting out the fact[s] upon which the petitioner relies for relief. If the *petitioner* desires a trial by jury, the petition shall so state. Upon the filing of the petition, the Clerk of the Superior Court shall issue a civil summons as in [a] *regular civil*

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action, and the sheriff of Buncombe County shall serve the summons and petition on all parties who did not join in the petition for trial. . . . Therefore, the matter shall proceed to trial as any other *civil action*.

2009 N.C. Sess. Laws 401 § 7 (emphasis added).

This Court interpreted the scope of a *de novo* appeal to the Buncombe County Superior Court from a decision by the Board upholding the discharge of an Asheville City police officer. *Warren v. City of Asheville*, 74 N.C. App. 402, 328 S.E.2d 859 (1985). In *Warren*, this Court concluded a *de novo* appeal to the trial court “vests a court with full power to determine the issues and rights of all parties involved, and to try the case as if the suit had been filed originally in that court.” *Id.* at 405, 328 S.E.2d at 862 (quoting *In re Hayes*, 261 N.C. 616, 622, 135 S.E.2d 645, 649 (1964)) (emphasis added).

“When construing a statute, ‘we are guided by the primary rule of construction that the intent of the legislature controls.’” *Woodlief v. N.C. State Bd. Of Dental Examiners*, 104 N.C. App. 52, 58, 407 S.E.2d 596, 600 (1991) (quoting *In re Hardy*, 294 N.C. 90, 95, 240 S.E.2d 367, 371 (1978)). Here, the Act’s purpose is to ensure Asheville City employees receive fair treatment in all aspects of their employment, including discharge. This purpose is even clearer following the Legislature’s codification of the mechanism allowing for a trial court’s review of the Board’s decision. Furthermore, this Court has ruled a trial court’s *de novo* review following the Board’s decision is a full trial proceeding. *See Warren* at 405-06, 328 S.E.2d at 862. In light of this, I cannot see how the Act or the Legislature ever contemplated, much less intended, for only one party to an appeal from the Board’s decision to have the right to a jury trial.

“Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give it its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein.” *Walters v. Cooper*, 226 N.C. App. 166, 169, 739 S.E.2d 185, 187 (2013) (quoting *State v. Camp*, 286 N.C. 148, 152, 209 S.E.2d 754, 756 (1974)). “When a literal interpretation of statutory language yields absurd results, however, or contravenes clearly expressed legislative intent, ‘the reason and purpose of the law shall control and the strict letter thereof shall be disregarded.’” *AVCO Financial Services v. Isbell*, 67 N.C. App. 341, 343, 312 S.E.2d 707, 708 (1984) (quoting *State v. Barksdale*, 181 N.C. 621, 625, 107 S.E. 505, 507 (1921)). “We also assume that the legislature acted with full knowledge of prior and existing law in drafting any particular statute.” *Walters* at 169, 739 S.E.2d 185, 187 (citation omitted).

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In concluding only a petitioner may request a jury trial, it seems the majority fails to consider the provision in its entirety. The majority instead focuses on the single statutory phrase, “if the petitioner desires a trial by jury, the petition shall so state.” In interpreting that language, the majority neglects to consider the legislature couched that phrase between the opening words “either party” and the closing sentence, “[t]herefore, the matter shall proceed to trial as any other civil action.” This final sentence, and especially the term “civil action,” directs the reader to Rule 38 of the North Carolina Rules of Civil Procedure: “[a]ny party may demand a trial by jury of any issue triable of right by a jury.” N.C. Gen. Stat. § 1A-1, Rule 38(b) (2016) (emphasis added).

Here, it naturally and logically follows our Rules of Civil Procedure apply. Our Legislature expressly provided “either party” has the right to request a trial *de novo*. Our Legislature further provided this trial *de novo* to proceed as “any other civil action.” Therefore, the invocation of Rule 38 indicates all the consequences of designating this mechanism for judicial review a “civil action” are in effect here: especially the fundamental right to a trial by jury.

The statutory phrase at the cornerstone of the majority’s decision simply serves as the mechanism for a petitioner to request a jury trial in an appeal from the Board’s decision. If the Legislature intended for this provision to mean only a petitioner may ask for a jury trial, the Legislature would have stated its intention by including the word “only.” Rather, the Legislature omitted the term “only” and instead provided for “either party[’s]” appeal to Superior Court to proceed as “any other civil action.” I cannot contemplate another civil action in this State which allows for only one party to designate whether a trial includes a jury.

In concluding only a Petitioner has a right to a jury trial, the majority’s construction superimposes the term “only.” Their view is the Legislature intended for only one party, the petitioning party in the proceeding below, to have the right to a jury trial. It does not account for the situation where both parties petition for review. This leads to the illogical result in violation of the canon of statutory construction prohibiting an interpretation that leads to an absurd result. *AVCO Financial Services* at 343, 312 S.E.2d at 708. At best, this interpretation results in a race between the City and the discharged employee to first appeal the Board’s decision¹. At worst, this interpretation creates an incentive for a party to lose its proceeding in front of the Board. In order for a party to

1. In fact, this is exactly what happened. Frost filed his petition for a trial *de novo* approximately 45 minutes after the City of Asheville filed its petition.

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qualify as a petitioner, and have the right to a jury trial, a party must first lose before the Board.

Mindful of the Act's purpose to protect discharged City employees, and the reasoning behind the Legislature's subsequent codification of section 7, I conclude either a petitioner or a respondent has a right to a jury trial following the Board's determination. I would therefore affirm the trial court's order denying Petitioner's motion to strike Respondent Frost's demand for a jury trial.

RANDALL COLE, PETITIONER

v.

NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, RESPONDENT

No. COA16-340

Filed 2 May 2017

1. Administrative Law—contested case—Office of Administrative Hearings—voluntary dismissal—state employee—wrongful termination

The trial court did not err in a wrongful termination case by a state employee by denying respondent N.C. Department of Public Safety's motion to dismiss the employee's second contested case petition. N.C.G.S. § 1A-1, Rule 41(a)(1) applies to contested cases before the Office of Administrative Hearings, and a petition for a contested case hearing may be voluntarily dismissed and refiled within one year.

2. Public Officers and Employees—state employee—just cause for dismissal—unsatisfactory job performance

The administrative law judge erred by reversing a state employee's termination from his position as a laundry plant manager based on unsatisfactory job performance. The requirements of the North Carolina Human Resources Act under 25 NCAC 01J .0605(b) were met and respondent had just cause to dismiss petitioner based on his failure to become certified as a Laundry Manager and his failure to reconcile receipts and send information and invoices to a central office.

Appeal by Respondent from final decision entered 9 February 2016 by Administrative Law Judge Donald W. Overby in the Office of Administrative Hearings. Heard in the Court of Appeals 17 October 2016.

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John C. Hunter for Petitioner.

Attorney General Joshua H. Stein, by Assistant Attorney General Tamika L. Henderson, for Respondent.

McGEE, Chief Judge.

The North Carolina Department of Public Safety (“Respondent”) appeals from a final decision of the Office of Administrative Hearings (“OAH”) concluding as a matter of law that Respondent lacked just cause to dismiss Randall Cole (“Petitioner”) from his position as a laundry plant manager, and ordering that he be retroactively reinstated but demoted. We conclude Respondent had just cause to dismiss Petitioner and, therefore, reverse the final decision of OAH.

I. Background

Petitioner worked for Respondent as an assistant director of the Craggy Laundry facility from November 2003 until his promotion to the position of plant manager in December 2010. Upon his promotion to plant manager, a change of command audit (“the audit”) was performed by Respondent. The audit is performed each time a new plant manager is hired, and serves as a “report of the condition of that particular facility under the prior management.” The audit revealed that improvement was needed in some areas of the laundry facility, and “significant improvement” was needed in others. Petitioner’s direct supervisor, Ronald Young (“Young”), discussed the results of the audit with Petitioner at a 3 February 2011 meeting. Due to the magnitude of the problems, “Petitioner was told that a follow-up audit would be conducted to verify corrective action was implemented.”

Young sent an email to Petitioner on 1 March 2011 reminding him that the problems that were found in the audit needed to be rectified. Although the problems had not been corrected by that time, Petitioner responded to Young and indicated that all of the issues had been corrected. The promised follow-up audit was conducted on 7 June 2011, and found that some of the issues identified in the audit had not been corrected. Due to these deficiencies, an unsatisfactory rating was entered into Petitioner’s employee appraisal, known as the appraisal process (“TAP”) for July 2011. An “employee action plan” was issued to Petitioner on 24 August 2011, that directed him to correct “all violations set forth in [the audit].”

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Sometime in November 2011, Young documented in Petitioner's TAP that Petitioner had abated all of the audit violations identified in the 24 August 2011 employee action plan. The TAP stated in the "performance log" that "[a]ll violations noted in [the audit] have abated." Despite this notation in Petitioner's TAP, Petitioner in fact had not abated all of the issues in the audit, and was issued a written warning for unsatisfactory job performance on 15 December 2011 (the "first written warning") for "not satisfactorily implementing or correcting actions prescribed on [the] action plan" issued 24 August 2011. The first written warning alerted Petitioner that he might "be subject to further discipline up to and including dismissal" if the problems were not corrected.

As a part of Petitioner's promotion to plant manager, Petitioner was required to become certified as a Laundry Manager under the Association of Linen Management Program. Petitioner was aware of this requirement, and the requirement was documented in his work plans in 2010, 2011, and 2012. Petitioner was also issued an action plan on 21 December 2012 that gave him until 31 January 2013 to obtain the certification. Despite the deadline being extended at least twice, Petitioner failed to obtain the required certification, and was issued another written warning on 20 March 2013 (the "second written warning").¹ The second written warning notified Petitioner that if he failed to achieve his certification by 20 April 2013,² he would "receive further disciplinary action up to and including dismissal."

As a part of Petitioner's job responsibilities as plant manager, he was required to reconcile receipts and send the information and invoices to a central office in Raleigh for payment. Petitioner was not fulfilling this job requirement and, in July 2013, Young reached out to Petitioner to inquire why the receipts and invoices were not being properly forwarded. Petitioner told Young that he would complete this task; however, he never did. As a result, Petitioner received a written warning for unsatisfactory job performance related to his failure to perform this task, as well as his failure to correct issues found in an audit conducted

1. The second written warning was issued for "grossly inefficient job performance" rather than unsatisfactory job performance. While Petitioner's conduct that led to the second written warning did not constitute grossly inefficient job performance, as the ALJ noted, "no disciplinary action shall be invalid solely because the disciplinary action is labeled incorrectly." 25 NCAC 01J .0604(c). Like the ALJ, we treat the second written warning as an instance of unsatisfactory job performance.

2. Petitioner did, eventually, receive the certification, but did so by July 2013, months after the 20 April 2013 deadline had passed.

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15 August 2013 (the “third written warning”). The third written warning advised Petitioner that he was expected to take “immediate corrective measures” or be subjected to “further disciplinary action up to and including dismissal.” Shortly after the third written warning was issued, a semi-annual safety inspection of the Craggy Laundry Facility was conducted and several violations were found, including failures to maintain safety reports and properly train staff on safety programs.

Karen Brown, the Director of Correction Enterprises and Young’s direct supervisor, “felt disciplinary action was warranted because of Plaintiff’s continued unsatisfactory job performance,” and a pre-disciplinary conference was held with Petitioner. Following this conference, Petitioner was dismissed from his position for unsatisfactory job performance. Following his dismissal, Petitioner utilized Respondent’s internal appeal procedure, and a final agency decision affirmed his dismissal. Petitioner filed a petition for a contested case hearing with OAH on 3 April 2014, alleging he was dismissed from his position of employment without just cause. Petitioner voluntarily dismissed his petition 144 days later, on 25 August 2014. More than eleven months later, on 12 August 2015, Petitioner filed a second petition for a contested case hearing.

Respondent filed a motion to dismiss the second petition, arguing that N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) is inapplicable to OAH proceedings and, therefore, a petition for a contested case hearing may not be voluntarily dismissed and refiled within one year. The Administrative Law Judge (“ALJ”) assigned to the case ruled that “Rule 41 of the N.C. Rules of Civil Procedure applies to contested cases heard by [OAH],” and denied Respondent’s motion. The ALJ held a hearing on the merits of Petitioner’s claims. Following that hearing, the ALJ issued a final decision concluding as a matter of law that “[a]lthough just cause existed for terminating Petitioner, Respondent failed to meet its burden of proof that it did not act erroneously or fail to use proper procedure” in terminating Petitioner from his employment “because Petitioner did not have two active warnings at the time he was disciplined and terminated.” According to the final decision, Respondent lacked just cause to terminate Petitioner but had “sufficiently proven that it had just cause to demote Petitioner based on his unsatisfactory job performance.” Therefore, the ALJ ordered Petitioner retroactively reinstated but demoted to the position of assistant manager. Respondent appeals.

II. Analysis

Respondent argues the ALJ erred by: (1) denying Respondent’s motion to dismiss and concluding that N.C.G.S. § 1A-1, Rule 41(a)(1)

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applies to proceedings before OAH; (2) entering several findings of fact that were not supported by substantial evidence in the record; (3) concluding that Respondent lacked just cause to dismiss Petitioner for unsatisfactory job performance; and (4) imposing a lesser form of discipline rather than remanding the case to the employing agency to impose a new form of discipline.

A. Applicability of N.C.G.S. § 1A-1, Rule 41(a)(1) to OAH Proceedings

[1] Respondent first argues the trial court erred in denying its motion to dismiss Petitioner's second contested case petition. We review this argument *de novo*. *Dion v. Batten*, ___ N.C. App. ___, ___, 790 S.E.2d 844, 851 (2016) (noting that this Court reviews issues of statutory interpretation *de novo*). Respondent contends that N.C.G.S. § 1A-1, Rule 41(a)(1), that permits a voluntarily dismissed claim to be refiled within one year of such dismissal, does not apply to cases before OAH. We disagree. N.C.G.S. § 1A-1, Rule 41(a)(1) provides, in relevant part:

Subject to the provisions of Rule 23(c) and of any statute of this State, an action or any claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case[.] . . . Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice[.] . . . If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal unless a stipulation filed under (ii) of this subsection shall specify a shorter time.

N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (2015). We begin with the assumption that the Rules of Civil Procedure apply to contested case hearings as they do in the trial courts, unless a statute or administrative rule dictates otherwise: "The Rules of Civil Procedure as contained in G.S. 1A-1 . . . shall apply in contested cases in the Office of Administrative Hearings (OAH) unless another specific statute or rule of the Office of Administrative Hearings provides otherwise." 26 NCAC 03 .0101(a) (2015) (emphasis added). Cases from this Court have interpreted N.C.G.S. § 1A-1, Rule 41(b) as applying to contested case hearings before OAH. See *Scott v. N.C. Dep't of Crime Control & Pub. Safety*, 222 N.C. App. 125, 730 S.E.2d 806 (2012); *Lincoln v. N.C. Dep't of Health & Human Servs.*, 172 N.C. App. 567, 616 S.E.2d 622 (2005).

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Respondent contends that N.C.G.S. § 1A-1, Rule 41(a)(1) is inapplicable to contested case proceedings because it permits “an action” to be dismissed and refiled by a plaintiff within one year. Since a contested case petition is not “an action” as defined in our General Statutes,³ Respondent reasons, N.C.G.S. § 1A-1, Rule 41(a)(1) cannot apply to contested case hearings. This assertion directly contradicts both *Scott* and *Lincoln*, each of which applied N.C. Gen. Stat. § 1A-1, Rule 41(b) to contested case hearings despite that portion of the rule also referring to the dismissal of “an action.” *Scott*, 222 N.C. App. at 131 n.7, 730 S.E.2d at 810 n.7; *Lincoln*, 172 N.C. App. at 572-73, 616 S.E.2d at 626.

Our General Assembly has empowered OAH with “such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which” OAH was created and, by statute, allowed the Chief Administrative Law Judge of OAH to “adopt rules to implement the conferred powers and duties.” N.C. Gen. Stat. §§ 7A-750, 7A-751(a) (2015). Under this authority, OAH promulgated 26 NCAC 03 .0101(a), which provides that the rules of civil procedure, including N.C.G.S. § 1A-1, Rule 41(a)(1) “shall apply” in contested cases in the Office of Administrative Hearings “unless another specific statute or rule provides otherwise.” 26 NCAC 03 .0101(a). Respondent’s interpretation would render any rule of civil procedure that refers to “an action” as inapplicable to contested case hearings before OAH, which uses the term “contested case.” Given 26 NCAC 03 .0101(a)’s expansive command that the rules of civil procedure “shall apply” in contested case proceedings unless another rule or statute directs otherwise, and previous interpretation of N.C.G.S. § 1A-1, Rule 41(b) in *Scott* and *Lincoln*, we reject Respondent’s reading of N.C.G.S. § 1A-1, Rule 41(a)(1).

Respondent also contends that N.C. Gen. Stat. § 126-34.02 mandates OAH issue a final decision within 180 days “from the commencement of the case” and thereby renders Rule 41(a)(1) inapplicable. We disagree. N.C.G.S. § 126-34.02, as relevant to this argument, provides:

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

3. N.C. Gen. Stat. § 1-2 provides: “An action is an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment or prevention of a public offense.”

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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.

N.C. Gen. Stat. § 126-34.02(a) (2015). The 180-day mandate in N.C.G.S. § 126-34.02 does not conflict with a petitioner's ability to voluntarily dismiss a case and refile it within one year as permitted by N.C.G.S. § 1A-1, Rule 41(a)(1). Our Supreme Court has held that "[t]he effect of a judgment of voluntary dismissal [pursuant to N.C.G.S. § 1A-1, Rule 41(a)] is to leave the plaintiff exactly where he or she was before the action was commenced." *Brisson v. Santoriello*, 351 N.C. 589, 593, 528 S.E.2d 568, 570 (2000) (citations, quotation marks, and brackets omitted). "If the action was originally commenced within the period of the applicable statute of limitations, it may be recommenced within one year after the dismissal, even though the base period may have expired in the interim." *Id.* at 394, 528 S.E.2d at 571 (citations omitted).

Once a voluntary dismissal has been taken pursuant to N.C.G.S. § 1A-1, Rule 41(a)(1), the petitioner has "terminated the action, leaving nothing in dispute[.]" *Teague v. Randolph Surgical Assocs., P.A.*, 129 N.C. App. 766, 773, 501 S.E.2d 382, 387 (1998). In the present case, the original action was commenced on 3 April 2014 when Petitioner filed a petition for contested case hearing. The petition was filed by Petitioner within thirty days of his receipt of the final agency decision in accordance with N.C.G.S. § 126-34.02. Before any decision was reached by OAH, Petitioner dismissed his claim without prejudice pursuant to N.C.G.S. § 1A-1, Rule 41(a)(1). At that time, the original contested case petition had been "terminated," leaving nothing in dispute and nothing for OAH to rule on within 180 days. *See Brisson*, 351 N.C. at 593, 528 S.E.2d at 570 (noting that "[a] Rule 41(a) dismissal strips the trial court of authority to enter further orders in the case, except" pursuant to Rule 41(d) in instances not relevant here). Petitioner's voluntary dismissal left him "exactly where he . . . was before [the contested case petition] was commenced," and allowed Petitioner to recommence his case "within one year after the dismissal, even though the base period . . . expired in the interim." *Id.* (citations omitted).

Pursuant to 26 NCAC 03 .0101(a), the North Carolina Rules of Civil Procedure "shall apply" in contested cases before OAH unless a "specific" statute or regulation provides otherwise. In the present case,

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having found no specific statute or rule that provides to the contrary, we hold N.C.G.S. § 1A-1, Rule 41(a)(1) applies to contested cases before OAH, and the ALJ therefore properly denied Respondent's motion to dismiss.

B. Challenged Findings of Fact

Respondent challenges findings of fact 6, 25, 27, 36, 39, and 41 made by the ALJ. All findings of fact that are not challenged are deemed to be conclusively established on appeal. *Blackburn*, ___ N.C. App. at ___, 784 S.E.2d at 519 (citing *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)). After carefully reviewing the record and the ALJ's final decision, we conclude that the challenged findings are either not material to our decision in this case, or are more properly labeled conclusions of law. The unchallenged findings are sufficient to show that Respondent had just cause to dismiss Petitioner for unsatisfactory job performance. See *Blackburn*, ___ N.C. App. ___, 784 S.E.2d at 519 (concluding that "it is not necessary for us to assess the evidentiary support for all of the findings challenged by" the appealing party). Therefore, we examine whether the unchallenged findings of fact supported Respondent's dismissal of Petitioner.

C. Just Cause to Dismiss Petitioner for Unsatisfactory
Job Performance

[2] Respondent argues the ALJ erred in concluding it lacked just cause to terminate Petitioner for unsatisfactory job performance. Respondent also contends that all of Petitioner's written warnings were "active" at the time of Petitioner's termination and, in the alternative, the plain language of 25 NCAC 01J .0605(b) does not mandate that the prior disciplinary actions be "active" to count toward the number needed before dismissal is permitted under the North Carolina Administrative Code ("the Administrative Code"). We review *de novo* whether just cause existed for Petitioner's termination. See *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 666-67, 599 S.E.2d 888, 898 (2004).

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). Pursuant to the 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 01J .0604 (2015).

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Unsatisfactory job performance is defined as “work-related performance that fails to satisfactorily meet job requirements as specified in the relevant job description, work plan, or as directed by the management of the work unit or agency.” 25 NCAC 01J .0614(9) (2015). The Administrative Code sets out the requirements for a career state employee to be dismissed for unsatisfactory job performance:

In order to be dismissed for a current incident of unsatisfactory job performance an employee must first receive at least two prior disciplinary actions: First, one or more written warnings followed by a warning or other disciplinary action which notifies the employee that failure to make the required performance improvements may result in dismissal.

25 NCAC 01J .0605(b) (2015). “Statutory interpretation properly begins with an examination of the plain words of the statute.” *Correll v. Division of Social Services*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992) (citation omitted). “When the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning.” *Lemons v. Old Hickory Council*, 322 N.C. 271, 276, 367 S.E.2d 655, 658 (1988) (citations omitted); *see also State v. Wiggins*, 272 N.C. 147, 153, 158 S.E.2d 37, 42 (1967) (“It is elementary that in the construction of a statute words are to be given their plain and ordinary meaning unless the context, or the history of the statute, requires otherwise.” (citation omitted)).

We are cognizant that this case requires us to interpret the meaning of an administrative regulation, not a statute. However, “[o]ur Supreme Court has applied the rules of statutory construction to administrative regulations as well as statutes.” *Kyle v. Holston Group*, 188 N.C. App. 686, 692, 656 S.E.2d 667, 672 (2008) (citations omitted). Therefore, we employ the above rules of statutory construction to the administrative regulation at issue.

Considering and applying the plain and unambiguous text of 25 NCAC 01J .0605(b) appears to present a straightforward answer to this case. The Administrative Code provision requires that, in order to be dismissed for a current incident of unsatisfactory job performance, an employee must have received two prior disciplinary actions, including a written warning and a warning or notification that failure to make the required improvements may result in dismissal. *See* 25 NCAC 01J .0605(b). In the present case, Petitioner received his first written warning on 15 December 2011, and a second written warning on 20 March

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2013. Both written warnings advised Petitioner that failure to make the required performance improvements – correcting the problems found in the audit and receiving a laundry manager certification, respectively – might result in further disciplinary action, including his dismissal.

Petitioner then received a third written warning on 24 September 2013, because he failed to correct deficiencies found in the 15 August 2013 audit. The third written warning, like the first and second, warned Petitioner that “if his [u]nsatisfactory [j]ob [p]erformance continued, it might result in further disciplinary action up to and including dismissal[.]” Petitioner was ultimately terminated due to his failure to correct the deficiencies found in the third written warning, which served as the “current incident of unsatisfactory job performance.” 25 NCAC 01J .0605(b). Therefore, the requirements of 25 NCAC 01J .0605(b) were met, and Respondent had just cause to terminate Petitioner for unacceptable personal conduct.

Petitioner maintained, and the ALJ ultimately concluded, that this application of 25 NCAC 01J .0605(b) to the facts of the present case was complicated by the existence of 25 NCAC 01J .0614(6). Found in the definitional section of the relevant subchapter of the administrative code, 25 NCAC 01J .0614(6) provides:

As used in this Subchapter:

....

- (6) Inactive Disciplinary Action means any disciplinary action issued after October 1, 1995 is deemed inactive for the purpose of this Section if:
 - (a) the manager or supervisor notes in the employee’s personnel file that the reason for the disciplinary action has been resolved or corrected;
 - (b) the purpose for a performance-based disciplinary action has been achieved, as evidenced by a summary performance rating of level 3 (Good) or other official designation of performance at an acceptable level or better and at least a level 3 or better in the performance area cited in the warning or disciplinary action, following the disciplinary warning or action; or
 - (c) 18 months have passed since the warning or disciplinary action, the employee does not have

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another active warning or disciplinary action
which occurred within the last 18 months.

25 NCAC 01J .0604(6) (2015) (emphases added). The ALJ concluded as a matter of law that, because the definitional section defined “inactive disciplinary action,” it is “only logical” that the two prior disciplinary actions required by 25 NCAC 01J .0605(b) must be active. “To hold to the contrary,” the ALJ concluded, “means the entire process of finding a prior discipline inactive has no applicability or effect; i.e., a meaningless exercise in futility.”⁴

We cannot subscribe to this reading of 25 NCAC 01J .0604(6)’s effect on 25 NCAC 01J .0605(b). By its terms, 25 NCAC 01J .0604(6) states that the definition of “Inactive Disciplinary Action” is operable only “[a]s used in” Subchapter J of Title 25 of the North Carolina Administrative Code. 25 NCAC 01J .0604(6) does not mandate that courts and ALJs make a finding that a prior disciplinary action is inactive, but only instructs that when the term “inactive disciplinary action” is used in Subchapter J of Title 25 of the Administrative Code, it has the meaning given to it by 25 NCAC 01J .0604(6). While 25 NCAC 01J .0605(b) is located in Subchapter J of Title 25, it does not use the phrase “inactive disciplinary action,” nor require that a disciplinary action be “active” – or not “inactive” – before it can be used as a “prior disciplinary action[]” to justify a career state employee’s dismissal for unsatisfactory job performance. *See* 25 NCAC 01J .0605(b).

In order to affirm the ALJ’s reading of the Administrative Code, we would need to insert a requirement into 25 NCAC 01J .0605(b) that the “two prior disciplinary actions” not be “inactive.” Such a requirement is clearly not contained in 25 NCAC 01J .0605(b). While the code drafters certainly *could* have required that the written warnings not be “inactive” in order for them to count towards the “two prior disciplinary actions” needed before a career state employee can be dismissed, they did not.

4. The ALJ also noted that the North Carolina State Human Resources Manual (“the Manual”) advises that “[a] disciplinary action . . . becomes inactive, i.e. cannot be counted towards the number of prior disciplinary actions that must be received before further action can be taken . . . when” any of the three circumstances outlined in 25 NCAC 01J .0604(6)(a)-(c) have been satisfied. However, as the ALJ recognized, the Manual has not been promulgated as a formal rule, and is not controlling. This Court has recognized that properly promulgated statutes and administrative regulations – and not a manual – are controlling in similar circumstances. *See Estate of Joyner v. N.C. Dep’t of Health & Human Servs.*, 214 N.C. App. 278, 288-89, 715 S.E.2d 498, 506 (2011) (holding that the North Carolina Adult Medicaid Manual “merely explains the definitions that currently exist” in statutes, rules, and regulations).

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We will not read a new requirement – that a warning not be “inactive” – into the code section at issue when such a requirement is not contained in the administrative regulation’s clear and ambiguous text. *See State v. Singletary*, ___ N.C. App. ___, ___, 786 S.E.2d 712, 725 (2016) (rejecting a litigant’s “extratextual interpretation” of a statute when such a “textual substitution” would be “contrary to the clear statutory mandate”).

A plain reading of 25 NCAC 01J .0605(b) requires that a career state employee must have received “at least two prior disciplinary actions” before being subject to dismissal for a third disciplinary action. In the present case, it is not contested that Petitioner had received two disciplinary actions prior to the “current incident” which led to his dismissal. Each of the three written warnings advised Petitioner that he was subject to further discipline, up to and including dismissal from employment, if the deficiencies were not corrected. This met the requirements of 25 NCAC 01J .0605(b), and Respondent therefore had just cause to dismiss Petitioner from his position as plant manager.

The ALJ declined to reach the holding we reach today, reasoning that it would leave 25 NCAC 01J .0614(6)’s definition of inactive disciplinary action “meaningless.” While the term inactive disciplinary action is currently inoperable because it is not used in Subchapter J of Title 25 of the Administrative Code, this does not foreclose future amendments to that section of the Administrative Code to give use to the term. We decline to make that amendment through judicial interpretation, and will not read a requirement into an administrative regulation that it plainly does not contain in order to make use of an otherwise inoperable definitional term. Having found the requirements of 25 NCAC 01J .0605(b) met, we hold that Respondent had just cause to dismiss Petitioner for unsatisfactory job performance, and the ALJ erred in reversing Respondent’s dismissal. We therefore reverse the final decision of OAH.

REVERSED.

Judges DIETZ and TYSON concur.

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[253 N.C. App. 282 (2017)]

WILLIAM BARRY FREEDMAN AND FREEDMAN FARMS, INC., PLAINTIFFS

v.

WAYNE JAMES PAYNE AND MICHAEL R. RAMOS, DEFENDANTS

No. COA16-969

Filed 2 May 2017

Pleadings—motion for judgment on pleadings—breach of fiduciary duty—breach of contract—constructive fraud—fraud—law of the case doctrine—in pari delicto doctrine

The trial court did not err by granting defendant attorneys' motion for judgment on the pleadings or by dismissing plaintiff farmer's claims for breach of fiduciary duty, breach of contract, constructive fraud, and fraud (arising out of defendants' representation of plaintiff in federal district court over improper hog waste discharge) based upon the law of the case and *in pari delicto* doctrines. Plaintiff agreed to conceal an alleged "side deal" from the judge, and he lied under oath about the basis for his agreement to plead guilty. *Freedman I* established that plaintiff was *in pari delicto* with defendants and this holding became the law of the case.

Appeal by plaintiff from order entered 25 July 2016 by Senior Resident Judge Robert H. Hobgood in New Hanover County Superior Court. Heard in the Court of Appeals 21 March 2017.

Randolph M. James, PC, by Randolph M. James, for plaintiff-appellant.

Cranfill Sumner & Hartzog LLP, by Melody J. Jolly and Patrick M. Mincey, for defendant-appellee Wayne James Payne.

Dickie, McCamey & Chilcote, PC, by Joseph L. Nelson, for defendant-appellee Michael R. Ramos.

ZACHARY, Judge.

William Barry Freedman (appellant) appeals from an order of the trial court dismissing his claims for breach of fiduciary duty, breach of contract, constructive fraud, and fraud brought against Wayne James Payne and Michael R. Ramos (defendants). On appeal, appellant argues that the trial court erred by dismissing his claims "based upon the law of the case and *in pari delicto* doctrines." After careful review of

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appellant's arguments in light of the record on appeal and the applicable law, we conclude that the trial court did not err.

I. Background

On 1 December 2014, appellant and Freedman Farms filed a complaint against defendants "in New Hanover County Superior Court following defendants' representation of appellant in federal district court. In the complaint, appellant alleged professional malpractice, breach of fiduciary duty, constructive fraud, breach of contract, and fraud. Freedman Farms alleged fraud and breach of contract by a third-party beneficiary." *Freedman v. Payne*, __ N.C. App. __, __, 784 S.E.2d 644, 646 (2016) (*Freedman I*). On 18 December 2014, our Supreme Court granted defendants' motion to designate the case as exceptional and assigned the case to Senior Resident Superior Court Judge Robert H. Hobgood.

Defendants filed separate motions to dismiss the complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) for failure to state a claim upon which relief could be granted. On 19 March 2015, the court entered an order concluding that defendants' motions to dismiss appellant's claim for legal malpractice "should be allowed with prejudice based on *in pari delicto*["]. The trial court denied defendants' motions to dismiss the remaining claims, and certified the matter for appellate review pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b) (2015). Plaintiff appealed the dismissal of his claim of legal malpractice to this Court, which affirmed the trial court's order in *Freedman I*. The factual background of this case was summarized in *Freedman I*:

Appellant and his parents manage Freedman Farms, a multi-county farming operation in which they . . . operate several hog farms. . . . [In] December 2007, Freedman Farms discharged approximately 332,000 gallons of liquefied hog waste . . . into Browder's Branch, a water of the United States. . . . [A]ppellant and Freedman Farms were charged with intentionally violating the Clean Water Act. Appellant retained defendants to represent him.

The trial began on 28 June 2011, and the prosecution put on evidence for five days. In appellant's complaint, he alleges that prior to the resumption of trial on 6 July 2011, defendant Ramos told appellant that the Assistant United States Attorney (AUSA) had approached him with a plea deal. . . . [A]ppellant states [that] defendant "Ramos asked AUSA Williams whether the government, in exchange for both [appellant] and Freedman Farms pleading guilty and

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agreeing to pay \$1,000,000 in restitution and a \$500,000 fine, would reduce the charges against [appellant] to a misdemeanor negligent violation of the Clean Water Act.” . . . [A]ppellant claims that he asked defendant Ramos to negotiate the fines and restitution to \$500,000, to take incarceration “completely off the table,” and to make AUSA Williams agree that neither appellant nor Freedman Farms would be debarred from federal farm subsidies.

Appellant further states in his complaint that when defendant Ramos returned from negotiating, he told appellant the following: the government was not interested in active time, the prosecutor agreed to “stand silent” at sentencing, appellant and Freedman Farms would avoid debarment from federal farm subsidies, and these promises were “part of a side-deal with [the prosecutor]—a wink-wink, nudge-nudge—and that [appellant] must not disclose this side-deal to the court,” as it “would cost [appellant] the chance to assure that he would not be incarcerated.” Accordingly, . . . appellant pleaded guilty to negligently violating the Clean Water Act. On 6 July 2011, the district court approved [the] plea agreement[.]. Contrary to the terms of the alleged side-deal, in appellant’s plea agreement, “the government expressly reserve[d] the right to make a sentence recommendation . . . and made no representations as to the effects of the guilty plea on debarment from Federal farm subsidies.”

On 13 February 2012, . . . [a]ppellant was sentenced to six months in prison and six months of house arrest[.] . . . Appellant obtained a new attorney[.] . . . The district court held a resentencing hearing on 1 October 2013 in which it vacated appellant’s previous conviction. Pursuant to a new plea agreement, appellant again pleaded guilty to negligently violating the Clean Water Act. The district court imposed a sentence of “five years of probation . . . and ten months going forward of home detention[.]” . . . Appellant was also required to pay the remaining restitution that Freedman Farms owed[.] . . .

Freedman I, __ N.C. App. at __, 784 S.E.2d at 646-47. Our opinion in *Freedman I*, which is discussed in greater detail below, held that certain allegations in appellant’s complaint established that appellant had

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participated in the wrongdoing of which he accused defendants, and affirmed the trial court's dismissal of appellant's legal malpractice claim on the basis that appellant and defendants were *in pari delicto*.

The *Freedman I* opinion was filed in April, 2016. Thereafter, defendants filed separate motions asking the trial court to strike certain allegations of appellant's complaint or to enter judgment on the pleadings pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(c) (2015), and to dismiss appellant's remaining claims for breach of contract, breach of fiduciary duty, constructive fraud, and fraud. Following a hearing conducted on 17 June 2016, the trial court entered an order on 25 July 2016 that granted defendants' motions for judgment on the pleadings and dismissed appellant's remaining claims. Appellant noted a timely appeal to this Court.

II. Standard of Review

This Court will "review *de novo* the grant of a motion to dismiss under Rule 12(b)(6) and for judgment on the pleadings under Rule 12(c)." *CommScope Credit Union v. Butler & Burke*, __ N.C. __, __, 790 S.E.2d 657, 659 (2016) (citations omitted). "On a motion for judgment on the pleadings, [a]ll well pleaded factual allegations in the nonmoving party's pleadings are taken as true and all contravening assertions in the movant's pleadings are taken as false." *Id.* (internal quotation omitted). In ruling on a party's motion for judgment on the pleadings, "[t]he trial court is required to view the facts and permissible inferences in the light most favorable to the nonmoving party." *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974) (citation omitted). "A Rule 12(c) movant must show that the complaint . . . fails to allege facts sufficient to state a cause of action or admits facts which constitute a complete legal bar to a cause of action." *CommScope*, __ N.C. at __, 790 S.E.2d at 659 (internal quotation omitted).

III. Discussion

The trial court dismissed appellant's claims against defendants on the grounds that appellant was *in pari delicto* with defendants and that the law of the case, as established by this Court's opinion in *Freedman I*, required dismissal of appellant's claims. On appeal, appellant argues that the trial court erred by ruling that the doctrine of *in pari delicto* was applicable to his claims for breach of contract, breach of fiduciary duty, constructive fraud, and fraud. Appellant also contends that the holding of *Freedman I* does not constitute the law of the case with regard to these claims. We have considered, but ultimately reject, these arguments.

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A. Doctrine of *In Pari Delicto*

The courts of this State “have long recognized the *in pari delicto* doctrine, which prevents the courts from redistributing losses among wrongdoers.” *Whiteheart v. Waller*, 199 N.C. App. 281, 285, 681 S.E.2d 419, 422 (2009), *disc. review denied*, 363 N.C. 813, 693 S.E.2d 353 (2010). As explained in *Freedman I*:

The common law defense by which the defendants seek to shield themselves from liability in the present case arises from the maxim *in pari delicto potior est conditio possidentis* [*defendentis*] meaning in a case of equal or mutual fault . . . the condition of the party in possession [or defending] is the better one. The doctrine, well recognized in this State, prevents the courts from redistributing losses among wrongdoers. The law generally forbids redress to one for an injury done him by another, if he himself first be in the wrong about the same matter whereof he complains. No one is permitted to profit by his own fraud, or to take advantage of his own wrong, or to found a claim on his own iniquity, or to acquire any rights by his own crime.

Freedman I, __ N.C. App. at __, 784 S.E.2d at 648 (internal quotations omitted).

Freedman I upheld the trial court’s dismissal of appellant’s claim for legal malpractice based upon the doctrine of *in pari delicto*. Appellant’s complaint alleged that defendants approached appellant about a plea agreement under the terms of which appellant would pay a substantial fine and would plead guilty to a misdemeanor offense, avoid imprisonment, and preserve access to certain federal programs. Appellant also alleged that defendants informed him that this was a secret “side deal” that could not be revealed to the federal judge presiding over the trial, that appellant agreed to conceal the alleged “side deal” from the judge, and that appellant lied under oath about the basis for his agreement to plead guilty. *Freedman I* held that certain allegations in appellant’s complaint, which the Court accepted as true for purposes of a N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) motion, established appellant’s wrongdoing and, based upon the doctrine of *in pari delicto*, barred appellant from seeking recovery for legal malpractice.

B. Law of the Case

The “law of the case” doctrine is well-established in the jurisprudence of our State. “[C]ertain points have been decided by the prior

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[decision] of this Court and are thus the ‘law of the case.’ ” *In re IBM Credit Corp.*, 222 N.C. App. 418, 421-22, 731 S.E.2d 444, 446 (2012). The Supreme Court of North Carolina has described the law of the case doctrine as follows:

[A]s a general rule when an appellate court passes on a question and remands the cause for further proceedings, the questions there settled become the law of the case, both in subsequent proceedings in the trial court and on subsequent appeal, provided the same facts and the same questions which were determined in the previous appeal are involved in the second appeal.

However, the doctrine of the law of the case contemplates only such points as are actually presented and necessarily involved in determining the case. The doctrine does not apply to what is said by the reviewing court, or by the writing justice, on points arising outside of the case and not embodied in the determination made by the Court. Such expressions are *obiter dicta* and ordinarily do not become precedents in the sense of settling the law of the case.

Hayes v. Wilmington, 243 N.C. 525, 536, 91 S.E.2d 673, 681-82 (1956). This Court may not revisit issues that have become the law of a case:

[O]nce a panel of the Court of Appeals has decided a question in a given case that decision becomes the law of the case and governs other panels which may thereafter consider the case. . . . [A] succeeding panel of that court has no power to review the decision of another panel on the same question in the same case.

N.C.N.B. v. Virginia Carolina Builders, 307 N.C. 563, 567, 299 S.E.2d 629, 631-32 (1983). However, “the law of the case applies only to issues that were decided in the former proceeding, whether explicitly or by necessary implication[.]” *Goldston v. State*, 199 N.C. App. 618, 624, 683 S.E.2d 237, 242 (2009).

C. Discussion

We next apply the principles discussed above to the facts of this case. In *Freedman I*, appellant appealed from the trial court’s dismissal of his claim for legal malpractice on the basis of the doctrine of *in pari delicto*. On appeal, appellant argued that the trial court erred “because . . . appellant’s complaint does not establish as a matter of law his

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intentional wrongdoing.” *Freedman I*, __ N.C. App. at __, 784 S.E.2d at 647. This Court disagreed and held as follows:

Here, treating the allegations in appellant’s complaint as true as we must at this stage, defendants are at fault for striking a “side-deal” with the prosecutor regarding prison time and federal farm subsidies, and for instructing appellant that he must not disclose the side-deal to the court. Appellant is at fault for lying under oath in federal court by affirming that he was not pleading guilty based on promises not contained in the plea agreement. . . . Although appellant claims that his complaint does not establish his intentional wrongdoing, we agree with defendants that appellant’s complaint shows otherwise. Appellant’s complaint reveals the following [allegations]:

34. Ramos returned and told [appellant] that AUSA Williams said the government was not interested in active time and that AUSA Williams had agreed to “stand silent” at sentencing and would not argue for an active sentence.

...

36. Ramos also told [appellant] that . . . AUSA Williams told him that the government did not want to pursue debarment [from federal farm subsidies].

...

38. Ramos then warned [appellant] that these promises from AUSA Williams were part of a side-deal with Williams—a wink-wink, nudge-nudge—and that [appellant] must not disclose this side-deal to the court, because this would upset Judge Flanagan and would cost [appellant] the chance to assure that he would not be incarcerated.

...

41. . . . [F]aced with the opportunity to avoid incarceration and debarment, . . . [appellant] agreed to plead guilty, on the terms as described by Ramos.

...

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43. Ramos and Payne lied to [appellant] and Ms. Pearl about having an undisclosed side-deal, as a result of which [appellant] pled guilty, Ms. Pearl pled guilty on behalf of Freedman Farm[s], and both [appellant] and Freedman Farms became liable for \$1,500,000 in fines and restitution.

44. The actual and only plea deal with AUSA Williams was precisely what appeared in the Plea Agreement itself that the government expressly reserve[d] the right to make a sentence recommendation and made no representations as to the effects of the guilty plea on debarment from Federal farm subsidies. . . .

. . .

Appellant lied under oath in order to benefit from an alleged side-deal in which he thought he could pay \$1,500,000 to avoid going to prison. When the deal unraveled and appellant was bound by the express terms of his plea agreement, appellant attempted to redistribute the loss, which the courts of this State will not do. . . . Because appellant is in the wrong about the same matter he complains of, the law forbids redress. . . . Although the underlying criminal prosecution of appellant may have been complex, appellant was able to ascertain the illegality of his actions during the sentencing hearing. . . . “The allegations of the complaint are discreditable to both parties. They blacken the character of the plaintiff as well as soil the reputation of the defendant. As between them, the law refuses to lend a helping hand. The policy of the civil courts is not to paddle in muddy water, but to remit the parties, when *in pari delicto*, to their own folly. So, in the instant case, the plaintiff must fail in his suit.”

Id. at __, 784 S.E.2d at 648-49 (quoting *Bean v. Detective Co.*, 206 N.C. 125, 126, 173 S.E. 5, 6 (1934)). Thus, *Freedman I* held as a matter of law that certain allegations in appellant’s complaint established that he was *in pari delicto* with defendants. This holding became the law of the case, which we are without authority to revisit. As a result, it is definitively established that those allegations of appellant’s complaint that were discussed in *Freedman I* show appellant to be *in pari delicto* with defendants.

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Appellant argues that the holding of *Freedman I* applies only to the dismissal of his claim for legal malpractice and does not constitute the law of the case in his appeal from the dismissal of his other claims. It is true that this Court in *Freedman I* did not discuss appellant's claims for breach of contract, breach of fiduciary duty, constructive fraud, or fraud, as those claims were not before this Court. However, *Freedman I* held that appellant was barred from recovering damages for legal malpractice because specific allegations in appellant's complaint showed him to be *in pari delicto* with defendants. The holding of *Freedman I* did not depend upon analysis of appellant's allegations regarding legal malpractice. Instead, *Freedman I* held, without discussion of whether appellant had stated a valid claim against defendants for legal malpractice, that appellant was barred from recovery because, as a matter of law, specific allegations in appellant's complaint established his wrongdoing and therefore implicated the doctrine of *in pari delicto*. The same allegations that were at issue in *Freedman I* are also incorporated into each of appellant's other claims. Under *Freedman I*, these allegations establish both appellant's wrongdoing and also the legal holding that appellant is *in pari delicto* with defendants. This conclusion, which we may not revisit, is independent of the specific allegations regarding the remaining claims.

Appellant also argues that the allegations of his complaint do not support the application of the doctrine of *in pari delicto* to the claims whose dismissal he has appealed. Appellant directs our attention to the fact that these claims are supported by factual allegations that are specific to each claim. In addition, appellant contends that his culpability was less than that of defendants, making application of the doctrine of *in pari delicto* improper. Appellant fails to acknowledge, however, that *Freedman I* held that appellant was *in pari delicto* with defendants based upon specific allegations which are part of each of the claims that were dismissed. We conclude that the trial court did not err by ruling that the holding of *Freedman I*, which became the law of the case, required dismissal of appellant's remaining claims.

IV. Conclusion

For the reasons discussed above, we conclude that the trial court did not err by granting defendants' motions for judgment on the pleadings or by dismissing appellant's claims and that its order should be

AFFIRMED.

Judges BRYANT and INMAN concur.

IN RE J.S.C.

[253 N.C. App. 291 (2017)]

IN THE MATTER OF J.S.C.

No. COA16-1222

Filed 2 May 2017

Child Abuse, Dependency, and Neglect—abuse and neglect—sufficiency of findings

The trial court did not err by adjudicating a minor child as abused and neglected where respondent mother failed to challenge the sufficiency of the stipulated findings.

Appeal by respondent-mother from orders entered 8 August 2016 and 6 September 2016 by Judge J.H. Corpening, II in New Hanover County District Court. Heard in the Court of Appeals 17 April 2017.

Regina Floyd-Davis for petitioner-appellee New Hanover County Department of Social Services.

Marie H. Mobley for guardian ad litem.

Richard Croutharmel for respondent-appellant mother.

ZACHARY, Judge.

Respondent-mother appeals from a consent order adjudicating her son “Jonah”¹ an abused and neglected juvenile, together with the resulting dispositional order that maintained the child in the custody of New Hanover Department of Social Services (“DSS”) and directed DSS to cease efforts toward reunification. Respondent-father has withdrawn his appeal by filing notice in the trial court pursuant to N.C. R. App. P. 37(e).

On 23 September 2015, DSS filed a juvenile petition claiming that seven-month-old Jonah was abused and neglected. The petition alleged that respondents brought Jonah to the hospital for “leg and arm spasms . . . similar to seizures.” The spasms had been occurring for a period of two to three weeks. An initial examination revealed that Jonah had experienced two “brain bleeds, one appearing old in nature, the other appearing of a more recent nature.” X-rays also showed a possible skull

1. We use this pseudonym to protect the juvenile’s identity and for ease of reading.

IN RE J.S.C.

[253 N.C. App. 291 (2017)]

fracture. Jonah was transferred to UNC-Chapel Hill Medical Center, where doctors found injuries consistent with

significant high impact trauma to the head. There is an old injury to the right side of the head manifested by the appearance of old blood and dead tissue with shrinkage of the brain noted. This is demonstrative of an injury which occurred weeks to months earlier. There is a very large amount of fluid on the brain, representative of an injury which occurred days to weeks earlier. The MRI revealed evidence of possible shearing injuries.

A doctor described Jonah's injuries to DSS as "very significant for non-accidental trauma." According to the petition, respondents were unable to account for "the severity of the injuries that [Jonah] has sustained." They cited several instances of Jonah falling from his bed, changing table, or stroller, as well as one occasion when a recoiling screen door had struck the child in the head.

Both respondents were charged with felonious child abuse. In July 2016, respondent-mother pleaded guilty to child abuse by grossly negligent omission resulting in serious bodily injury to the child. N.C. Gen. Stat. § 14-318.4(a4) (2015). She was sentenced to an active prison term of twenty-five to forty-two months.

On 8 August 2016, respondents appeared in court and tendered a "Consent Order on Adjudication" signed by all parties and their counsel.² The order provides that the parties "have stipulated and agreed to the entry of this Order which provides for the following facts, conclusions of law and order" adjudicating Jonah as neglected and abused. Among the parties' stipulated facts are the following:

4. [Jonah] is a neglected and abused juvenile in that a parent, guardian, custodian or caretaker has inflicted or allowed to be inflicted a serious physical injury by other than accidental means, in that on or about September 22, 2015, [Jonah] was diagnosed with a possible skull fracture and two brain bleeds and said injury has been determined to be non-accidental by his treating physicians.

...

2. The transcript reflects that respondent-father and his counsel signed the consent adjudication order during the hearing.

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6. The enormity and consequences of the injuries to the minor child were increased as a result of one or both parents failing to seek medical treatment in a timely manner.

7. The parents were subsequently charged with having committed felonious assault on the child. Respondent Father is presently awaiting trial . . . Respondent Mother entered into a plea agreement on or about July 21, 2016 wherein she pled guilty to one count of felony child abuse-neglect- serious bodily injury.

. . .

13. The stipulations and agreements made regarding the factual circumstances set forth herein are made by the parents after thoughtful consideration as to the best interest of their child and for the purposes of resolving this case in the most expeditious manner.

The order reserved the rights of all parties “to present any further evidence or reports . . . at the disposition hearing.”

After signing the consent adjudication order, the trial court proceeded to disposition. It received written reports prepared by DSS and the guardian *ad litem* and heard arguments from counsel. In its “Order on Disposition” entered 6 September 2016, the court maintained Jonah in DSS custody, ceased reunification efforts with the parents, and scheduled a permanency planning hearing for 15 September 2016. Respondents were each awarded one hour per month of supervised visitation upon their release from confinement.

In her lone argument on appeal, respondent-mother challenges the validity of the “Consent Adjudication Order” based on the trial court’s failure to state that the adjudicatory findings of fact were made under the “clear and convincing evidence” standard of proof required by N.C. Gen. Stat. § 7B-805 (2015). She cites our decision in *In re Church*, 136 N.C. App. 654, 525 S.E.2d 478 (2000), in which we reversed an ordering terminating parental rights due to the failure of the “trial court to affirmatively state in its order the standard of proof utilized in the termination proceeding.” *Id.* at 657, 525 S.E.2d at 480; *see also* N.C. Gen. Stat. § 7B-1109(f) (2015) (requiring petitioner to prove facts by “clear, cogent, and convincing evidence” at the adjudicatory stage of a termination proceeding); *In re D.R.B.*, 182 N.C. App. 733, 739, 643 S.E.2d 77, 81 (2007) (citation omitted) (requiring termination order to “indicate the evidentiary standard under which the court made its adjudicatory findings of

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fact”). Respondent-mother further states that this Court has applied the holding in *In re Church* to an initial adjudication of abuse, neglect, or dependency under N.C. Gen. Stat. § 7B-805. *See In re E.N.S.*, 164 N.C. App. 146, 152, 595 S.E.2d 167, 171 (noting “there is clear case law that holds the order of the trial court must affirmatively state the standard of proof utilized”), *disc. review denied*, 359 N.C. 189, 606 S.E.2d 903-04 (2004) (citation omitted). However, we find *Church* and its progeny distinguishable from the present case.

Article 8 of the Juvenile Code provides two procedural paths for an adjudication of abuse, neglect, or dependency: an adjudicatory hearing or an adjudication by consent. As we explained in *In re K.P.*, ___ N.C. App. ___, 790 S.E.2d 744 (2016):

When a juvenile is alleged to be abused, neglected, or dependent, N.C. Gen. Stat. § 7B-802 (2015) requires the court to conduct an “adjudicatory hearing” in the form of “a judicial process designed to adjudicate the existence or nonexistence of any of the conditions alleged in a petition.” . . . “[T]he allegations in a petition alleging that a juvenile is abused, neglected, or dependent shall be proved by clear and convincing evidence.” N.C. Gen. Stat. § 7B-805 (2015). . . .

“An adjudication of abuse, neglect or dependency *in the absence of an adjudicatory hearing* is permitted only in very limited circumstances.” N.C. Gen. Stat. § 7B-801(b1) (2015) authorizes the court to enter “a consent adjudication order” only if: (1) all parties are present or represented by counsel, who is present and authorized to consent; (2) the juvenile is represented by counsel; and (3) the court makes sufficient findings of fact.

Id. at ___, 790 S.E.2d at 747 (quoting *In re Shaw*, 152 N.C. App. 126, 129, 566 S.E.2d 744, 746 (2002)) (emphasis added).

The statute upon which respondent-mother relies, N.C. Gen. Stat. § 7B-805, is titled “Quantum of proof in *adjudicatory hearing*.” *Id.* (emphasis added). In *In re Church* and each additional case cited by respondent-mother, the trial court entered its order after an adjudicatory hearing – either at the initial adjudication stage under Article 8 or in a termination of parental rights proceeding under Article 11, *see* N.C. Gen. Stat. § 7B-1109 (2015). *In re J.D.S.*, 170 N.C. App. 244, 247, 253, 612 S.E.2d 350, 353, 356, *disc. review denied*, 360 N.C. 64, 623 S.E.2d 584

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(2005); *E.N.S.*, 164 N.C. App. at 148, 152, 595 S.E.2d at 169, 171; *Church*, 136 N.C. App. at 655, 525 S.E.2d at 479.

Here, the trial court entered a consent adjudication order pursuant to N.C. Gen. Stat. § 7B-801(b1), without an adjudicatory hearing and based entirely on stipulated facts. *See generally In re I.S.*, 170 N.C. App. 78, 86, 611 S.E.2d 467, 472 (2005). (“ [S]tipulations are judicial admissions and are therefore binding in every sense, preventing the party who agreed to the stipulation from introducing evidence to dispute it and relieving the other party of the necessity of producing evidence to establish an admitted fact.” (quoting *Thomas v. Poole*, 54 N.C. App. 239, 241, 282 S.E.2d 515, 517 (1981))). As there was no adjudicatory hearing, the court did not receive or weigh evidence, assess the credibility of witnesses, or otherwise engage in the process of fact-finding. *See generally In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000) (noting “the duty of the trial judge to consider and weigh all of the competent evidence, and to determine the credibility of the witnesses and the weight to be given their testimony”). The court thus had no occasion to apply the “clear and convincing evidence” standard of proof or any other standard. Under these circumstances, we decline to extend our holding in *In re Church* to find reversible error based on the failure of the consent adjudication order to state the evidentiary standard contained in N.C. Gen. Stat. § 7B-805.³

Respondent-mother does not challenge the sufficiency of the stipulated findings to support Jonah’s adjudication as an abused and neglected juvenile. *See* N.C. Gen. Stat. § 7B-801(b1) (requiring consent adjudication order to contain “sufficient findings of fact”). Nor does she

3. Another statute in Article 8, N.C. Gen. Stat. § 7B-807 (2015) (“Adjudication”), expressly provides that “[i]f the court finds from the evidence, *including stipulations by a party*, that the allegations in the petition have been proved by clear and convincing evidence, *the court shall so state.*” (Emphasis added); *see also Church* 136 N.C. App. at 657, 525 S.E.2d at 480 (citing the statutory forbear to § 7B-807 to “note the legislature has specifically required the standard of proof utilized by the trial court be affirmatively stated in the context of . . . abuse, neglect and dependent proceedings”).

Here, the trial court did not make any findings of fact, in that the parties consented to and stipulated to the entire order. Accordingly, section 7B-807 does not appear to be applicable. Moreover, respondent-mother does not cite to section 7B-807 in her principal brief, and her reference to the statute in her reply brief is insufficient to present a claim on appeal. *Larsen v. Black Diamond French Truffles, Inc.*, __ N.C. App. __, __, 772 S.E.2d 93, 96 (2015) (holding that “where a party fails to assert a claim in its principal brief, it abandons that issue and cannot revive the issue via reply brief”).

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claim error with regard to the court's dispositional order. Accordingly, both orders are affirmed.

AFFIRMED.

Judges ELMORE and HUNTER, JR. concur.

TRISTA MICHELLE LAPRADE (FORMERLY TRISTA MICHELLE BARRY), PLAINTIFF
v.
CHRISTOPHER BARRY, DEFENDANT

No. COA16-11

Filed 2 May 2017

1. Child Custody and Support—custody modification—substantial change of circumstances

The trial court did not err by concluding that a substantial change of circumstances justified child custody modification where there were issues regarding communication between the parents and the father's care of the child.

2. Child Custody and Support—custody modification—motion to dismiss—sufficiency of evidence

Although defendant father contended the trial court erred in a child custody modification case by denying his motions to dismiss, there was a substantial change of circumstances concerning the parents' unwillingness or inability to communicate in a reasonable manner regarding their child's needs.

3. Child Custody and Support—custody modification—circumstances at all relevant times—specific findings

The trial court did not err in a child custody modification case by allegedly refusing to allow defendant father to ask questions that dealt with circumstances of co-parenting that existed at the time of the previous order and prior to the existing order. The findings showed the circumstances at all relevant times.

Appeal by defendant from order entered 22 May 2015 by Judge Peter Knight in District Court, Henderson County. Heard in the Court of Appeals 8 August 2016.

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*Emily Sutton Dezio, for plaintiff-appellee.**Donald H. Barton, P.C., by Donald H. Barton, for defendant-appellant.*

STROUD, Judge.

Defendant appeals an order modifying custody by granting plaintiff primary custody of the parties' child. Because the trial court's findings of fact support its conclusion of a substantial change of circumstances which affects the child's welfare due to father's failure to communicate with the mother and interference with the child's relationship with her mother, as well as mother's positive changes in behavior, we affirm.

I. Background

In December of 2005, plaintiff and defendant were married. In September of 2007, the couple had one child, Reagan.¹ The parties separated in 2009 and since have engaged in a continuing battle regarding custody. In June of 2010, plaintiff-mother filed a verified divorce complaint and alleged "[t]hat there are no issues of child support, custody, alimony or equitable distribution pending between the parties as they have heretofore entered into a separation agreement that they wish to be incorporated into the divorce judgment." Mother also asked that the separation agreement be incorporated into the divorce judgment. In July of 2010, father filed a verified answer and counterclaimed for divorce and primary custody of Reagan. In August of 2010, mother filed a motion to amend her divorce complaint because

it was discovered that the Plaintiff had a misconception about the child custody and welfare, child welfare, and child support paragraphs in the separation agreement she had drafted. The Plaintiff was under the misconception that joint custody, as agreed to in the separation agreement, was the same as her having joint primary custody. According to the Plaintiff, the Defendant's visitation schedule was in line with the Defendant having secondary joint custody of the minor child.

That same month, mother also filed a reply to father's counterclaim requesting primary custody.

1. A pseudonym will be used to protect the identity of the minor child.

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On 2 September 2010, the trial court entered a consent order allowing mother's motion to amend her complaint and granting the parties' requests for divorce. On 15 February 2011, the trial court entered a permanent custody order which granted physical custody to mother from Tuesday to Saturday and to father from Saturday to Tuesday.

In May of 2012, mother filed a motion to modify the custody order alleging a substantial change of circumstances because father was primarily relying on his girlfriend to care for Reagan. Mother alleged that the girlfriend was mean to Reagan and caused Reagan medical problems due to issues with diaper cream. Mother contended that Reagan was anxious and stressed when it was time for her to be with her father. In September of 2012, father also filed a motion to modify custody based on a number of allegations but mostly relying upon mother's remarriage to someone with a criminal record.

On 19 December 2012, the trial court modified the permanent custody order, giving primary physical care and custody to father and secondary physical custody to mother for several reasons, including mother repeatedly taking the child to the doctor and alleging abuse after visits with father despite no signs of abuse, an issue of domestic violence between mother and her husband, and the parties' overall utter inability to work together for the benefit of Reagan.

In April of 2014, mother filed another motion to modify custody alleging a substantial change of circumstances for several reasons, again primarily concerned with father's girlfriend being the primary caretaker for the child and usurping her role as the child's mother. The trial court held a hearing on the motion over five days, beginning on 20 January 2015 and ending on 18 March 2015. On 22 May 2015, the trial court entered an order modifying custody and granting primary physical care and custody to mother. Father appeals.

II. Change of Circumstances

[1] Father first contends that the trial court erred in determining that a substantial change of circumstances had occurred justifying a modification of custody. Father takes an unusual approach to his argument. Father failed to directly challenge the sufficiency of the evidence to support the trial court's findings of fact which form the basis for the trial court's conclusion of a substantial change of circumstances but instead created a table of the transcript testimony, highlighting evidence he believes undermines the trial court's findings of fact. In other words, rather than arguing the findings of fact are not supported by the evidence, he directs the Court's attention to other contradictory evidence

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which might support a different finding of fact. For example, the first row of 25 total rows reads:

<p>Pages 15-16</p>	<p>Mrs. LaPrade says that her ex rarely communicates what is going on in the child’s life however on page 16 she provides no examples of what things she is missing she say’s [(sic)] “I just assume so.”</p>
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A. Standard of Review

It is well established in this jurisdiction that a trial court may order a modification of an existing child custody order between two natural parents if the party moving for modification shows that a substantial change of circumstances affecting the welfare of the child warrants a change in custody. The party seeking to modify a custody order need not allege that the change in circumstances had an adverse effect on the child. While allegations concerning adversity are acceptable factors for the trial court to consider and will support modification, a showing of a change in circumstances that is, or is likely to be, beneficial to the child may also warrant a change in custody.

As in most child custody proceedings, a trial court’s principal objective is to measure whether a change in custody will serve to promote the child’s best interests. Therefore, if the trial court does indeed determine that a substantial change in circumstances affects the welfare of the child, it may only modify the existing custody order if it further concludes that a change in custody is in the child’s best interests.

The trial court’s examination of whether to modify an existing child custody order is twofold. The trial court must determine whether there was a change in circumstances and then must examine whether such a change affected the minor child. If the trial court concludes either that a substantial change has not occurred or that a substantial change did occur but that it did not affect the minor child’s welfare, the court’s examination ends, and no modification can be ordered. If, however, the trial court determines that there has been a substantial change

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in circumstances and that the change affected the welfare of the child, the court must then examine whether a change in custody is in the child's best interests. If the trial court concludes that modification is in the child's best interests, only then may the court order a modification of the original custody order.

When reviewing a trial court's decision to grant or deny a motion for the modification of an existing child custody order, the appellate courts must examine the trial court's findings of fact to determine whether they are supported by substantial evidence. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

Our trial courts are vested with broad discretion in child custody matters. This discretion is based upon the trial courts' opportunity to see the parties; to hear the witnesses; and to detect tenors, tones, and flavors that are lost in the bare printed record read months later by appellate judges. Accordingly, should we conclude that there is substantial evidence in the record to support the trial court's findings of fact, such findings are conclusive on appeal, even if record evidence might sustain findings to the contrary.

In addition to evaluating whether a trial court's findings of fact are supported by substantial evidence, this Court must determine if the trial court's factual findings support its conclusions of law. With regard to the trial court's conclusions of law, our case law indicates that the trial court must determine whether there has been a substantial change in circumstances and whether that change affected the minor child. Upon concluding that such a change affects the child's welfare, the trial court must then decide whether a modification of custody was in the child's best interests. If we determine that the trial court has properly concluded that the facts show that a substantial change of circumstances has affected the welfare of the minor child and that modification was in the child's best interests, we will defer to the trial court's judgment and not disturb its decision to modify an existing custody agreement.

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Shipman v. Shipman, 357 N.C. 471, 473–75, 586 S.E.2d 250, 253–54 (2003) (citations, quotation marks, and brackets omitted).

B. Trial Court’s Findings Regarding Change of Circumstances

The trial court’s order first sets forth a summary of the circumstances at the time of entry of the prior order in a section helpfully entitled “[a]t the time of the entry of the Order[.]” In brief summary, Reagan was 5, in a private kindergarten, and attended gymnastics class each week; mother had been taking the child repeatedly for unnecessary physical examinations in an attempt to show that father or someone in his home was abusing her; mother was repeatedly contacting law enforcement regarding her allegations of abuse against father; mother was not employed or in school; father’s girlfriend cared for the child when he was at work; and neither party was communicating with the other about the child.

In the next section, entitled “[a]t the time of this hearing upon Plaintiff mother’s Motion to Modify Custody[.]” the trial court sets out its findings of fact regarding the current circumstances of Reagan and the parties: Reagan was age 7, in second grade in a public school, and still active in gymnastics. The trial court found that

the parties have been polarized, with the Defendant and his girlfriend keeping tight control of [Reagan] prior to and following the sessions, and severely limiting contact between [Reagan] and the Plaintiff and any one in her party, including Defendant’s own mother. The Defendant’s practice in this regard has had a negative effect upon [Reagan]: her anxiety level is high.

The trial court noted mother’s living circumstances but did not find any relevant changes from the time of the prior order. The order then makes detailed findings of fact, and finding of fact 36 specifically notes which findings it based its finding of a substantial change of circumstances upon:

36. The undersigned finds that two patterns of conduct which were engaged in by the Plaintiff at the time of the Order are no longer occurring. Specifically,

a. There is no evidence that the Plaintiff mother has taken the child for any unnecessary physical examinations, in an effort to prove that the Defendant father or someone in the Defendant’s home was abusing the child, since the time of the entry of the Order.

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b. The Plaintiff mother has not since the entry of the Order, contacted law enforcement authorities in an effort to initiate an investigation of the Defendant father's possible abuse of the child.

The trial court then concluded its findings of fact within finding of fact 37:

The fact[s] found in the preceding finding number 36, together with the facts found in finding number 16, finding number 25, finding number 30, finding number 31, among other findings, constitute a substantial change of circumstances since the entry of the Order, which change of circumstances has materially affected the welfare of the child [Reagan.]

C. Re-weighing Evidence

Father's argument, with his table of testimony highlights, asks us to re-weigh the evidence in his favor, and this we cannot and will not do. *Id.* at 475, 586 S.E.2d at 253-54 (“[S]hould we conclude that there is substantial evidence in the record to support the trial court's findings of fact, such findings are conclusive on appeal, even if record evidence might sustain findings to the contrary.”) Furthermore, as father has failed to challenge the trial court's findings of fact as not supported by the evidence but instead argued for alternative findings, these findings are now binding upon this Court. *See id.*; *see also In re J.K.C.*, 218 N.C. App. 22, 26, 721 S.E.2d 264, 268 (2012) (“The trial court's remaining unchallenged findings of fact are presumed to be supported by competent evidence and binding on appeal.”)

D. Adverse Effect

Father then argues that the evidence does not show any adverse effect upon Reagan:

[a] review of all of the transcripts of all of the proceedings reveals information that none of the activities complained of had any affect adversely or otherwise, on the child's school attendance, performance, grades, medical and dental conditions, interactions with friends, relatives and that her mother talks to her every night.

We first note that our consideration is based upon the findings of fact made by the trial court, which we have already determined are binding. It is not our role to do a “review of all of the transcripts of all of the proceedings” to find the information father favors. *See Shipman*,

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357 N.C. at 474, 586 S.E.2d at 253. But essentially, father's argument is that a major issue since the inception of this case has been the parties' inability to communicate and father seems to contend that because it has always been a problem, it cannot constitute a substantial change of circumstances. Even if we concede father's dim view of the parties' communication history, his brief ignores that the trial court's findings of fact which noted both that father's *present* actions had adversely affected the child *and* mother's *present* circumstances had improved to the child's benefit.

The binding findings of fact establish:

19. The parties continue to communicate almost exclusively by text messages. The [father] often fails to respond to messages and inquiries from the [mother], and at other times often believes that a one-word response is sufficient. The undersigned finds as a fact that the [father's] practices result in an inability to cooperate for [Reagan's] benefit, and therefore has a negative impact upon [Reagan's] welfare.

....

25.

Generally, the return calls from [Reagan] to her mother are made on speakerphone, with the [father] or [his girlfriend] listening in. It is not unusual for [father's girlfriend] to suggest answers to [Reagan], by whispered voice audible on the speakerphone connection. . . .

[Reagan] is often in the sole care of [father's girlfriend] when she is in Defendant father's custody. The Defendant father and [his girlfriend] have regularly refused to provide to the Plaintiff mother the cell telephone number for [the girlfriend].

As to the significant positive changes mother has made, as noted above, the trial court found that mother's "patterns of conduct" had changed in that she stopped taking the child for unnecessary physical examinations and contacting law enforcement to try to have father investigated for abuse.

It is beyond obvious that a parent's unwillingness or inability to communicate in a reasonable manner with the other parent regarding their child's needs may adversely affect a child, and the trial court's

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findings abundantly demonstrate these communication problems *and* the child's resulting anxiety from her father's actions. While father is correct that this case overall demonstrates a woeful refusal or inability of both parties to communicate with one another as reasonable adults on many occasions, we can find no reason to question the trial court's finding that these communication problems are *presently* having a negative impact on Reagan's welfare that constitutes a change of circumstances. *See generally Shipman*, 357 N.C. at 473–75, 586 S.E.2d at 253–54. In fact, it is foreseeable the communication problems are likely to affect Reagan more and more as she becomes older and is engaged in more activities which require parental cooperation and as she is more aware of the conflict between her parents. Therefore, we conclude that the binding findings of fact support the conclusion that there was a substantial change of circumstances justifying modification of custody. This argument is overruled.

III. Motion to Dismiss

[2] Father next contends that “the trial court committed reversible error in denying defendant father’s motion to dismiss at the close [of] the plaintiff’s evidence and at the close of all the evidence.” The entire substance of father’s argument in this section is as follows:

There was no substantial relevant competent evidence introduced at the time of the close of Plaintiff [(sic)] evidence or at the close of all the evidence that a substantial change of circumstances affecting the welfare of the parties['] minor child had occurred since the entry of the honorable Judge Brooks order and Defendant Father’s motion should have been granted.

As we have already determined that the trial court’s binding findings of fact support its conclusion of law regarding a substantial change of circumstances, we need not address this argument. *See generally In re J.K.C.*, 218 N.C. App. at 26, 721 S.E.2d at 268.

IV. Father’s Evidence

[3] Lastly, father also contends that “the trial court commit[t]ed reversible error in refusing to allow the defendant father to ask questions that dealt with circumstances that existed at the time of the previous order and prior to the existing order.” Father directs us to the transcript where his attorney was cross-examining mother and asked her why she “can co-parent with my client now as opposed to” in the past? Mother responded that father had prevented her from doing so. Father’s counsel

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then stated, “So it’s his fault that you alleged sexual abuse by him . . . [.]” and was then interrupted by an objection from mother’s attorney which the trial court sustained. The entirety of his counsel’s argument before the trial court was:

The fact is she’s not saying there’s any difference now as there was in the past, and I’m questioning her credibility on her statement that she can do it now and that there’s – she’s always tried with this gentleman to co-parent and that it’s my client’s fault. So I don’t know how in the world I could possibly accept that as an answer and not have to delve back into a little bit of what she’s done in the past.

Father’s counsel seems to be arguing that he should have been allowed to present evidence of mother’s past behavior which occurred prior to entry of the previous order. But the prior orders had findings of fact regarding mother’s behavior; custody was modified adversely to her in the prior order based upon that behavior. In fact, the trial court specifically found that mother no longer made abuse allegations against father as she had at the time of the prior order. Thus, the trial court not only acknowledged the past behavior father’s counsel wished to question mother on, but also noted the current change of that behavior. In any event, father made no offer of proof for any additional evidence he wanted to present, so we cannot address his argument further. *See State v. Dew*, 225 N.C. App. 750, 759, 738 S.E.2d 215, 221 (2013) (“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. For that reason, in order for a party to preserve for appellate review the exclusion of evidence, the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record. In the absence of an adequate offer of proof, we can only speculate as to what the witness’ answer would have been. As a result of the fact that the record does not contain the substance of any answer that Detective Curry might have given to the question posed by Defendant’s trial counsel, we have no basis for determining the extent, if any, to which the trial court’s ruling might have prejudiced Defendant.” (citations, quotation marks, and brackets omitted)).

Ultimately, father’s entire brief reiterates that there is nothing new here; he and mother have always had poor communication regarding Reagan and his girlfriend has always primarily cared for her when in his care. Even if all that is true, the trial court’s findings support its

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conclusion of a substantial change of circumstances since as Reagan has gotten older, these actions affect her more adversely and mother's behaviors have changed for the better. Beyond that, the trial court made many more findings — which we need not address in detail here — to support its conclusions. In fact, we must commend the trial court's very well-organized and thorough order. The findings clearly delineate the circumstances at the time of the prior order, at the time of the current hearing, and the specific findings which the trial court found to support its conclusion of a change of circumstances.

For the foregoing reasons, we affirm.

AFFIRMED.

Chief Judge McGEE and Judge CALABRIA concur.

STATE OF NORTH CAROLINA

v.

ERIC JONATHAN COX

No. COA16-1068

Filed 2 May 2017

1. Constitutional Law—right to speedy trial—delay in bringing before magistrate—holding without bond

The trial court did not err in a prosecution for second-degree murder and other charges by denying defendant's motion to dismiss due to a seven-hour delay in bringing him before a magistrate. Defendant was afforded multiple opportunities to have witnesses or an attorney present, which he elected not to exercise.

2. Evidence—cross-examination—limitation on scope

The trial court did not err in an impaired driving case, resulting in a car accident and death of the other driver, by preventing defendant from cross-examining a witness regarding the contents of a verified complaint in a related civil case. Defendant failed to show that the trial court's decision to limit the scope of cross-examination influenced the jury's verdict.

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3. Negligence—jury instruction—proximate cause—intervening negligence

The trial court did not err in an impaired driving case, resulting in a car accident and death of the other driver, by using the applicable pattern jury instruction and supplemental instruction for proximate cause. Defendant failed to show plain error was caused by the absence of a jury instruction on intervening negligence where the evidence showed that defendant drove through a red light while grossly impaired and caused a crash.

4. Motor Vehicles—jury instruction—felonious serious injury by vehicle—driving under the influence

The trial court did not err in an impaired driving case, resulting in a car accident and death of the other driver, by instructing the jury with regard to the charge of felonious serious injury by vehicle. The trial court instructed the jury in conformity with the law, and a showing that defendant's action of driving while under the influence was one of the proximate causes was sufficient evidence.

5. Negligence—failure to properly restrain in child seat—not evidence of negligence or contributory negligence

The trial court did not abuse its discretion in an impaired driving case, resulting in a car accident and death of the other driver, by excluding evidence that the child passenger in the other car was not properly restrained in a child seat. A child restraint system violation is not evidence of negligence or contributory negligence.

Appeal by defendant from judgment entered 7 July 2016 by Judge Yvonne Mims Evans in Mecklenburg County Superior Court. Heard in the Court of Appeals 6 April 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Kathryn E. Hathcock, for the State.

Devereux & Banzhoff, PLLC, by Andrew B. Banzhoff, for defendant-appellant.

TYSON, Judge.

Eric Jonathan Cox (“Defendant”) appeals from his convictions of second-degree murder, felonious serious injury by vehicle, driving while impaired, and failure to comply with a driver's license restriction. We find no error.

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I. BackgroundA. Evidence Presented at Trial

Hluon Siu finished working her second shift at Metrolina Greenhouse in Charlotte at approximately 1:00 a.m. on Monday, 28 November 2011. She picked up her four-year-old son, Khai, from his father's home at approximately 2:00 a.m. Ms. Siu was driving a white 2004 Nissan Altima sedan. Khai was seated in a booster seat in the rear passenger seat.

Ms. Siu was driving outbound on The Plaza, which has two lanes of outbound traffic, two lanes of inbound traffic, and a left turn lane. At 2:37 a.m., Ms. Siu was driving through a green light at the intersection of East Sugar Creek Road, when her vehicle was struck on the driver's side by a 2000 gray Chevrolet Tahoe driven by Defendant. The evidence tended to show Defendant, who was traveling on Sugar Creek Road, failed to stop at a red light prior to entering the intersection. Ms. Siu was killed almost immediately by the impact.

Carmen Hayes witnessed the crash and testified Defendant's vehicle "flew across" the intersection. Hayes opined Defendant's vehicle was traveling between fifty and sixty miles per hour, even though the posted speed limit at the intersection was thirty-five miles per hour. Hayes was clearly able to see the traffic signals at the intersection, and testified the light was green in Ms. Siu's lane of travel. Hayes testified Defendant got out of his vehicle, appeared to be uninjured, and "he just kind of stood there" and did "absolutely nothing." She stated, "He never once asked if she okay, he was not apologetic, he stood there. . . . No remorse."

Pamela Pittman and her daughter also witnessed the crash, and they both testified the light in Ms. Siu's lane of travel was green. Pittman immediately went to Ms. Siu's overturned vehicle to render assistance. She testified Defendant stood beside his vehicle and walked around with his hands in his pockets.

Charlotte-Mecklenburg Police Sergeant David Sloan was assigned to the Department's Major Crash Unit. At approximately 2:45 a.m., Sergeant Sloan contacted Sergeant Jesse Wood, Officer Jonathan Cerdan, and Detective Matthew Sammis to assist in investigation of the crash. The three officers arrived at the scene, where several other officers were already present.

Defendant was seated in the backseat of a patrol vehicle. Officer Cerdan was assigned to evaluate Defendant for impairment. Officer Cerdan had arrested Defendant for driving while impaired in 2009 and recognized his personalized license plate. Officer Cerdan observed Defendant's eyes

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to be red, watery and bloodshot. A strong odor of alcohol emanated from Defendant's breath. Defendant initially denied drinking alcohol, but later stated to Officer Cerdan he drank a glass of wine at 9:00 p.m. and had taken "DayQuil and NyQuil" earlier that day.

Officer Cerdan performed field sobriety testing on Defendant. On the horizontal gaze nystagmus test, Defendant manifested all six clues of impairment. On the walk-and-turn test, Defendant stopped for re-instruction after the first nine steps, took an improper turn, and displayed difficulty maintaining balance. On the one leg stand test, Defendant swayed and used his arms for balance. After completing the field sobriety tests, Officer Cerdan formed the opinion that Defendant's mental and physical faculties were appreciably impaired by alcohol. Defendant was arrested for driving while impaired and for failure to comply with his .04 blood alcohol concentration restriction on his driver's license.

Officer Cerdan transported Defendant to Carolinas Medical Center-Mercy Hospital for chemical analysis of Defendant's blood. They arrived at the hospital at 4:33 a.m. Defendant signed the implied consent rights form and did not exercise his right to contact an attorney or request a witness to view the testing procedure. The first blood sample was drawn by a registered nurse from Defendant at 4:55 a.m. A subsequent chemical analysis of Defendant's blood sample by the Charlotte-Mecklenburg Police crime lab revealed a .17 blood alcohol concentration.

Defendant was transported to the Mecklenburg County Law Enforcement Center and interviewed by Officer Cerdan and Detective Sammis. Defendant was read Miranda rights at 6:15 a.m. and waived his right to have an attorney present during questioning. At the conclusion of the interview, Detective Sammis charged Defendant with second-degree murder and felonious serious injury by vehicle.

At the conclusion of his investigation of the crash, Detective Sammis determined that Defendant was traveling on East Sugar Creek Road and failed to stop for a properly working red light at its intersection with The Plaza. Defendant hit Ms. Siu's vehicle while traveling approximately 48.6 miles per hour. Ms. Siu was driving through a green light on The Plaza at approximately 36.8 miles per hour at the time Defendant struck her vehicle. There was no evidence of any "pre-impact braking" from tire marks on the road.

Detectives retrieved an iPhone from the driver's side floorboard of Defendant's vehicle. One of the text messages stored in Defendant's phone was sent about fourteen hours prior to the crash, and stated, "I

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might drink a little more than I should tonight.” Defendant did not offer any evidence at trial.

B. Appellate History

On 16 September 2014, the jury convicted Defendant of all charges. The trial court sentenced Defendant to an active sentence of 175 to 219 months for the second-degree murder conviction, 5 days for the operation of a vehicle in violation of a license restriction, and a consecutive sentence of 33 to 49 months for the conviction of felonious serious injury by vehicle. Defendant appealed to this Court.

On appeal, Defendant argued, *inter alia*, “that his statutory and constitutional rights were violated by an unnecessary seven-hour delay between his arrest and appearance before a magistrate, requiring the trial court to dismiss the charges.” *State v. Cox*, No. 15-244, 2016 N.C. App. LEXIS 149, at *1 (N.C. Ct. App., Feb. 16, 2016) (“*Cox I*”).

In an unpublished opinion filed 16 February 2016, this Court determined “the trial court’s order denying Defendant’s motion to dismiss failed to resolve all material issues of fact and law presented in that motion.” We vacated the order and remanded to the trial court “for further findings and conclusions.” *Id.* On remand, the trial court entered an amended order denying Defendant’s motion to dismiss on 27 April 2016.

Because this Court vacated the order denying Defendant’s motion to dismiss and remanded, the remaining issues Defendant raised on appeal in *Cox I* were not ruled upon. Defendant appeals from the amended order, entered on remand, and also raises the same issues he asserted in his previous appeal.

II. Jurisdiction

Jurisdiction lies in this Court from final judgment of the superior court entered upon the jury’s verdict pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2015).

III. Issues

Defendant argues the trial court erred by: (1) denying his motion to dismiss due to the delay in bringing him before a magistrate; (2) preventing him from cross-examining a witness regarding the contents of a verified complaint; (3) excluding evidence that the child victim was not properly restrained in a child seat; (4) instructing the jury on proximate cause; and (4) instructing the jury on a lesser standard of proof than required by statute.

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IV. Denial of Defendant's Motion to Dismiss

[1] Defendant argues the trial court prejudicially erred by denying his motion to dismiss, because the delay in bringing him before a judicial officer and the magistrate's error in holding him without bond violated his constitutional rights. We disagree.

A. Standard of Review

"Dismissal of charges for violations of statutory rights is a drastic remedy which should be granted sparingly. Before a motion to dismiss should be granted . . . it must appear that the statutory violation caused irreparable prejudice to the preparation of defendant's case." *State v. Labinski*, 188 N.C. App. 120, 124, 654 S.E.2d 740, 742-43 (citation, quotation marks, and italics omitted), *disc. review denied*, 362 N.C. 367, 661 S.E.2d 889 (2008).

The standard of review on appeal of the denial of a motion to dismiss is "whether there is competent evidence to support the findings and the conclusions. If there is a conflict between the state's evidence and defendant's evidence on material facts, it is the duty of the trial court to resolve the conflict and such resolution will not be disturbed on appeal." *State v. Lewis*, 147 N.C. App. 274, 277, 555 S.E.2d 348, 351 (2001) (internal citations and quotation marks omitted). Findings of fact which are not challenged "are presumed to be correct and are binding on appeal. We [therefore] limit our review to whether [the unchallenged] facts support the trial court's conclusions." *State v. Eliason*, 100 N.C. App. 313, 315, 395 S.E.2d 702, 703 (1990) (citations omitted).

B. Statutory Requirements upon Arrest

N.C. Gen. Stat. § 15A-511(a)(1) (2015) provides: "A law-enforcement officer making an arrest . . . must take the arrested person without unnecessary delay before a magistrate as provided in G.S. 15A-501." N.C. Gen. Stat. § 15A-501 provides:

Upon the arrest of a person, with or without a warrant, . . .
a law enforcement officer:

(2) Must, with respect to any person arrested without a warrant and, for purpose of setting bail, with respect to any person arrested upon a warrant or order for arrest, take the person arrested before a judicial official without unnecessary delay.

....

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(5) Must without unnecessary delay advise the person arrested of his right to communicate with counsel and friends and must allow him reasonable time and reasonable opportunity to do so.

N.C. Gen. Stat. § 15A-501(2), (5) (2015).

Our Supreme Court has held that “[u]nquestionably, the failure of law enforcement personnel in complying with the provisions of [N.C. Gen. Stat. § 15A-511 and N.C. Gen. Stat. § 15A-501] can result in the violation of a person’s constitutional rights.” *State v. Reynolds*, 298 N.C. 380, 398, 259 S.E.2d 843, 854 (1979), *cert. denied*, 446 U.S. 941, 64 L. Ed. 2d 795 (1980); *see also* N.C. Gen. Stat. § 15A-954(a)(4) (2015) (“The court on motion of the defendant must dismiss the charges stated in a criminal pleading if it determines that . . . [t]he defendant’s constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant’s preparation of his case that there is no remedy but to dismiss the prosecution.”)

Defendant contends he was not taken before a magistrate, as required by N.C. Gen. Stat. § 15A-501(2), or advised of his right to communicate with friends as required by N.C. Gen. Stat. § 15A-501(5), without unnecessary delay.

The crash occurred at 2:37 a.m. Officer Cerdan arrived at the scene between 3:15 and 3:20 a.m. and conducted field sobriety testing on Defendant. Defendant was arrested without a warrant for driving while impaired and violation of his .04 BAC driver’s license restriction.

Upon remand, the trial court made the following findings of fact in its amended order denying Defendant’s motion to dismiss:

7. Officer Cerdan informed Sgt. Sloan of his findings and drove Defendant to CMC-Mercy hospital to have his blood drawn. Upon arrival at the hospital around 4:33 am, Officer Cerdan advised the Defendant of his rights. Defendant signed the rights form and did not ask to have a witness or an attorney present. A telephone was available to Defendant in the hospital room. His blood was drawn at 4:55 am. Defendant was examined by a physician and cleared. Cerdan collected the evidence and completed the discharge paperwork.

8. Two vials of blood were drawn from Defendant. One vial was tested by a chemical analyst and the second was

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preserved for further testing if needed. Defendant has not requested that the second vial of blood be tested.

9. He was then taken to the Law Enforcement Center where they waited for the lead Detective Sammis to arrive and interview Defendant. Sammis arrived at about 5:52 a.m.

10. Detective Sammis began the interview with Defendant at 6:15 am by reading the Miranda rights form. Defendant initialed each right indicating that he understood, signed the waiver of rights form and agreed to make a statement without the presence of a lawyer. The interview concluded after an hour. Defendant was then charged with second degree murder and felony serious injury by vehicle.

11. Detective Sammis prepared the arrest affidavit, checked Defendant's criminal history and driving history. Officer Cerdan then transported Defendant to the Mecklenburg County jail for processing at 9:35 am. He was brought before a magistrate at approximately 11:11 am. Prior to seeing the magistrate, Defendant made a phone call to a friend. He did not ask the friend to come to the jail until after he knew the conditions of his release.

12. The magistrate set bond on each of the Defendant's charges except the second degree murder charge. The magistrate may have misconstrued the Bond policy of "no recommendation" on a second degree murder charge, as "no bond". The State concedes and the Court finds that the failure to set bond on the murder charge was a violation of NCGS Sec. 15A-533(b).

13. The Defendant had a first appearance hearing via video conference on November 29, 2011. Bond was set at \$350,000 secured on the second degree murder case. He was represented by counsel at that hearing.

14. Defendant was released on bond several days after his arrest.

Based upon these findings, the trial court concluded in the amended order:

1. The Defendant was advised of his rights to have family, friends or an attorney present twice before he appeared

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before the Magistrate. He indicted [sic] at the hospital and when interviewed by Detective Sammis, that he understood his rights. He did not ask for a witness or an attorney. Defendant was not denied his right to consult with family, friends, or an attorney. There was no violation of NCGS § 15A-501(5);

2. The time spent in taking Defendant from the scene of the wreck to the hospital for medical assessment and blood draw, then the Law Enforcement Center where he was interviewed by a detective; and from there to the jail before being presented to the Magistrate did not constitute an unnecessary delay as to substantially violate Defendant's statutory right to be taken before a Magistrate without delay following his arrest at 4:00 a.m. There was no violation of NCGS § 15A-501(2), nor has Defendant demonstrated that he was prejudiced by the passage of time from his arrest until his appearance before the Magistrate.

3. While the Magistrate violated the Defendant's right to pre-trial release; the Defendant has failed to establish that he suffered irreparable prejudice as a result of the Magistrate's failure[.]

Defendant contends the relevant delay of time is nine hours, the period of time between the crash and his appearance before the magistrate. However, the pertinent time span is calculated between Defendant's arrest at approximately 4:00 a.m. and his appearance before a magistrate, which is approximately seven hours. *See* N.C. Gen. Stat. § 15A-501.

C. Hill and Knoll

Defendant argues this case is controlled by *State v. Hill*, 277 N.C. 547, 178 S.E.2d 462 (1971). In *Hill*, the defendant was arrested for driving while impaired at approximately 11:00 p.m. and "was not permitted to telephone his attorney until after the breathalyzer testing and photographic procedures were completed and the warrant was served." *Id.* at 553, 178 S.E.2d at 466. The defendant called an attorney, who was also a relative. The attorney's request to see the defendant "was peremptorily and categorically [sic] denied." *Id.* From the time of the defendant's arrest until he was released about 7:00 a.m. the following morning "only law enforcement officers had seen or had access to him." *Id.*

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Our Supreme Court explained that, because “[i]ntoxication does not last,” if a person accused of driving while impaired “is to have witnesses for his defense, he must have access to his counsel, friends, relatives, or some disinterested person within a relatively short time after his arrest.” *Id.* The Court concluded, “when an officer’s blunder deprives a defendant of his only opportunity to obtain evidence which might prove his innocence, the State will not be heard to say that such evidence did not exist.” *Id.* at 555, 178 S.E.2d at 467.

The Court held the defendant

was denied his constitutional and statutory right to communicate with both counsel and friends at a time when the denial deprived him of any opportunity to confront the State’s witnesses with other testimony. Under these circumstances, to say that the denial was not prejudicial is to assume that which is incapable of proof.

Id. at 554, 178 S.E.2d at 466.

The General Assembly amended North Carolina’s driving while impaired statutes after the Supreme Court’s opinion in *Hill*. Under the current version of N.C. Gen. Stat. § 20-138.1(a)(2), a defendant may be convicted of DWI if his alcohol concentration, “at any relevant time after the driving,” is .08 or more. N.C. Gen. Stat. § 20-138.1(a)(2) (2015). When *Hill* was decided, the statute provided that a 0.10 alcohol concentration merely created *an inference* of intoxication.

The amendment was addressed in *State v. Knoll*, 322 N.C. 535, 369 S.E.2d 558 (1988). The *Knoll* Court held, under the current statute, “denial of access is no longer inherently prejudicial to a defendant’s ability to gather evidence in support of his innocence in every driving while impaired case” since an alcohol concentration of .08 is sufficient to show impairment, on its face, to convict the defendant. *Id.* at 545, 369 S.E.2d at 564 (citation omitted). The Court held “in those cases arising under NCGS § 20-138.1(a)(2), prejudice will not be assumed to accompany a violation of defendant’s statutory rights, but rather, defendant must make a showing that he was prejudiced in order to gain relief.” *Id.*

D. Prejudice

The evidence showed and the trial court found that Defendant was arrested at the scene and transported to the hospital. At 4:33 a.m., he was advised of his rights and did not request the presence of a witness or attorney. A telephone was available to him. Two vials of blood were

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drawn with Defendant's consent. One was preserved for further testing, if needed. Defendant did not request further testing of the blood sample. He was transported from the hospital, and arrived at the Law Enforcement Center at 5:21 a.m. to be interviewed. Defendant waived his *Miranda* rights, and agreed to make a statement without the presence of an attorney. Prior to his appearance before the magistrate, Defendant telephoned a friend, but did not ask the friend to come to the jail.

Unlike in *Hill*, the evidence and findings indicate Defendant was afforded multiple opportunities to have witnesses or an attorney present pursuant to N.C. Gen. Stat. § 15A-501(5), which he elected not to exercise. Defendant cannot now assert he was prejudiced to gain relief, either by the absence of a witness or attorney or by the time period between his arrest and appearance before a magistrate. *See Knoll*, 322 N.C. at 545, 369 S.E.2d at 564. Defendant's arguments are overruled.

V. Limitation on Defendant's Cross-Examination of Cooke

[2] Defendant argues the trial court erred by preventing him from cross-examining Christopher Cooke ("Cooke") regarding the contents of a verified complaint Cooke filed against Defendant and the estate of Ms. Siu on behalf of himself and Khai. We disagree.

A. Standard of Review

"The long-standing rule in this jurisdiction is that the scope of cross-examination is largely within the discretion of the trial judge, and his rulings thereon will not be held in error in the absence of a showing that the verdict was improperly influenced by the limited scope of the cross-examination." *State v. Woods*, 307 N.C. 213, 220-21, 297 S.E.2d 574, 579 (1982).

B. Exclusion of Evidence Intended to Show Bias

Cooke is Khai's father. Khai suffered extensive injuries during the crash, which included a severe and traumatic brain injury, a small spleen laceration, and ligament injuries and a bone fracture in his neck. Cooke was called by the State as a witness "simply to talk about some biographical information concerning [Ms.] Siu, and also Khai, and also to talk about [Khai's] injuries." The State filed a motion *in limine*, which sought to prevent Defendant from cross-examining Cooke concerning the contents of the verified civil complaint. The trial court granted the State's motion and prohibited Defendant from cross-examining Cooke regarding the allegations in the complaint, or about any bias that might result from Cooke's financial interest in Defendant's prosecution.

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Cooke's testimony on direct examination was limited to factual information regarding his family and Khai's injuries. The State did not elicit any testimony from him regarding the cause of the crash. Cooke offered no testimony that would tend to sway the jury in deciding Defendant's guilt. "The trial judge may and should rule out immaterial, irrelevant, and incompetent matter." *State v. Jacobs*, 172 N.C. App. 220, 228, 616 S.E.2d 306, 312 (2005) (quoting *State v. Stanfield*, 292 N.C. 357, 362, 233 S.E.2d 574, 578 (1977)). Defendant has failed to show the trial court's decision to limit the scope of his cross-examination influenced the jury's verdict. See *Woods*, 307 N.C. at 220-21, 297 S.E.2d at 579. This argument is without merit and is overruled.

VI. Jury InstructionsA. Standard of Review

"Where the defendant preserves his challenge to jury instructions by objecting at trial, we review 'the trial court's decisions regarding jury instructions . . . *de novo*[']" *State v. Hope*, 223 N.C. App. 468, 471-72, 737 S.E.2d 108, 111 (2012) (quoting *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009)).

Where a defendant fails to object to the challenged instruction at trial, any error is generally reviewed under the plain error rule. *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

B. Proximate Cause and Intervening Negligence

[3] Defendant argues the trial court's instruction on proximate cause was erroneous, confused the jurors, and the trial court committed plain error by failing to instruct the jury on intervening negligence. We disagree.

The trial court instructed the jury in accordance with the applicable pattern jury instruction, as follows: "[T]he death of the victim was proximately caused by the unlawful act of the defendant done in a malicious manner." The trial court then gave the following supplemental instruction: "[T]he State must prove beyond a reasonable doubt only that the defendant's negligence was a proximate cause." (emphasis supplied). Defendant argues these two phrases are competing, and tend to suggest different formulations of the proof required of the State. Defendant contends the language of the supplemental instruction suggests to the jury that they not consider the impact of any negligence

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on the part of Ms. Siu. Defendant acknowledges he did not request a jury instruction on intervening negligence.

In *State v. Bailey*, 184 N.C. App. 746, 646 S.E.2d 837 (2007), this Court explained the law of proximate cause and intervening negligence in criminal prosecutions. In that case, the defendant was convicted of felony death by motor vehicle. *Id.* at 747, 646 S.E.2d at 838. The State's evidence tended to show the defendant was traveling behind a vehicle driven by the decedent. The decedent had stopped her vehicle in the roadway. The defendant applied his brakes, was unable to stop, and his vehicle collided into the back of the decedent's vehicle. *Id.* A blood sample obtained from the defendant showed a blood alcohol content of 0.22. *Id.*

The defendant requested an instruction on the decedent's "contributory negligence." *Id.* at 748-49, 646 S.E.2d at 839. This Court explained:

Intervening negligence in cases such as this is relevant as to whether defendant's actions were the proximate cause of the decedent's death. *State v. Harrington*, 260 N.C. 663, 666, 133 S.E.2d 452, 455 (1963). An instruction to that effect, if denied, would have warranted a new trial. *See State v. Hollingsworth*, 77 N.C. App. 36, 40, 334 S.E.2d 463, 466 (1985). Accordingly, this Court has granted a new trial where defendant requested an instruction on intervening negligence because the question of whether defendant's conduct was the proximate cause of death is a question for the jury. *Id.* In the instant case, however, defendant did not seek such an instruction. Moreover, the trial court accurately instructed the jury by stating that, "[t]here may be more than one proximate cause of an injury. The State must prove beyond a reasonable doubt only that the defendant's negligence was a proximate cause." Accordingly, we find that the trial court did not err in denying defendant's requested instruction.

Id. at 749, 646 S.E.2d at 839.

The Court further explained:

Even assuming [the decedent] was negligent, "[i]n order for negligence of another to insulate defendant from criminal liability, that negligence must be such as to break the causal chain of defendant's negligence; otherwise, defendant's culpable negligence remains a proximate cause, sufficient

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to find him criminally liable.” *Hollingsworth*, 77 N.C. App. at 39, 334 S.E.2d at 465. In the instant case, [the decedent’s] negligence, if any, would be, at most, a *concurring* proximate cause of her own death. *See id.* at 39, 334 S.E.2d at 466. This is especially true here, where the State’s evidence tended to show that defendant’s blood alcohol content was over twice the legal limit. This impairment inhibited defendant’s ability to “exercise [] due care [and] to keep a reasonable and proper lookout in the direction of travel[.]” *Id.*

Id. at 749, 646 S.E.2d at 839-40 (emphasis in original).

While Defendant’s counsel argued at various times that causation was an issue in this case, our review of the record does not demonstrate “the jury probably would have reached a different result” if the instruction on intervening negligence was given. *Jordan*, 333 N.C. at 440, 426 S.E.2d at 697. Overwhelming evidence, including the testimonies of three eye witnesses, was presented to show Defendant drove through the red light, while grossly impaired and caused the crash. Our review of the record on appeal concludes the only evidence to hint Ms. Siu may have been negligent in causing the crash is Defendant’s off-handed comment to Officer Cerdan prior to the blood draw, when he asked if Officer Cerdan “tested the person that ran the red light.” Defendant has failed to show plain error by the absence of a jury instruction on intervening negligence.

Even presuming Ms. Siu was somehow negligent, “her negligence, if any, would be, at most, a *concurring* proximate cause of her own death.” *Bailey*, 184 N.C. App. at 749, 646 S.E.2d at 839-40 (emphasis in original). The State’s evidence tended to show that Defendant’s blood alcohol content was over twice the legal limit. “This impairment inhibited defendant’s ability to exercise due care and to keep a reasonable and proper lookout in the direction of travel.” *Id.* (citation, quotation marks, and brackets omitted). The trial court’s supplemental instruction on proximate cause was an accurate statement of the law. *See id.* at 749, 646 S.E.2d at 839.

C. Instruction on Felonious Serious Injury by Vehicle

[4] Defendant also argues the trial court erred by instructing the jury with regard to the charge of felonious serious injury by vehicle, as follows:

And fifth, that the impaired driving by the defendant proximately, but unintentionally, caused the victim’s serious injury. Proximate cause is a real cause, a cause without

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which the victim's serious injury would not have occurred. The defendant's act need not have been the last or nearest cause. It is sufficient if it concurred with some other cause acting at the same time which, in combination with it, proximately caused the victim's serious injury.

Defendant cites N.C. Gen. Stat. § 20-141.4(a4)(3) (2015), which states: "The commission of the offense . . . is *the* proximate cause of the serious injury." (emphasis supplied). Defendant asserts this language "forecloses the possibility of the state proving proximate cause in conjunction with some other concurrent cause." We disagree.

Defendant acknowledges in his brief this Court's previous rejection of this argument. See *State v. Leonard*, 213 N.C. App. 526, 530, 711 S.E.2d 867, 871 (2011) (defendant's operation of a motor vehicle under the influence of an impairing substance "need not be the only proximate cause of a victim's injury in order for defendant to be found criminally liable; a showing that defendant's action of driving while under the influence was one of the proximate causes is sufficient.") The trial court accurately instructed the jury in conformity with the law. This argument is without merit and is overruled.

VII. Exclusion of Evidence that the Child Victim was not Properly Restrained

[5] Defendant argues the trial court erred by denying his requests to allow evidence that Khai was not properly restrained in a child seat pursuant to N.C. Gen. Stat. § 20-137.1. We disagree.

A. Standard of Review

This Court reviews the trial court's decision to exclude evidence for an abuse of discretion. *State v. Cooper*, 229 N.C. App. 442, 227, 747 S.E.2d 398, 403-404 (2013).

B. Analysis

The statute cited by Defendant states, "Every driver who is transporting one or more passengers of less than 16 years of age shall have all such passengers properly secured in a child passenger restraint system or seat belt which meets federal standards applicable at the time of its manufacture." N.C. Gen. Stat. § 20-137.1(a) (2015). However, the law also provides, "Evidence of failure to wear a seat belt shall not be admissible in any criminal or civil trial, action, or proceeding except in an action based on a violation of this section or as justification for the stop of a vehicle or detention of a vehicle operator and passengers."

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N.C. Gen. Stat. § 20-135.2A(d) (2015). Furthermore, a child restraint system violation “shall not be evidence of negligence or contributory negligence.” N.C. Gen. Stat. § 20-137.1(d)(4) (2015). Defendant’s argument is without merit and is overruled.

VIII. Conclusion

Defendant elected not to exercise multiple opportunities to have witnesses or an attorney present after his arrest pursuant to N.C. Gen. Stat. § 15A-501(5). Defendant cannot demonstrate he was irreparably prejudiced by the absence of a witness or attorney or by the time period, which elapsed between his arrest and appearance before a magistrate to warrant dismissal of his charges.

Cooke offered no testimony that would tend to sway the jury in deciding Defendant’s guilt. Defendant has failed to show the trial court committed prejudicial error by not allowing Defendant to cross-examine Cooke regarding the contents of his civil complaint against Defendant and Ms. Siu to show bias.

The trial court’s jury instructions on proximate cause were accurate and did not mislead the jury. Defendant has failed to show the trial court committed plain error by failing to give an instruction on intervening negligence.

The trial court did not abuse its discretion by not allowing evidence that Khai was not properly restrained in a child seat. Defendant received a fair trial, free from prejudicial errors he argued. *It is so ordered.*

NO PREJUDICIAL ERROR.

Judges McCULLOUGH and DILLON concur.

Judge McCULLOUGH concurred in this opinion prior to 24 April 2017.

STATE v. HARRIS

[253 N.C. App. 322 (2017)]

STATE OF NORTH CAROLINA

v.

JEROME HARRIS, DEFENDANT

No. COA16-874

Filed 2 May 2017

1. Evidence—witness interview video—past recorded recollection hearsay exception—corroboration

The trial court did not err in a second-degree murder and possession of a firearm by a felon case by allowing the State to introduce a video of a witness's interview by law enforcement and to play the video for the jury. The video was a "past recorded recollection" hearsay exception and also served as corroborative evidence substantiating witness testimony.

2. Jury—supplemental jury instructions—continued deliberations after inability to reach verdict

The trial court did not commit plain error in a second-degree murder and possession of a firearm by a felon case by failing to give all supplemental jury instructions for a deadlocked jury. The trial court's instructions to continue deliberations did not coerce the jury into reaching its verdict.

Appeal by defendant from judgment entered 11 December 2015 by Judge Michael R. Morgan in Wake County Superior Court. Heard in the Court of Appeals 22 February 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Marc X. Sneed, for the State.

Cheshire Parker Schneider & Bryan, PLLC, by John Keating Wiles, for defendant-appellant.

BERGER, Judge.

Jerome Harris ("Defendant") appeals from judgment entered following his conviction for second degree murder and possession of a firearm by a convicted felon. Defendant contends the trial court erred (1) by allowing the State to introduce a video of a witness' interview by law enforcement into evidence, both substantively and corroboratively, and to play the video for the jury; and (2) by giving supplemental

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jury instructions urging the jurors to continue their deliberations when it was communicated to the trial court that they were unable to agree upon a verdict.

After review, we disagree with Defendant on his first assignment of error and hold that the trial court did not commit error in allowing the State's video interview evidence to be played for the jury, first as a 'past recorded recollection' exception to hearsay, and second as corroborative evidence substantiating their witness' testimony. We agree with Defendant on his second assignment of error that the trial court erred by giving some, but not all, of the supplemental jury instructions required by statute if it appears to the judge that the jury has been unable to agree upon a verdict. However, because this was unpreserved error and the trial court's instructions did not coerce the jury into reaching its verdict, it did not rise to the level of plain error. For these reasons, Defendant received a fair trial free from prejudicial error.

Factual Background

The State presented evidence at trial that tended to show the following chain of events led to the death of Corey Jackson ("Jackson"). Donovan Bridges ("Bridges"), a close friend of Defendant for approximately 12 years, testified that he, Jackson, and Defendant were at a cook-out together on April 20, 2014. At the cookout, Jackson and Defendant began to argue when Jackson told Defendant, "We used to take your drugs and we used to beat you up whenever you was on the streets." Jackson's comment was made in the presence of Defendant's girlfriend, Africa Ledbetter ("Ledbetter"), and their children. After this verbal exchange, Defendant expressed anger to Bridges at this insult and his intent to shoot Jackson that day. Defendant also asked Bridges about acquiring a gun. Defendant did not know where his gun was located because Ledbetter had hidden it from him.

Tyshia Wilson ("Wilson") testified that on April 21, 2014, she noticed that Jackson seemed agitated and anxious when she saw him at the home of Cora Bost ("Bost"), Wilson's mother. When Wilson asked Jackson why he was anxious, he said that he was in the middle of a confrontation with Defendant and wanted it resolved that day. Jackson let Wilson know about the confrontation so that he "wouldn't get jumped," and also said that he wanted to fight Defendant in the parking lot their adjacent apartments shared.

Once Jackson, Wilson, and others left Bost's home and returned to Defendant and Jackson's apartment complex, Defendant was found pacing outside as he talked on his telephone. Jackson challenged

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Defendant to a fight, but Defendant said he did not have time to fight. Bost testified that Jackson, in reference to a previous domestic incident between Defendant and Ledbetter in which police were called, said to Defendant, “You must be still mad because you think my girl called the cops on you when you was beating [Ledbetter].”

Defendant continued his telephone conversation and requested the person to whom he was speaking to bring him a gun. Jackson continued to call Defendant inflammatory names as he challenged him to fight, but Defendant continued to decline Jackson’s invitation. Later that day, Jackson informed his wife, Tyasha Smalley (“Smalley”), about his confrontation with Defendant and how Defendant had accused Jackson of trying to “holler at” Ledbetter. Jackson denied having ever pursued any kind of relationship with Ledbetter.

Several days passed, and on April 24, 2014, Smalley and her son Christian returned to the apartment they shared with Jackson. Jackson had previously sent Smalley a text message at approximately 2:40 p.m. saying that he was at their apartment cleaning. When Smalley and Christian arrived, Smalley paused briefly outside to speak with Ledbetter’s parents who were sitting on Defendant and Ledbetter’s front porch. Christian entered the apartment first, and came back outside to tell Smalley that Jackson was lying on the floor of their living room, face down and unresponsive. Ledbetter’s stepfather called for police and an ambulance.

As part of law enforcement’s initial investigation, Raleigh Police Detective Brian Neighbors (“Detective Neighbors”) interviewed Ledbetter’s 13-year-old son, Xavier Gibbes (“Gibbes”), on that same day, April 24. Gibbes informed Detective Neighbors during this interview that he had heard a gunshot at approximately 2:45 to 3:00 p.m. earlier that day in the vicinity of Jackson’s apartment, and several seconds later had observed Defendant walking away from the apartment with a jacket in his hand.

When Bridges returned to his apartment on April 24 and saw the ongoing investigation at Jackson’s apartment, he called Defendant because of the conversation he and Defendant had the previous day. During this conversation, Defendant asked whether the police were looking for him, and admitted that “he [had] shot [Jackson] and thought he hit him at least once”. Bridges was interviewed by Raleigh Police Detective Eric Emser (“Detective Emser”) on April 24, and he conveyed the content of his conversation with Defendant to Detective Emser.

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Dr. Lauren Scott (“Dr. Scott”) of the Office of the Chief Medical Examiner performed an autopsy of Jackson on April 25, 2014. Dr. Scott testified about the autopsy, finding that Jackson had suffered four gunshot wounds. Two of these gunshot wounds entered Jackson’s back and were determined to be fatal.

Defendant was arrested on the morning of April 25, 2014. Following his arrest, Defendant was interviewed by Raleigh Police Detective Zeke Morse (“Detective Morse”). During the interview, Defendant informed Detective Morse where he would be able to find the weapon with which he had shot Jackson.

At trial, Defendant freely, voluntarily, and understandingly elected to remain silent and not present any evidence on his own behalf, after consultation with his counsel.

Procedural Background

Defendant was indicted by a Wake County Grand Jury on June 2, 2014, for possession of a firearm by a convicted felon in violation of N.C. Gen. Stat. § 14-415.1, and first degree murder in violation of N.C. Gen. Stat. § 14-17. These charges were joined for trial as they arose from the same acts of Defendant. Defendant was tried before a jury beginning on December 7, 2015, in Wake County Superior Court, the Honorable Michael R. Morgan presiding. The jury returned verdicts finding Defendant guilty of possession of a firearm by a convicted felon, for which Defendant was sentenced to a term of 17 to 30 months, and guilty of second degree murder, for which he was sentenced to a term of imprisonment of 328 to 406 months; the sentence terms to run consecutively. Defendant gave oral notice of appeal.

Analysis

Defendant has two assignments of error asserted in this appeal. His first assignment contests the introduction of a video interview conducted by Detective Neighbors of Gibbes into the State’s evidence, and allowing said interview to be played twice for the jury. His second assignment of error, albeit unpreserved at trial, challenges supplemental jury instructions given by the trial court when the jury communicated that it was unable to reach a verdict after three hours of deliberation. We take each in turn.

I. Video Recording of Witness’ Interview

[1] By his first assignment of error, Defendant contends that the trial court erred by allowing the State to twice play for the jury a video

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recording of its witness being interviewed by law enforcement. Defendant argues that it was error for the trial court to allow the video interview to be introduced as evidence both substantively, and thereafter corroboratively. In other words, it should have failed substantively, and therefore failed corroboratively. We disagree.

Initially, we must note that “[e]vidence of an out-of-court statement of a witness, related by the in-court testimony of another witness, may be offered as substantive evidence¹ or offered for the limited purpose of corroborating the credibility of the witness making the out-of-court statement.²” *State v. Ford*, 136 N.C. App. 634, 640, 525 S.E.2d 218, 222 (2000) (footnotes in original). “Although the better practice calls for the party offering the evidence to specify the purpose for which the evidence is offered, unless challenged there is no requirement that the purpose be specified.” *Id.* “If the offering party does not designate the purpose for which the evidence is offered, the evidence is admissible if it qualifies either as corroborative evidence or competent substantive evidence.” *Id.* (citing *State v. Goodson*, 273 N.C. 128, 129, 159 S.E.2d 310, 311 (1968); *State v. Chandler*, 324 N.C. 172, 182, 376 S.E.2d 728, 735 (1989)).

A. Introduction of Recording as Hearsay Exception

Defendant first argues that the trial court erred in allowing the video interview to be introduced as substantive evidence and played for the jury when the State’s witness, Gibbes, was unable to recall any of the statements he made to Detective Neighbors soon after Defendant had shot and killed Jackson. Defendant argues that the State introduced the video interview pursuant to Rule 612 of the North Carolina Rules of Evidence as a ‘present recollection refreshed’, and in allowing it to do so, the trial court erred. However, in light of the testimony of Gibbes, the arguments of counsel, and the ruling of the trial court, the evidence was properly introduced pursuant to Rule 803(5) as a hearsay statement that fits within an exception to exclusion. Therefore, as shown below, the trial court did not err, and this portion of this alleged error is overruled.

At the time evidence is admitted, exceptions to the admission must generally be preserved by counsel with an objection. N.C. Gen. Stat.

1. The evidence would qualify as substantive evidence if it was offered for the truth of the matter asserted and qualified as an exception under our hearsay rules. N.C. Gen. Stat. § 8C-1, Rule 803 (1999).

2. If offered simply as corroborative evidence and admitted for this limited purpose, the evidence does not constitute hearsay evidence because it is not offered to prove the truth of the prior out-of-court statement. As such this evidence does not qualify as an exception to the hearsay rule.

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§ 8C-1, Rule 103; N.C.R. App. P. 10(a)(1). “In order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent.” *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991) (citing N.C.R. App. P. 10(b)(1)).

The specific grounds for objection raised before the trial court must be the theory argued on appeal because “the law does not permit parties to swap horses between courts in order to get a better mount in the [appellate court].” *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934). Furthermore, when counsel objects to the admission of evidence on only one ground, he or she fails to preserve the additional grounds for appeal, unless plain error is specifically and distinctly argued on appeal. *State v. Frye*, 341 N.C. 470, 496, 461 S.E.2d 664, 677 (1995) (citing N.C.R. App. P. 10(c)(4)). For this issue, Defendant has not argued plain error. Therefore, we only address the grounds under which the contested admission of evidence was objected, as any other grounds have been waived.

The admission of evidence alleged to be hearsay is reviewed *de novo* when preserved by an objection. *State v. Wilson*, 197 N.C. App. 154, 159, 676 S.E.2d 512, 515 (2009). Unless there is an evidentiary rule to the contrary, assignment of error to the admission of evidence is waived on appeal if no objection is raised to the trial court. *State v. Johnson*, 209 N.C. App. 682, 692, 706 S.E.2d 790, 797 (2011). Furthermore, unless a defendant proves that a different result would have been reached at trial absent the error, evidentiary errors are harmless. *State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893, *disc. review denied*, 354 N.C. 223, 554 S.E.2d 650 (2001) (citing *State v. Campbell*, 133 N.C. App. 531, 540, 515 S.E.2d 732, 738 (1999)).

Hearsay is “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” N.C. Gen. Stat. § 8C-1, Rule 801 (2015). Hearsay may not be admitted into evidence, “except as provided by statute or by [the evidentiary] rules.” N.C. Gen. Stat. § 8C-1, Rule 802 (2015). These evidentiary rules provide exceptions for certain hearsay evidence to not be excluded if the statement fits in certain categories. N.C. Gen. Stat. § 8C-1, Rule 803 (2015). One such statement that will not be excluded by the hearsay rule is “[a] memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly.” N.C. Gen. Stat. § 8C-1, Rule 803(5). This is considered a ‘past recollection recorded’, and,

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“[i]f admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.” *Id.*

In the case *sub judice*, Defendant argues that the trial court permitted the jury to hear the recording of Gibbes’ interview by Detective Neighbors under Rule 612(a) of the North Carolina Rules of Evidence. Defendant further argues that the trial court erred by allowing the State to play this recording, because under Rule 612 Defendant must be the party choosing whether or not the recording will be played for the jury.

Rule 612 provides for the use of a writing or object to be used to refresh the witness’ memory. N.C. Gen. Stat. § 8C-1, Rule 612 (2015). This ‘present recollection refreshed’ writing or object may be used by the witness to refresh his memory, but the “adverse party is entitled to have the writing or object produced at the trial, hearing, or deposition in which the witness is testifying”. *Id.* Furthermore, this adverse party is “entitled to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness”. *Id.*

However, it was neither explicitly stated whether the State was seeking to introduce the video into evidence as a hearsay exception pursuant to Rule 803(5) or as a ‘present recollection refreshed’ pursuant to Rule 612, nor was it stated that the trial court was allowing the video’s introduction into evidence pursuant to either of these two rules. Therefore, we must distinguish between a writing that is offered as a ‘past recollection recorded’ and one that is offered as a ‘present recollection refreshed’ because the admissibility requirements are critically different.

“Before a past recollection recorded can be read into evidence, certain foundational requirements must be met.” *State v. Harrison*, 218 N.C. App. 546, 551-52, 721 S.E.2d 371, 376 (2012). This Court, in *State v. Love*, 156 N.C. App. 309, 576 S.E.2d 709 (2003), explained that

[i]n order to admit ‘recorded recollection’ pursuant to N.C. Gen. Stat. § 8C-1, Rule 803(5), the party offering the recorded recollection must show that the proffered [evidence] meets three foundational requirements: (1) The [evidence] must pertain to matters about which the declarant once had knowledge; (2) The declarant must now have an insufficient recollection as to such matters; (3) The [evidence] must be shown to have been made by the declarant or, if made by one other than the declarant,

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to have been examined and adopted . . . when the matters were fresh in [his or her] memory.

Id., 156 N.C. App. at 314, 576 S.E.2d at 712 (brackets omitted).

In contrast,

[u]nder present recollection refreshed the witness' memory is refreshed or jogged through the employment of a writing, diagram, smell or even touch, and he testifies from his memory so refreshed. Because of the independent origin of the testimony actually elicited, the stimulation of an actual present recollection is not strictly bounded by fixed rules but, rather, is approached on a case-by-case basis looking to the peculiar facts and circumstances present.

[*State v. Gibson*, 333 N.C. 29, 50, 424 S.E.2d 95, 107 (1992) overruled on other grounds by *State v. Lynch*, 334 N.C. 402, 432 S.E.2d 349 (1993)]. Because "the evidence is the testimony of the witness at trial, whereas with a past recollection recorded the evidence is the writing itself," "the foundational questions raised by past recollection recorded are never reached." *Id.* The relevant test, then, "is whether the witness has an independent recollection of the event and is merely using the memorandum to refresh details or whether the witness is using the memorandum as a testimonial crutch for something beyond his recall." *State v. York*, 347 N.C. 79, 89, 489 S.E.2d 380, 386 (1997).

Harrison, at 552, 721 S.E.2d at 376.

The testimony of Gibbes leading up to the introduction of the video evidence to the jury showed that this evidence was necessary "as a testimonial crutch for something beyond his recall." See *York*, at 89, 489 S.E.2d at 386. During direct examination of Gibbes by the State, the following pertinent exchanges illustrated Gibbes' lack of recall:

[The State]: All right. Now, what was the detective talking to you about?

[Gibbes]: I don't remember.

[The State]: You don't remember?

[Gibbes]: Huh-uh. I really don't...

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And:

[The State]: Do you recall telling the detective that?

[Gibbes]: No.

And:

[The State]: Okay. You don't recall this detective that's depicted with you looking at this piece of paper in State's Exhibit 99, this being the sketch and you indicating where you were when you heard the gunshot and two or three seconds later, you see [Defendant] walking away carrying a jacket?

[Gibbes]: No, I really don't.

[The State]: Okay. Did you tell the detective that?

[Gibbes]: No.

[The State]: Tell us everything – how long did you stay at the Raleigh Police Department?

[Gibbes]: I really don't know. That was a year ago. You can't expect me to recall that.

Following these exchanges, the State asked Gibbes whether viewing the video interview with Detective Neighbors would be helpful. Gibbes responded, "I mean, whatever floats your boat." Then, when Defendant was asked by the trial court whether or not he objected to the introduction of the video evidence to the jury, Defendant's counsel initially had no objection, but then changed his mind and entered an objection.

The objection lodged by Defendant before the introduction of the contested evidence is consistent with an objection to the introduction of 'past recollection recorded' evidence, particularly the second foundational requirement enunciated in *Love*: "[t]he declarant must now have an insufficient recollection as to such matters..." *Love*, 156 N.C. App. at 314, 576 S.E.2d at 712. Defendant's counsel objected "because of the testimony of the witness saying he did not remember." The trial court responded in overruling Defendant's objection that "[t]he aspect of his saying he did not remember is a demonstration of his recollection being exhausted", i.e., insufficient recollection as to such matters.

As the pertinent parts of the testimony above show, Gibbes had insufficient recollection as to the information he had conveyed to

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Detective Neighbors when those matters were fresh in his memory. Had Defendant's counsel objected to the introduction of the evidence generally, or objected to any other foundational issues specifically, those objections could be reviewed by this Court. However, Defendant has failed to preserve other grounds for review and he is not permitted "to swap horses between courts." *Weil*, at 10, 175 S.E. at 838. Therefore, based upon Defendant's counsel's objection, and the concomitant scope of review permitted within this Court, we must conclude that the trial court did not err in allowing the video of this interview to be played for the jury during Gibbes' testimony as 'past recollection recorded' substantive evidence.

B. Introduction of Recording as Corroborative Evidence

Defendant next argues, within this same issue, that the introduction of the same video interview as corroborative evidence during the testimony of Detective Neighbors was allowed in error. Defendant argues this was error because, if the video was improperly introduced during Gibbes' testimony as substantive evidence, it should not have been introduced during Detective Neighbors' testimony as corroborative evidence. As shown above, the introduction of the video as substantive evidence was not error; therefore, Defendant's argument fails to show why it could not have been introduced as corroborative evidence at a later point in the trial.

Furthermore, and most dispositive, Defendant did not object to the second introduction of this evidence under any issues pertaining to corroboration. Defendant's counsel, in giving his grounds for objection, stated, "Judge, I'm going to object to reshoving this, especially when the State's witness who is being interviewed [in the video] is not here that that [*sic*] we can call and cross-examine about what happened." As stated above, and emphasized here, the specific grounds for objection raised before the trial court must be the theory argued on appeal because "the law does not permit parties to swap horses between courts in order to get a better mount in the [appellate court]." *Weil*, at 10, 175 S.E. at 838. Furthermore, when counsel objects to the admission of evidence on only one ground, he or she fails to preserve the additional grounds for appeal, unless plain error is specifically and distinctly argued on appeal. *Frye*, at 496, 461 S.E.2d at 677 (citing N.C.R. App. P. 10(c)(4)). Again, as in the first part of this issue, plain error has not been argued.

At trial, the State questioned Detective Neighbors extensively about the interview recorded in the video, specifically detailing the Detective's many questions asked and Gibbes' responses given, along with the

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circumstances surrounding the interview. When viewing the introduction into evidence of the video interview, especially in the context of Detective Neighbors' testimony, the video interview was played for the jury to corroborate Detective Neighbors' prior testimony about the interview, not to corroborate any of Gibbes' previous testimony.

Corroboration is the process of persuading the trier of the facts that a witness is credible. We have defined "corroborate" as "to strengthen; to add weight or credibility to a thing by additional and confirming acts or evidence." Prior consistent statements of a witness are admissible as corroborative evidence even when the witness has not been impeached. However, the prior statement must in fact corroborate the witness' testimony.

In order to be corroborative and therefore properly admissible, the prior statement of the witness need not merely relate to specific facts brought out in the witness's testimony at trial, so long as the prior statement in fact tends to add weight or credibility to such testimony. Our prior statements are disapproved to the extent that they indicate that additional or "new" information, contained in the witness's prior statement but not referred to in his trial testimony, may never be admitted as corroborative evidence. However, the witness's prior statements as to facts not referred to in his trial testimony and not tending to add weight or credibility to it are not admissible as corroborative evidence. Additionally, the witness's prior contradictory statements may not be admitted under the guise of corroborating his testimony.

State v. Locklear, 172 N.C. App. 249, 256, 616 S.E.2d 334, 339 (2005) (quoting *State v. Ramey*, 318 N.C. 457, 468-69, 349 S.E.2d 566, 573-74 (1986) (internal citations and quotations omitted)) (emphasis removed).

Detective Neighbors testified in elaborate detail about his interview with Gibbes. The State methodically questioned Detective Neighbors about his interviewee, Gibbes, as well as the responses Gibbes gave surrounding the death of his neighbor. Detective Neighbors testified to the detailed chronological order of Gibbes' explanation of what he had witnessed. Thereafter, the State requested that the video interview be played for the jury to corroborate Detective Neighbors' testimony about the interview. There may or may not have been inconsistencies between Detective Neighbors' testimony and the video interview, and there may

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or may not have been facts mentioned in one but not the other, but these were for the jury to consider and weigh. *See Id.* The statements made in the video interview were admissible as corroborative evidence. *See State v. Higginbottom*, 312 N.C. 760, 768, 324 S.E.2d 834, 840 (1985), *superseded by statute on other grounds as stated in State v. Green*, 348 N.C. 588, 502 S.E.2d 819 (1998) (“It is not necessary that evidence prove the precise facts brought out in a witness’s testimony before that evidence may be deemed corroborative of such testimony and properly admissible.” *citing State v. Burns*, 307 N.C. 224, 297 S.E.2d 384 (1982)).

“The jury could not be allowed to consider this evidence for any other purpose [but corroboration], however, and whether it in fact corroborated the [Detective]’s testimony was, of course, a jury question.” *Locklear*, at 257, 616 S.E.2d at 340 (citation and quotation marks omitted). The trial court did not err in allowing the video interview be played for the jury for the purpose of corroborating Detective Neighbors’ testimony, and, therefore, this portion of Defendant’s assignment of error is overruled.

II. Supplemental Jury Instruction

[2] Next we address Defendant’s argument that a new trial is required because he was deprived of his fundamental right to a properly instructed jury. We disagree with his contention that the supplemental jury instruction, given by the trial court in response to the jury’s communication that it was “stuck” during its deliberation, had a probable impact on the jury’s verdict or improperly coerced the jury to reach a verdict. Therefore, this alleged error was not prejudicial and we decline to grant Defendant a new trial.

Defendant did not object at trial to the instructions assigned as error. “Therefore, our review as to these instructions is limited to a review for plain error.” *State v. Evans*, 346 N.C. 221, 225, 485 S.E.2d 271, 273 (1997) (citing *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983)).

Our Supreme Court reaffirmed their holding in *State v. Odom*, and further clarified how the plain error standard of review applies on appeal to unpreserved instructional error, in *State v. Lawrence*, 365 N.C. 506, 723 S.E.2d 326 (2012):

For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. *See Odom*, 307 N.C. at 660, 300 S.E.2d at 378. To show that an error was fundamental, a defendant must establish prejudice – that, after examination of the entire record,

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the error “had a probable impact on the jury’s finding that the defendant was guilty.” *See id.* (citations and quotation marks omitted); *see also* [*State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986)] (stating “that absent the error the jury probably would have reached a different verdict” and concluding that although the evidentiary error affected a fundamental right, viewed in light of the entire record, the error was not plain error). Moreover, because plain error is to be “applied cautiously and only in the exceptional case,” *Odom*, 307 N.C. at 660, 300 S.E.2d at 378, the error will often be one that “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings,” *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (quoting [*U.S. v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)]).

Lawrence, at 518, 723 S.E.2d at 334. “[E]ven when the ‘plain error’ rule is applied, ‘[i]t 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.’” *Odom*, at 660-61, 300 S.E.2d at 378 (citing *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977)).

After approximately three hours of deliberations, the trial court received a note from the jury indicating that “they ha[d] a split of 11 to 1.” Neither the State, nor Defendant, objected to the trial court’s “inclination to give them what is colloquially known as the dynamite charge, which would have them to be urged to do what they can to arrive at a unanimous verdict.”

Once the jury was present in the courtroom, the trial court stated:

By virtue of your most recent note that’s been passed to me, your foreperson informs me that you have so far been unable to agree upon a verdict. The Court wants to emphasize the fact that it is your duty to do whatever you can to reach a verdict. You should reason the matter over together as reasonable men and women and to reconcile your differences, if you can, without the surrender of conscientious convictions. But no juror should surrender his or her honest conviction as to the weight or effect of the evidence solely because of the opinion of his or her fellow jurors, or for the mere purpose of returning a verdict.

Once again, neither party objected to the supplemental instructions after it was given. The trial court then excused the jury to allow their deliberations to continue.

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Defendant contends that this instruction was given in violation of N.C. Gen. Stat. § 15A-1235 (2015), which contains guidelines for instructing a deadlocked jury. Pursuant to N.C. Gen. Stat. § 15A-1235,

(a) Before the jury retires for deliberation, the judge must give an instruction which informs the jury in order to return a verdict, all 12 jurors must agree to a verdict of guilty or not guilty.

(b) Before the jury retires for deliberation, the judge may give an instruction which informs the jury that:

(1) Jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;

(2) Each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;

(3) In the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and

(4) No juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

(c) If it appears to the judge that the jury has been unable to agree, the judge may require the jury to continue its deliberations and may give or repeat the instructions provided in subsections (a) and (b). The judge may not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

(d) If it appears that there is no reasonable possibility of agreement, the judge may declare a mistrial and discharge the jury.

N.C. Gen. Stat. § 15A-1235.

“Whenever the trial judge gives a deadlocked jury any of the instructions authorized by N.C.G.S. § 15A-1235(b), he must give all of them.” *State v. Aikens*, 342 N.C. 567, 579, 467 S.E.2d 99, 106 (1996) (citation omitted). Defendant argues in his brief that the trial court’s supplemental

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instruction omitted the substance of N.C. Gen. Stat. § 15A-1235(b)(1) and (2), and entirely omitted (b)(3). However, “[t]he purpose behind the enactment of N.C.G.S. § 15A-1235 was to avoid coerced verdicts from jurors having a difficult time reaching a unanimous decision.” *Evans*, 346 N.C. at 227, 485 S.E.2d at 274 (citing *State v. Williams*, 339 N.C. 1, 39, 452 S.E.2d 245, 268 (1994), *overruled on other grounds by State v. Warren*, 347 N.C. 309, 492 S.E.2d 609 (1997) *cert. denied*, __ U.S. __, 133 L.Ed.2d 61 (1995)).

In *State v. Evans*, as in the case *sub judice*, the jurors were admonished not to compromise or surrender their conscientious or honest convictions for the mere purpose of returning a verdict. *Evans*, 346 N.C. at 227, 485 S.E.2d at 274. “The substance of these instructions was to ask the jury to continue its deliberations, and the instructions were not coercive.” *Id.* Our Supreme Court specifically noted in *Evans* “that the effect of the instructions was not so coercive as to impel defendant’s trial counsel to object to the instructions.” *Id.* (quoting *State v. Peek*, 313 N.C. 266, 272, 328 S.E.2d 249, 253 (1985)). Defendant’s counsel here did not object to the trial court’s supplemental instructions when they were given, and, as in *Evans*, the trial court’s instructions were not coercive and any error was not fundamental. “[A]fter examination of the entire record, the error [could not be said to have] ‘had a probable impact on the jury’s finding that the defendant was guilty.’” *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (citing *Odom*, 307 N.C. at 660, 300 S.E.2d at 378). This was not plain error.

While the failure of the trial court to give the full instructions as directed by N.C. Gen. Stat. § 15A-1235 did not rise to the level of plain error, we must clarify that at the time the instruction was given, the trial court should reasonably have believed that the jury was deadlocked. Because the trial court gave some of the instructions, but not all of them, it did commit error. However, this error does not automatically entitle Defendant to a new trial because, as our Supreme Court has recognized, “‘every variance from the procedures set forth in the statute does not require the granting of a new trial.’” *Williams*, 315 N.C. at 327-28, 338 S.E.2d at 86 (quoting *Peek*, 313 N.C. at 271, 328 S.E.2d at 253); *See also State v. Easterling*, 300 N.C. 594, 268 S.E.2d 800 (1980).

Reading the instructions as a whole, and the context in which they were given, the trial court’s supplemental instructions neither forced a verdict nor contained elements of coercion, but merely served as a catalyst for further deliberations. Defendant has failed to show how the instructions given could be reasonably interpreted as coercive, and failed to establish plain error. Therefore, because the instructional

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mistake had no probable impact on the jury's finding that Defendant was guilty, we conclude that it was not prejudicial error.

Conclusion

The trial court did not err in allowing the State to introduce into evidence the video interview of Gibbes by Detective Neighbors, either substantively as a 'past recollection recorded' exception to hearsay, or corroboratively to substantiate Detective Neighbors' testimony. While the trial court did err in failing to give the full supplemental jury instructions required by N.C. Gen. Stat. § 15A-1235, Defendant will receive no relief from this error as it was neither plain nor prejudicial.

NO PREJUDICIAL ERROR.

Judges CALABRIA and HUNTER, JR concur.

STATE OF NORTH CAROLINA
v.
ROBERT HAROLD JOHNSON

No. COA16-527

Filed 2 May 2017

1. Jury—verdict—unanimity—multiple counts—instructions

There was a unanimous verdict in a case involving multiple charges and multiple counts rising from the sexual abuse of defendant's stepson. Although defendant contended that the organization of the offenses in the instructions by geographic location did not sufficiently identify the multiple offenses, the State presented evidence of offenses in each of the locations identified, defendant did not object to the instructions or the verdict sheets, and there was no indication that the jury was confused.

2. Sexual Offenders—lifetime registration—findings

A lifetime order to register as a sexual offender was remanded for proper findings where defendant was convicted of sexual offense with a child and sexual activity by a substitute parent and the trial court found that the offenses were reportable and aggravated. Defendant acknowledged on appeal that he was convicted of reportable offenses but challenged the findings that he was convicted of an aggravated offense. The sexual offenses here

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may or may not involve the penetration statutorily required for an aggravated offense.

3. Satellite-Based monitoring—reasonable search—no determination

An order for lifetime satellite-based monitoring was reversed and remanded where the trial court did not make the reasonableness determination mandated by the U.S. Supreme Court in *Grady v. N.C.*, __U.S.__, 191 L.Ed. 459 (2015).

Appeal by defendant from judgments entered 3 December 2015 by Judge Michael D. Duncan in Watauga County Superior Court. Heard in the Court of Appeals 17 November 2016.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Anita LeVeauz, for the State.

Glover & Petersen, P.A., by James R. Glover, for defendant-appellant.

TYSON, Judge.

Robert Harold Johnson, (“Defendant”) appeals from judgments entered upon his convictions for first degree sex offense with a child and sex offense by a substitute parent. We find no error in part, and reverse in part and remand to the trial court to issue correct findings and orders regarding sex offender registration and satellite-based monitoring (“SBM”) requirements.

I. Background

Defendant was arrested and a Watauga County Grand Jury indicted Defendant on three counts of sexual offense with a child, three counts of sexual activity by a substitute parent, and three counts of taking indecent liberties with a child. The charges were spread among three identical superseding indictments dated 5 January 2015, each of which contained one count of each offense.

Prior to jury selection, the State voluntarily dismissed the three counts of indecent liberties with a child. The remaining charges for sexual offense with a child and sexual activity by a substitute parent were joined for trial without objection.

Evidence presented by the State at trial tended to show Defendant forced his wife’s ten-year-old son to perform fellatio on him, when Defendant was supposed to be taking the juvenile to school and at

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other times inside and outside the juvenile's grandparents' house, where Defendant and the juvenile lived.

On 3 December 2015, the jury returned verdicts finding Defendant guilty of all six charges—three counts of sex offense with a child and three counts of sex activity by a substitute parent. Based upon the verdicts, the trial court entered three separate judgments corresponding to the indictments, with one count of each offense included in each judgment. Defendant received three consecutive sentences of 300 to 420 months imprisonment. The court further ordered that upon Defendant's release from prison, Defendant shall register as a sex offender for life and enroll in SBM for the remainder of his life. Defendant filed notice of appeal on 11 December 2015.

II. Jurisdiction

Jurisdiction lies in the Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2015) and N.C. Gen. Stat. § 15A-1444(a) (2015).

III. Issues

On appeal, Defendant raises the following three issues: whether the trial court erred by (1) allowing the jury to return guilty verdicts that were potentially less than unanimous by failing to adequately detail the incident of sex offense alleged in a particular indictment; (2) ordering lifetime sex offender registration based on a finding that Defendant was convicted of an aggravated offense; and (3) ordering lifetime SBM without a determination that the program was a reasonable search.

IV. Unanimous Verdicts

[1] In order to clarify and better distinguish sexual offenses, many of the sexual offense statutes were reorganized, renamed, and renumbered by the General Assembly following this Court's recommendation in *State v. Hicks*, 239 N.C. App. 396, 768 S.E.2d 373 (2015). See 2015 N.C. Sess. Laws 181 (effective 1 Dec. 2015). Those changes became effective 1 December 2015, but apply only to the prosecution of offenses committed after the effective date. See 2015 N.C. Sess. Laws. 181 sec. 48. We reference the previous version of the statutes in effect at the time the offenses in this case were committed.

The three superseding indictments in this case were identical, each charging one count of sex offense with a child in violation of N.C. Gen. Stat. § 14-27.4A(a) and one count of sexual activity by a substitute parent in violation of N.C. Gen. Stat. § 14-27.7(a) within the same period of time and without details distinguishing between the incidents. The

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evidence presented to the jury at trial included evidence of multiple sexual interactions between Defendant and the juvenile.

During the charge conference, the court inquired of counsel how to differentiate between the offenses in the charge to the jury. In response, the prosecutor suggested that the offenses be differentiated based on where each offense was alleged to have occurred— “inside Dovie Evans’ house,” “outside of Dovie Evans’s [sic] house,” and “at the end of a dirt road near Dovie Evans’s [sic] house.” The defense objected to the prosecutor’s suggestion contending the locations were “a little too broad and open-ended.” Although the defense suggested more specific instructions, the defense declined to offer specific suggestions.

After considering options to make the instructions more specific, the court noted Defendant’s objection and decided it would differentiate between the offense based on where the offenses were alleged to have occurred as follows: “inside Dovie Evans’ house,” “outside Dovie Evans’ house, but on Dovie Evans’ property[,]” and “at the end of a dirt road off Snyder Branch road near Dovie Evans’ house.” The jury was then instructed on the sex offense with a child and sexual activity by a substitute parent offenses with the offenses differentiated by where they were alleged to have occurred, as decided during the charge conference. The defense did not object to the instructions. The verdict sheets provided to the jury also differentiated between the offenses by where each offense was alleged to have occurred. The defense also did not object to the verdict sheets.

Defendant challenges the entry of judgements on convictions for the offenses purportedly occurring “inside Dovie Evans’ house” and “outside Dovie Evans’ house but on Dovie Evans’ property” in file numbers 14 CRS 1235 and 14 CRS 50591. Defendant contends the trial court erred in failing to sufficiently identify the incidents constituting the offenses and, therefore, deprived him of his right to unanimous jury verdicts.

A. Standard of Review

“The North Carolina Constitution and North Carolina Statutes require a unanimous jury verdict in a criminal jury trial.” *State v. Lawrence*, 360 N.C. 368, 373-74, 627 S.E.2d 609, 612 (2006) (citing N.C. Const. art. 1, § 24; N.C. Gen. Stat. § 15A-1237(b)). Although Defendant did not object to the instructions or the verdict sheets provided to the jury, “where the [alleged] error violates the right to a unanimous jury verdict under Article I, Section 24, it is preserved for appeal without any action by counsel.” *State v. Wilson*, 363 N.C. 478, 484, 681 S.E.2d 325, 330

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(2009) (citation omitted). “This is so because ‘the right to a unanimous jury verdict is fundamental to our system of justice.’” *State v. Gillikin*, 217 N.C. App. 256, 261, 719 S.E.2d 164, 168 (2011) (quoting *Wilson*, 363 N.C. at 486, 681 S.E. 2d at 331).

B. Analysis

Defendant argues that with respect to both the sexual assault purported to have occurred inside the house and the sexual assault purported to have occurred outside the house but on the property, “the jury heard testimony about two distinctly different incidents involving a sex offense and the jury could have returned its verdicts of guilt without being unanimous that the Defendant committed a particular offense.” The State argues that the indictments were sufficient to give Defendant notice of the charges, that there was sufficient evidence to support convictions on the charged offenses in each location, and that the jury instructions were clear.

Upon review of both parties’ arguments, it is evident the State’s response does not directly address Defendant’s argument. Defendant’s argument asserts the evidence presented at trial showed multiple, distinct instances of sexual assault occurring inside the house and multiple, distinct instances of sexual assault occurring outside the house, but on the property. Because the jury was not provided more details in the instructions or on the verdict sheets, Defendant contends he is not certain whether the jury unanimously found Defendant guilty based on the same incidents. We disagree.

“To convict a defendant, the jurors must unanimously agree that the State has proven beyond a reasonable doubt each and every essential element of the crime charged.” *State v. Jordan*, 305 N.C. 274, 279, 287 S.E.2d 827, 831 (1982). As this Court has explained,

[t]here is no risk of a nonunanimous verdict . . . where the statute under which the defendant is charged criminalizes “a single wrong” that “may be proved by evidence of the commission of any one of a number of acts . . . ; [because in such a case] the particular act performed is immaterial.”

State v. Petty, 132 N.C. App. 453, 460, 512 S.E.2d 428, 433 (quoting *State v. Hartness*, 326 N.C. 561, 566-67, 391 S.E.2d 177, 180 (1990)), *appeal dismissed and disc. review denied*, 350 N.C. 598, 537 S.E.2d 490 (1999). In *Petty*, this Court analyzed the first degree sexual offense in violation of N.C. Gen. Stat. § 14-27.4(a) and held the “gravamen, or gist, is to criminalize the performance of a sexual act with a child.” *Id.* at 461-62, 512

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S.E.2d at 434. The statute “does not create disparate offenses, rather it enumerates the methods by which the single wrong of engaging in a sexual act with a child may be shown.” *Id.* at 462, 512 S.E.2d at 434. Thus, instructions that a defendant could be found guilty of first degree sex offense based on different sexual acts was not error. *Id.* at 462-63, 512 S.E.2d at 434. The analysis applies equally to sexual offense with a child pursuant to N.C. Gen. Stat. § 14-27.4A and sexual activity by a substitute parent pursuant to N.C. Gen. Stat. § 14-27.7(a), both of which criminalize a “sexual act,” and not the method by which the sexual act is perpetrated.

More recently, our Supreme Court applied the same reasoning in *Lawrence*, while addressing the issue of jury unanimity on three counts of indecent liberties with a minor. *Lawrence*, 360 N.C. at 373, 627 S.E.2d at 612. In *Lawrence*, the Court recognized that “the indecent liberties statute simply forbids ‘any immoral, improper, or indecent liberties.’ ” *Id.* at 374, 627 S.E.2d at 612 (quoting N.C. Gen. Stat. § 14-202.1(a)(1) (2005)). “Thus, even if some jurors found that the defendant engaged in one kind of sexual misconduct, while others found that he engaged in another, the jury as a whole would unanimously find that there occurred sexual conduct within the ambit of any immoral, improper, or indecent liberties.” *Id.* (citations and internal quotation marks omitted). Consequently, the Court held “a defendant may be unanimously convicted of indecent liberties even if: (1) the jurors considered a higher number of incidents of immoral or indecent behavior than the number of counts charged, and (2) the indictments lacked specific details to identify the specific incidents.” *Id.* at 375, 627 S.E.2d at 613.

Subsequent to *Lawrence*, this Court has applied the same rationale to overrule arguments regarding jury unanimity on sexual offense charges where “the jury was instructed on all issues, including unanimity; [and] separate verdict sheets were submitted to the jury for each charge.” *State v. Brigman*, 178 N.C. App. 78, 93-94, 632 S.E.2d 498, 508 (quoting *Lawrence*, 360 N.C. at 376, 627 S.E.2d at 613), *appeal dismissed and disc. review denied*, 360 N.C. 650, 636 S.E.2d 813 (2006); *see State v. Wallace*, 179 N.C. App. 710, 719-20, 635 S.E.2d 455, 462-63 (2006), *appeal dismissed and disc. review denied*, 361 N.C. 436, 649 S.E.2d 896 (2007); *State v. Burgess*, 181 N.C. App. 27, 37-38, 639 S.E.2d 68, 75-76 (2007), *cert. denied*, 365 N.C. 337, 717 S.E.2d 384-85 (2011). This Court has also explained that

[t]he reasoning our Supreme Court set forth in *Lawrence* may be imputed to sexual offense charges because: (1) N.C. Gen. Stat. § 15-144.2(a) authorizes, for sexual offense,

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an abbreviated form of indictment which omits allegations of the particular elements that distinguish first-degree and second-degree sexual offense[;] and (2) if a defendant wishes additional information in the nature of the specific “sexual act” with which he stands charged, he may move for a bill of particulars.

Wallace, 179 N.C. App. at 720, 635 S.E.2d at 462-63 (2006) (citations omitted).

Based on *Lawrence* and its progeny, we overrule Defendant’s arguments regarding jury unanimity in this case, even though the jury may have considered a greater number of incidents than those charged in the indictments. Here, Defendant was charged with three counts of sexual offense with a child and three counts of sexual activity by a substitute parent in three separate indictments alleging one count of each offense. The jury instructions and the verdict sheets distinguished between the three sets of charges based upon the different locations where the offenses allegedly occurred and the State presented evidence of sexual offenses in each of the locations identified. Jury unanimity was shown as there was evidence of fellatio inside the house both at the computer table and in the bathroom, or that there was evidence of fellatio outside the house but on the property both inside a car and in the driveway.

Moreover, this Court has identified the following factors to consider when determining whether a defendant has been unanimously convicted by a jury:

(1) whether defendant raised an objection at trial regarding unanimity; (2) whether the jury was instructed on all issues, including unanimity; (3) whether separate verdict sheets were submitted to the jury for each charge; (4) the length of time the jury deliberated and reached a decision on all counts submitted to it; (5) whether the record reflected any confusion or questions as to jurors’ duty in the trial; and (6) whether, if polled, each juror individually affirmed that he or she had found defendant guilty in each individual case file number.

State v. Pettis, 186 N.C. App. 116, 123, 651 S.E.2d 231, 235 (2007). In the present case, although Defendant initially objected to the language proposed to differentiate the charges at the charge conference, Defendant did not object to the instructions issued to the jury or to the verdict sheets provided to the jury. The trial court instructed the jury on its duty of unanimity and the jury returned its guilty verdicts after approximately

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twenty minutes of deliberation. There is no indication in the record that the jury was confused, and the jurors confirmed their guilty verdicts upon being polled in open court.

Under the circumstances in this case, there is no issue concerning unanimity of the jury verdicts. Thus, the trial court did not err in entering judgments for sexual offense with a child and sexual activity by a substitute parent in the case numbers 14 CRS 1235 and 14 CRS 50591. Similarly, the trial court did not err in entering the third judgment in 14 CRS 51139, which Defendant does not challenge on appeal.

V. Registration Requirement

[2] Defendant also challenges the trial court's order that he register as a sex offender for life upon his release from prison. Upon review, we reverse the trial court's order concerning sex offender registration and remand to the trial court.

Our General Assembly has established registration programs to assist law enforcement in the protection of the public from persons who are convicted of sex offenses or of certain other offenses committed against minors. N.C. Gen. Stat. § 14-208.5 (2015); *see also* N.C. Gen. Stat. § 14-208.6A (2015). To that end, a person who has a "reportable conviction" is required to register for a period of at least 30 years. N.C. Gen. Stat. § 14-208.7 (2015). A person who is a recidivist, who is convicted of an aggravated offense, or who is classified as a sexually violent predator is required to maintain registration for life. N.C. Gen. Stat. § 14-208.23 (2015).

In this case, the orders for lifetime registration were based on the court's findings that Defendant has been convicted of reportable convictions and that the offenses of conviction are aggravated offenses. Defendant did not contest either of these findings below. While Defendant acknowledges on appeal that he was convicted of reportable convictions and is therefore required to register as a sex offender, Defendant now contends the court erred in ordering registration for life based upon findings he was convicted of aggravated offenses. Defendant argues on appeal that neither sexual offense with a child nor sexual activity by a substitute parent are listed as aggravated offenses in the statute. We agree.

A. Standard of Review

Despite Defendant's failure to object below, this issue is preserved for appeal. As stated above, N.C. Gen. Stat. § 14-208.23 provides that "[a] person who is a recidivist, who is convicted of an aggravated offense, or who is classified as a sexually violent predator *shall*

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maintain registration for the person's life." (emphasis supplied). "[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." *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985). Defendant alleges a violation of a statutory mandate, and "[a]lleged statutory errors are questions of law and as such, are reviewed *de novo*." *State v. Mackey*, 209 N.C. App. 116, 120, 708 S.E.2d 719, 721 (2011) (internal citations omitted).

B. Analysis

For purposes of sex offender registration and SBM requirements,

"[a]ggravated offense" means any criminal offense that includes either of the following: (i) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim of any age through the use of force or the threat of serious violence; or (ii) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim who is less than 12 years old.

N.C. Gen. Stat. § 14-208.6(1a) (2015).

Defendant asserts "the trial court 'is only to consider the elements of the offense of which a defendant was convicted and is not to consider the underlying factual scenario giving rise to the conviction' when determining whether a defendant's 'conviction offense [i]s an aggravated offense. . . .'" *State v. Treadway*, 208 N.C. App. 286, 302, 702 S.E.2d 335, 348 (2010) (quoting *State v. Davison*, 201 N.C. App. 354, 364, 689 S.E.2d 510, 517 (2009)). "In other words, the elements of the conviction offense must 'fit within' the statutory definition of 'aggravated offense.'" *State v. Boyett*, 224 N.C. App. 102, 116, 735 S.E.2d 371, 380 (2012) (citing *State v. Singleton*, 201 N.C. App. 620, 630, 689 S.E.2d 562, 569, *disc. review improvidently allowed*, 364 N.C. 418, 700 S.E.2d 226 (2010)). Thus, our review is limited to comparing the statutory definition of "aggravated offense" to the elements of the convicted offenses.

First, Defendant was charged and convicted on three counts of sexual offense with a child under N.C. Gen. Stat. § 14-27.4A(a). At the time of the offenses, that statute provided that "[a] person is guilty of sexual offense with a child if the person is at least 18 years of age and engages in a sexual act with a victim who is a child under the age of 13 years." N.C. Gen. Stat. § 14-27.4A (2013). Thus, the elements of sexual offense with a child are (1) a sexual act, (2) with a victim under the age of 13 years, (3) by a person who is at least 18 years old.

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Second, Defendant was charged and convicted on three counts of sexual activity by a substitute parent under N.C. Gen. Stat. § 14-27.7(a). At the time of the offenses, that statute provided that “[i]f a defendant who has assumed the position of a parent in the home of a minor victim engages in vaginal intercourse or a sexual act with a victim who is a minor residing in the home . . . the defendant is guilty of a Class E felony. Consent is not a defense to a charge under this section.” N.C. Gen. Stat. § 14-27.7(a) (2013). Thus, the elements of sexual activity by a substitute parent are (1) vaginal intercourse or a sexual act, (2) with a minor victim residing in a home, (3) by a person who has assumed the position of a parent in the minor victim’s home.

When comparing the elements of the convicted offenses to the elements in the definition of an aggravated offense, the elements do not precisely align.

We begin our analysis with part two of the definition of aggravated offense, which the State does not address. Under part two, an offense can only be found to be an aggravated offense if it includes “engaging in a sexual act involving vaginal, anal, or oral penetration with a victim who is less than 12 years old.” N.C. Gen. Stat. § 14-208.6(1a)(ii). Whereas this second category of aggravating offense requires a victim to be under the age of 12, sexual offense with a child requires proof that the victim is under the age of 13 and sexual activity by a substitute parent requires proof that the victim is a minor—that is under the age of 18. Because the age elements differ and neither convicted offense requires proof that a victim is under the age of 12, Defendant’s convicted offenses are not aggravated offenses under the second part of the aggravated offense definition. See *Treadway*, 208 N.C. App. at 303, 702 S.E.2d at 348 (holding “first degree sexual offense pursuant to N.C. Gen. Stat. § 14-27.4(a)(1) is not an aggravated offense[.]” because, “[c]learly, a child under the age of 13 is not necessarily also a child less than 12 years old.”).

Although the State does not address the second part of the definition, the State contends both sexual offense with a child and sexual activity by a substitute parent are aggravated offenses under part one of N.C. Gen. Stat. § 14-208.6(1a). Like part two of the definition, part one requires a sexual act involving penetration. However, instead of an age element, part one of the aggravated offense definition requires that the “sexual act involving vaginal, anal, or oral penetration” be perpetrated “through the use of force or the threat of serious violence[.]” N.C. Gen. Stat. § 14-208.6(1a)(i).

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On appeal, the State asserts that the sexual act in this case involved oral penetration through the use of force. The State contends the elements of both sexual offense with a child and sexual activity by a substitute parent fall within the elements required for an aggravated offenses under N.C. Gen. Stat. § 14-208.6(1a)(i). In support of its argument, the State cites *State v. Sprouse*, 217 N.C. App. 230, 719 S.E.2d 234 (2011), *disc. review denied*, 365 N.C. 552, 722 S.E.2d 787 (2012), for the proposition that a sexual offense against a minor necessarily involves the use of force or the threat of serious violence, because a minor is incapable of consent as a matter of law. Besides asserting that the specific facts in this case show oral penetration, facts which the State acknowledges are not considered in the determination of whether a convicted offense is an aggravated offense, the State does not address whether the convicted offenses require proof of penetration.

In *Sprouse*, the defendant was convicted on multiple counts of statutory rape, statutory sex offense, indecent liberties with a child, and sexual activity by a substitute parent, and ordered to enroll in lifetime SBM for all offenses. *Id.* at 235, 719 S.E.2d at 239. Among the issues on appeal, the defendant argued the lifetime SBM orders were in error because the convictions were not for aggravated offenses. *Id.* at 239, 719 S.E.2d 241. This Court noted “no meaningful distinction between [first-degree rape of a child and statutory rape] for purposes of lifetime SBM” and, therefore, affirmed the orders of lifetime SBM based on the defendant’s statutory rape convictions. *Id.* at 240-41, 719 S.E.2d at 242. This Court, however, reversed the orders of lifetime SBM based upon the convictions for statutory sex offense, sexual activity by a substitute parent, and indecent liberties with a child because “they do not meet the definition of an aggravated offense.” *Id.* at 241, 719 S.E.2d at 242.

In *Sprouse*, this Court relied upon *State v. Clark*, which held that statutory rape was an aggravated offense because it involves penetration and the use of force or the threat of serious violence. *State v. Clark*, 211 N.C. App. 60, 76, 714 S.E.2d 754, 764 (2011), *disc. review denied*, ___ N.C. ___, 722 S.E.2d 595 (2012). This Court noted first-degree rape of a child is an aggravated offense because it requires proof of vaginal intercourse and because rape of a child under the age of 13 necessarily involves the use of force or the threat of serious violence because the child is inherently incapable of consenting. *Id.* at 72-73, 714 S.E.2d at 763.

The present case is distinguishable in that the offenses of which Defendant was convicted offenses were not rape offenses. The convicted offenses in this case were sexual offense with a child and sexual activity

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by substitute parent, both of which only require a “sexual act.” For purposes of both offenses, a “[s]exual act” means cunnilingus, fellatio, anilingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person’s body” N.C. Gen. Stat. § 14-27.1 (2013). Not all “sexual acts” involve the element of penetration required to constitute an aggravated offense. In *Clark*, this Court differentiated first degree rape from other offenses on the basis that

obtaining a first degree rape conviction pursuant to N.C. Gen. Stat. § 14-27.2(a)(1) requires proof that a defendant “engage[d] in vaginal intercourse” with his or her victim, as compared to some other form of inappropriate contact. N.C. Gen. Stat. § 14-27.2(a)(1). In other words, anyone found guilty of first degree rape in violation of N.C. Gen. Stat. § 14-27.2(a)(1) has necessarily “[engaged] in a sexual act involving vaginal, anal, or oral penetration,” N.C. Gen. Stat. § 14-208.6(1a), based solely on an analysis of the elements of the conviction offense.

Clark, 211 N.C. App. at 73, 714 S.E.2d at 763. The same was true in *Sprouse* for statutory rape. Yet, this Court specifically noted in *Clark* that

[t]he same is not necessarily true with respect to a conviction for first degree sexual offense in violation of N.C. Gen. Stat. § 14-27.4(a)(1), since an individual can be convicted of first degree sexual offense on the basis of cunnilingus, which does not require proof of penetration. *State v. Ludlum*, 303 N.C. 666, 669, 281 S.E.2d 159, 161 (1981) (stating that “[w]e do not agree, however, that penetration is required before cunnilingus, as that word is used in the statute, can occur”).

Id. at 73 n. 4, 714 S.E.2d at 763 n. 4; *see also State v. Hoover*, 89 N.C. App. 199, 208, 365 S.E.2d 920, 926 (“Proof of a “sexual act” under G.S. 14-27.7 does not require, but may involve, penetration.”), *cert. denied*, 323 N.C. 177, 373 S.E.2d 118 (1988).

Because the elements of the convicted offenses in this case require only a sexual act, which may or may not involve penetration, neither sexual offense with a child pursuant to N.C. Gen. Stat. § 14-27.4A nor sexual offense by a substitute parent pursuant to N.C. Gen. Stat. § 14-27.7(a) necessarily involves the penetration statutorily required to

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constitute an aggravated offense under N.C. Gen. Stat. § 14-208.6(1a). We reverse the registration order and remand to the trial court for entry of a registration order based upon proper findings.

IV. SBM Requirement

[3] The trial court also ordered Defendant to enroll in SBM for the remainder of his life upon his release from prison. In the final issue on appeal, Defendant contends the trial court erred in ordering lifetime SBM without a determination that the program was a reasonable search as mandated under *Grady v. North Carolina*, __ U.S. __, 191 L. Ed. 2d 459 (2015). The State concedes the issue and we agree.

The findings that Defendant's convictions require lifetime registration for aggravated offenses were in error. Therefore, the order for lifetime SBM must be supported on other grounds. Defendant acknowledges the court correctly found that he had been convicted of sex offense with a child and that lifetime SBM is mandated by N.C. Gen. Stat. § 14-27.4A for a conviction of sex offense with a child. That statute provides that

(b) A person convicted of [sexual offense with a child] is guilty of a Class B1 felony and shall be sentenced pursuant to Article 81B of Chapter 15A of the General Statutes, except that in no case shall the person receive an active punishment of less than 300 months, and except as provided in subsection (c) of this section. *Following the termination of active punishment, the person shall be enrolled in satellite-based monitoring for life pursuant to Part 5 of Article 27A of Chapter 14 of the General Statutes.*

N.C. Gen. Stat. § 14-27.4A(b) (emphasis added).

However, in *Grady*, the Supreme Court of the United States held that North Carolina's SBM program constitutes a search within the meaning of the Fourth Amendment and must be reasonable based on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations. *Grady*, __ U.S. at __, 191 L. Ed. 2d at 462. The Supreme Court then remanded the matter for a hearing on the reasonableness of SBM in the case. *Id.*

Under the mandate of *Grady*, in *State v. Blue*, __ N.C. App. __, __, 783 S.E.2d 524, 527 (2016), this Court reversed a SBM order after "the trial court simply acknowledged that SBM constitutes a search and

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summarily concluded it is reasonable[.]” This Court held the trial court failed to follow the mandate in *Grady* to determine the reasonableness of the SBM program based upon the totality of the circumstances and remanded the matter to the trial court for a new hearing. *Id.* This Court also held the State bears the burden of proving SBM and the length thereof is reasonable. *Id.*

In the present case, Defendant and the State agree that no evidence was presented to demonstrate the reasonableness of lifetime SBM. As a result, we reverse the SBM order and remand for the reasonableness determination mandated by *Grady*. See *Grady*, __ U.S. at __, 191 L. Ed. 2d at 462.

VII. Conclusion

We hold the jury unanimously convicted Defendant on three counts each of sexual offense with a child and sexual activity by a substitute parent. Defendant received a fair trial free from error in the convictions or entry of those judgments.

We reverse the orders for lifetime registration and lifetime SBM and remand to the trial court for further proceedings and orders consistent with the law. *See id. It is so ordered.*

NO ERROR IN PART; REVERSED IN PART AND REMANDED.

Judges McCULLOUGH and DILLON concur.

Judge McCULLOUGH concurred in this opinion prior to 24 April 2017.

STATE v. REGAN

[253 N.C. App. 351 (2017)]

STATE OF NORTH CAROLINA

v.

WANDA LEE REGAN, DEFENDANT

No. COA16-682

Filed 2 May 2017

1. Appeal and Error—notice of appeal—inaccurate judgment date—certiorari

The Court of Appeals granted defendant's petition for certiorari where defendant's notice of appeal contained an inaccurate judgment date, in violation of Rule 4 of the N.C. Rules of Appellate Procedure.

2. Probation and Parole—revocation—subject matter jurisdiction—probation from another county

The Harnett County Superior Court had subject matter jurisdiction to revoke defendant's probation in a Sampson County case even though the record did not show a transfer of the case to Harnett County. Defendant was already on probation from a prior Harnett County case, her probation was supervised in Harnett County, she lived in Harnett County, and defendant violated her probation in Harnett County.

3. Probation and Parole—revocation—findings

The trial court did not make insufficient findings when revoking defendant's probation. The transcript and judgments reflected that the judge considered the evidence and the judge complied with the relevant statute, N.C.G.S. § 15A-1344(f), by finding good cause to revoke probation. The statute did not require that the trial court make any specific findings.

Appeal by Defendant from judgment entered 27 January 2016 by Judge C. Winston Gilchrist in Harnett County Superior Court. Heard in the Court of Appeals 11 January 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Allison A. Angell, for the State.

Joseph P. Lattimore for Defendant-Appellant.

INMAN, Judge.

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A trial court located in a county where a defendant resides and violates the terms of her probation is vested with jurisdiction to revoke the defendant's probation.

Wanda Lee Regan ("Defendant") appeals judgments revoking her probation in two criminal matters. On appeal, Defendant argues that the trial court in Harnett County lacked subject matter jurisdiction to commence a probation revocation hearing because the probation originated in Sampson County. Defendant also argues that the trial court erred in failing to make statutorily required findings of good cause to revoke her probation. After careful review, we affirm.

Factual & Procedural History

The evidence presented before the trial court tends to show the following:

On 16 March 2010 in Harnett County District Court, Defendant pled guilty in case number 09 CRS 054650, the case originating in Harnett County, to forging an instrument on 2 June 2009. The trial court accepted Defendant's plea and sentenced her to a minimum four months and a maximum six months imprisonment. The trial court suspended the sentence and placed Defendant on supervised probation for 24 months. Defendant's probation was supervised in the Harnett County Probation Office. In the Spring of 2011, Defendant's probation was supervised by Harnett County Probation Officer Sabrina Wiley.

On 3 May 2010 in Sampson County Superior Court, Defendant pled guilty in case number 09 CRS 052339, the case originating in Sampson County, to attempted first degree burglary on 25 July 2009. The trial court accepted Defendant's plea and sentenced her to a minimum 23 months and a maximum 37 months imprisonment. The trial court suspended the sentence and placed Defendant on supervised probation for 24 months. Defendant's probation was supervised in the Harnett County Probation Office, but the record on appeal does not reflect that Defendant's probation case was transferred from Sampson to Harnett County.

On 30 March 2011, Defendant spoke with Officer Wiley by phone and advised her that she had left North Carolina. Defendant refused to disclose her location.

On 5 April 2011, Defendant failed to attend a scheduled meeting with Officer Wiley. Subsequently, on 14 April 2011, a warrant was issued in Harnett County for Defendant's arrest. On that same date, Harnett County Probation Officer Norma Wood—who was working

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as a surveillance officer tasked with locating people who had fled the jurisdiction—was assigned to locate and arrest Defendant.

Officer Wood traveled to Defendant's last known address, a mobile home park in Angier, in Harnett County, where Defendant had lived with her aunt. Wood also visited Defendant's mother's home in Harnett County and called Defendant's daughter, who resided in Garner, North Carolina. Defendant's family members told Officer Wood that Defendant had left North Carolina, but did not disclose where Defendant was located.

On 25 April 2011, Officer Wiley filed a Probation Report in Harnett County Superior Court in case number 09 CRS 054650, the case originating in Harnett County. The Probation Report alleged that Defendant failed to report for a scheduled appointment on 5 April 2011, was in arrears with regard to monetary obligations, and left the jurisdiction without permission.

On that same date, Wiley filed a second Probation Report in Harnett County Superior Court in case number 11 CRS 00906. This case number corresponded with 09 CRS 052339, the case originating in Sampson County. The second Probation Report also alleged that Defendant failed to report for a scheduled appointment on 5 April 2011, was in arrears with regard to monetary obligations, and left the jurisdiction without permission.

Defendant avoided probation supervision for more than four years after notifying Officer Wiley that she had left North Carolina. She surrendered to law enforcement authorities in Texas in late 2015 and was extradited to North Carolina. More than a month prior to her arrest in Texas, Defendant contacted Officer Wood by telephone and said she wanted to surrender, but Defendant would not disclose her location.

The probation violation cases came on for hearing 27 January 2016 in Harnett County Superior Court, Judge C. Winston Gilchrist presiding. The State offered the testimony of one witness, Officer Wood, who by that time had been assigned to supervise Defendant's probation after Officer Wiley had been reassigned to another county. Defendant also testified at the hearing.

Defendant admitted that she left North Carolina in 2011 and went to Texas. She also admitted to speaking with Officer Wood by telephone. At the conclusion of the probation violation hearing, the trial court found Defendant in willful violation of the terms and conditions of her probation, revoked her probation in both cases, and activated her suspended sentences.

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Defendant filed a timely notice of appeal. Defendant also filed a petition for writ of certiorari in the alternative, should this Court find her written notice of appeal defective.

Appellate Jurisdiction

[1] As an initial matter, we must address this Court’s jurisdiction. On 10 February 2016, Defendant filed a notice of appeal to this Court. The notice of appeal referred to an inaccurate judgment date, in violation of Rule 4 of the North Carolina Rules of Appellate Procedure. *See* N.C.R. App. P. 4(a) (2014) (“The notice of appeal required to be filed and served by subdivision (a)(2) of this rule shall specify the party or parties taking the appeal; shall designate the judgment or order from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.”). Defendant filed a petition for writ of certiorari seeking this Court’s review notwithstanding her defective notice of appeal. “While this Court cannot hear [D]efendant’s direct appeal, it does have the discretion to consider the matter by granting a petition for writ of *certiorari*.” *State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 320 (2005). As such, we allow Defendant’s petition for writ of certiorari and address her appeal on the merits.

Analysis*I. Trial Court Jurisdiction*

[2] Defendant contends that the State failed to present sufficient evidence that the Harnett County Superior Court had subject matter jurisdiction to revoke probation in file number 11 CRS 00906, the case which originated in Sampson County. We disagree.

A party may raise the issue of subject matter jurisdiction at any time. *State v. Satanek*, 190 N.C. App. 653, 656, 660 S.E.2d 623, 625 (2008) (citation omitted). “Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal.” *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010) (citation omitted).

Section 15A-1344(a) of the North Carolina General Statutes—entitled “Authority to Alter or Revoke”—provides in pertinent part:

Except as provided in subsection (a1) or (b), probation may be reduced, terminated, continued, extended, modified, or revoked by any judge entitled to sit in the court which imposed probation and who is resident or presiding in the district court district as defined in G.S. 7A-133

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or superior court district or set of districts as defined in G.S. 7A-41.1, as the case may be, where the sentence of probation was imposed, *where the probationer violates probation, or where the probationer resides.*

N.C. Gen. Stat. § 15A-1344 (2015) (emphasis added).

Defendant argues that the State did not meet its burden of showing that 1) the Sampson County probation was transferred to Harnett County Superior Court and the Harnett County Superior Court thereafter issued its own probation order authorizing supervision of Defendant; 2) Defendant violated her probation in Harnett County; or 3) Defendant resided in Harnett County at the time of the violations. Defendant's argument is refuted by evidence that at the time she violated her probation by failing to pay supervision fees and by leaving the state, her residence was in Harnett County. Defendant's argument also is refuted by evidence that she violated her probation by failing to report for an appointment with her probation officer in Harnett County, thus vesting Harnett County Superior Court with jurisdiction to revoke Defendant's probation.

"It is presumed, when the Court is not required to find facts and make conclusions of law and does not do so, that the court on proper evidence found facts to support its judgment." *Sherwood v. Sherwood*, 29 N.C. App. 112, 113-14, 223 S.E.2d 509, 510-11 (1976) (citations omitted). Here, it was reasonable for the trial court to find that Defendant resided in Harnett County. Defendant's last address known to the Harnett County Probation Office, which was supervising her probation, was in Harnett County. Defendant testified that Officer Wood had visited the mobile home in Angier where Defendant lived with her aunt to make sure that Defendant was at home during the curfew hours required by the terms of her probation. Defendant also testified that "I always have a home with my mother, yes." Defendant's mother lived in Harnett County at the time Defendant violated her probation.

Moreover, the trial court also could have found as a fact, based on a reasonable inference from the evidence, that Defendant violated the terms of her probation in Harnett County when she failed to meet with Officer Wiley on 5 April 2011. Probation officers routinely schedule appointments with probationers at county probation offices, so that officers can meet with multiple probationers in a single day and complete office work while waiting for probationers to report for their appointments. By failing to appear for her appointment with Officer Wiley of the Harnett County Probation Office, Defendant committed a probation violation in Harnett County.

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In order to avoid disputes, uncertainty, and costly litigation, the better practice for probation officers is to specify on probation violation reports any address relevant to alleged probation violations, such as the last known address of a probationer who has left the jurisdiction without permission or the address of the probation office where a defendant failed to attend a scheduled meeting. Additionally, in a probation violation hearing, the better practice for the State is to introduce direct evidence of any address relevant to an alleged probation violation. In this case, the indirect evidence—sufficient to allow the reasonable inference that Defendant resided in Harnett County when she fled the jurisdiction and violated her probation in Harnett County by failing to meet with her probation officer there—supports the trial court’s presumed findings necessary to support its judgment.

Defendant also argues that the trial court had no jurisdiction to revoke her probation in the case originating in Sampson County because there is no record showing that her probation case was transferred from Sampson County to Harnett County. However, Defendant cites no controlling statute or precedent, nor are we aware of any requiring transfer of a probation case to the county where probation is ultimately revoked so long as the probationer resided in that county or violated probation in that county.

Because the evidence supported the trial court’s presumed findings that Defendant resided in Harnett County and violated the terms of her probation in Harnett County, we hold that the Harnett County Superior Court had subject matter jurisdiction to revoke Defendant’s probation in 11 CRS 00906, the case originating in Sampson County.

II. *Requisite Findings*

[3] Defendant contends that the trial court erred in revoking her probation after its expiration because it did not make adequate findings of fact. This argument is without merit.

Section 15A-1344(f) of the North Carolina General Statutes—entitled “Extension, Modification, or Revocation after Period of Probation”—provides the four criteria that must be met for the trial court to extend, modify, or revoke probation after the probation term has expired:

- (1) Before the expiration of the period of probation the State has filed a written violation report with the clerk indicating its intent to conduct a hearing on one or more violations of one or more conditions of probation.

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(2) The court finds that the probationer did violate one or more conditions of probation prior to the expiration of the period of probation.

(3) The court finds for good cause shown and stated that the probation should be extended, modified, or revoked.

(4) If the court opts to extend the period of probation, the court may extend the period of probation up to the maximum allowed under G.S. 15A-1342(a).

N.C. Gen. Stat. § 15A-1344(f). Defendant contends the trial court erred in failing to make any written or oral findings of good cause to revoke her probation. This argument is misplaced.

Defendant relies on *State v. Love*, 156 N.C. App. 309, 576 S.E.2d 709 (2003) for the contention that the trial court's failure to make the requisite findings of fact was error that renders the judgments void. However, *Love* involved a different statute, N.C. Gen. Stat. § 15A-1343.2(d) (2003), which requires the trial court to make "*specific findings* that longer or shorter periods of probation are necessary" to deviate from probation terms provided by that statute. N.C. Gen. Stat. § 15A-1343.2(d) (emphasis added). The statute at issue in this case does not require that the trial court make any specific findings. It simply provides that the trial court can alter probation after expiration of the period of probation has expired if "the [trial] court finds for good cause shown and stated that the probation should be extended, modified, or revoked." N.C. Gen. Stat. § 15A-1344(f)(3).

A criminal defendant is subject to revocation of her probation for any violation committed prior to 1 December 2011:

A hearing to revoke a defendant's probationary sentence only requires that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation or that the defendant has violated without lawful excuse a valid condition upon which the sentence was suspended. The judge's finding of such a violation, if supported by competent evidence, will not be overturned absent a showing of manifest abuse of discretion.

State v. Young, 190 N.C. App. 458, 459, 660 S.E.2d 574, 576 (2008) (citations and quotation marks omitted).

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The trial court complied with N.C. Gen. Stat. § 15A-1344(f)(3) by finding good cause to revoke Defendant's probation. Remaining in North Carolina was a condition of Defendant's probation. Defendant testified that she left the jurisdiction in 2011. Reporting for office meetings with her probation officer as directed was also a condition of Defendant's probation. The State presented competent evidence, the sworn affidavit of Officer Wiley, that Defendant failed to report as directed on 5 April 2011. Defendant testified that she did not return to North Carolina because "after talking to Ms. Woods, I mean, frankly, it scared the hell out of me, so I didn't come back." From the bench, the trial court announced, "I find the Defendant's in willful violation of the terms and conditions of her probation."

Each of the judgments—09 CR 54650, the case originating in Harnett County, and 11 CRS 00906, the case originating in Sampson County—incorporates a corresponding violation report (both dated 25 April 2011) and indicates the specific paragraphs of the violation report which the trial court found as the basis for the finding that Defendant willfully violated the terms of her probation. Each judgment also includes a box checked by the trial court indicating that "[e]ach violation is, in and of itself, a sufficient basis upon which this Court should revoke probation and activate the suspended sentence." Both the transcript of the probation violation hearing and the judgments entered reflect that the trial court considered the evidence and found good cause to revoke Defendant's probation.

Conclusion

Because the trial court had jurisdiction and found good cause to revoke Defendant's probation, we affirm the orders revoking Defendant's probation.

AFFIRMED.

Judges CALABRIA and McCULLOUGH concur.

Judge Douglas McCullough concurred in this opinion prior to 24 April 2017.

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STATE OF NORTH CAROLINA

v.

JOE ROBERT REYNOLDS, DEFENDANT

No. COA16-149

Filed 2 May 2017

1. Constitutional Law—federal—double jeopardy—sex offender—failure to notify sheriff of change of address—failure to report in person to sheriff’s office

Double jeopardy was violated where defendant, a sex offender, was convicted of failing to inform the sheriff of a change of address under N.C.G.S. § 14-208.11(a)(2) and (a)(7), pursuant to the requirements in N.C.G.S. § 14-208.9(a). The latter statute applied to both subsections of N.C.G.S. § 14-208.11, so that both had the same elements.

2. Sexual Offenders—change of address—failure to report

The trial court correctly denied the motion of sexual offender to dismiss charges involving the failure to register his change of address after he was released from jail. Defendant had registered prior to being jailed for 30 days for contempt. The N.C. Supreme Court has not established a minimum time for the facility imprisoning a registrant to be considered a new address. The defendant in this case was not merely in jail overnight.

3. Appeal and Error—mootness—case overruled between trial and appeal

Defendant’s argument that a trial court erred by not allowing him to refer to a Court of Appeals case in his closing argument was moot where the N.C. Supreme Court overruled the Court of Appeals case between trial and appeal.

4. Indictment and Information—tracking language of relevant statute

Indictments for two offenses, which involved the failure of a sex offender to register, each alleged the essential elements of the offense charged where they tracked the language of the relevant statute.

Appeal by defendant from judgment entered on or about 5 November 2015 by Judge William D. Albright in Superior Court, Surry County. Heard in the Court of Appeals 8 August 2016.

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Attorney General Joshua H. Stein, by Assistant Attorney General William P. Hart, Jr., for the State.

Amanda S. Zimmer, for defendant-appellant.

STROUD, Judge.

Defendant appeals judgment from two convictions arising out of his failure to inform the sheriff's office of his address after being released on parole and one conviction for attaining the status of habitual felon. For the following reasons, we vacate one of defendant's convictions on the basis of double jeopardy, find no error on the other issues raised, and remand for resentencing.

I. Background

The general background of this case was stated in *State v. Reynolds*,

On or about 22 July 2013, defendant was indicted for failing to register as a sex offender. Thereafter, on or about 7 October 2013, defendant was indicted for attaining the status of habitual felon. During defendant's trial, two witnesses testified on behalf of the State. The first witness was defendant's supervising parole officer who testified that though defendant had on more than one occasion previously registered as a sex offender within three business days as required by law, defendant eventually refused to register after he was released from incarceration after a parole violation, stating that he was already registered and nothing had changed. The second witness was a detective with the Surry County Sheriff's Office who testified that he went to a magistrate for an arrest warrant due to defendant's failure to register within three business days of being released from incarceration, although he too noted defendant had previously registered.

___ N.C. App. ___, 775 S.E.2d 695, slip op. at 1-2. (No. COA14-1019) (June 16, 2015) (unpublished) ("*Reynolds I*"). In *Reynolds I*, this Court vacated defendant's convictions concluding North Carolina General Statute § 14-208.11(a)(1) "logically applies only to individuals who are registering for the first time and not to defendant, who was already registered." *See id.* at 4.

Thereafter, in August of 2015, defendant was again indicted for failure to report a new address as a sex offender and failure to report in

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person as a sex offender, both on the same offense date as in *Reynolds I*, but under North Carolina General Statute § 14-208.11(a)(2) and (a)(7). Defendant was also indicted for attaining the status of habitual felon. After a trial, the jury found defendant guilty on all counts, and the trial court entered judgment. Defendant appeals.

II. Double Jeopardy

[1] Defendant was convicted of two separate crimes arising from his failure to register his change of address, one pursuant to North Carolina General Statute § 14-208.11(a)(2) and one pursuant to North Carolina General Statute § 14-208.11(a)(7). North Carolina General Statute § 14-208.11(a) provides in pertinent part:

(a) A person required by this Article to register who willfully does any of the following is guilty of a Class F felony:

....

(2) Fails to notify the last registering sheriff of a change of address as required by this Article.

....

(7) Fails to report in person to the sheriff's office as required by G.S. 14-208.7, 14-208.9, and 14-208.9A.

N.C. Gen. Stat. § 14-208.11(a) (2013).

North Carolina General Statute § 14-208.11(a)(7) refers to three other statutes which address registration in different situations, but only one, § 14-208.9, is applicable in this situation.¹ Thus here, the State was required to prove that defendant failed to register as required by North Carolina General Statute § 14-208.9.

North Carolina General Statute § 14-208.9(a) provides in pertinent part:

(a) If a person required to register changes address, the person shall *report in person* and *provide written*

1. North Carolina General Statute § 14-208.7 is not applicable here because it applies to "the initial registration[.]" *State v. Crockett*, 368 N.C. 717, 722, 782 S.E.2d 878, 882 (2016) ("We now hold that N.C.G.S. § 14-208.9, the change of address statute, and not section 14-208.7, the registration statute, governs the situation when, as here, a sex offender who has already complied with the initial registration requirements is later incarcerated and then released."). North Carolina General Statute § 14-208.9A is not applicable here either since that statute specifically deals with verification of registration. *See* N.C. Gen. Stat. § 14-208.9A (2013).

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notice of the new address not later than the third business day after the change to the sheriff of the county with whom the person had last registered. If the person moves to another county, the person shall also report in person to the sheriff of the new county and provide written notice of the person's address not later than the tenth day after the change of address.

N.C. Gen. Stat. § 14-208.9(a) (2013) (emphasis added).

With this background in mind, we turn to defendant's double jeopardy argument. Defendant contends that the trial court violated his constitutional protection against double jeopardy by entering judgment for convictions under both North Carolina General Statute § 14-208.11(a)(2) and (a)(7). "The standard of review for this issue is *de novo*, as the trial court made a legal conclusion regarding the defendant's exposure to double jeopardy." *State v. Fox*, 216 N.C. App. 144, 147, 721 S.E.2d 673, 675 (2011) (citation and quotation marks omitted). "[T]he applicable test to determine whether double jeopardy attaches in a single prosecution is whether each statute requires proof of a fact which the others do not." *State v. Mulder*, 233 N.C. App. 82, 89, 755 S.E.2d 98, 102 (2014) (citation, quotation marks, and brackets omitted).

Turning back to the statute under which defendant was convicted:

(a) A person required by this Article to register who willfully does any of the following is guilty of a Class F felony:

....

(2) Fails to notify the last registering sheriff of a change of address as required by this Article.

....

(7) Fails to report in person to the sheriff's office as required by G.S. 14-208.7, 14-208.9, and 14-208.9A.

N.C. Gen. Stat. § 14-208.11(a). Our Court has already plainly stated that "[a] conviction for violating N.C. Gen. Stat. §§ 14-208.9(a) and 14-208.11(a)(2) requires proof beyond a reasonable doubt that: (1) the defendant is a person required to register; (2) the defendant changes his or her address; and (3) the defendant fails to notify the last registering sheriff of the change of address [.]” See *State v. Worley*, 198 N.C. App. 329, 334, 679 S.E.2d 857, 861 (2009) (emphasis added) (citations, quotation marks, ellipses, and brackets omitted). As to the elements of North Carolina General Statute § 14-208.11(a)(7), we have already established that in

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this particular case North Carolina General Statute § 14-208.11(a)(7) is controlled by the elements in North Carolina General Statute § 14-208.9 because the other two statutes noted in (a)(7) regarding initial registration and verification of registration are not applicable here. *See* N.C. Gen. Stat. § 14-208.11(a)(7); *see also* N.C. Gen. Stat. § 14-208.9A; *Crockett*, 368 N.C. at 722, 782 S.E.2d at 882. *Worley* clearly states that “N.C. Gen. Stat. §§ 14-208.9(a) and 14-208.11(a)(2)” have the exact same elements. *See Worley*, 198 N.C. App. at 334, 679 S.E.2d at 861. Thus, in this particular instance *both* § 14-208.11(a)(2) and (a)(7) required defendant to inform the sheriff of his change of address pursuant to the requirements in § 14-208.9(a). *See* N.C. Gen. Stat. § 14-208.11(a)(2) and (7); *Worley*, 198 N.C. App. at 334, 679 S.E.2d at 861.

The State attempts to distinguish the elements of North Carolina General Statute § 14-208.11(a)(2) and (7) by arguing

the trial court’s charge of failing to notify the last registering sheriff of a change of address was based upon Defendant’s failure to provide written notice to the sheriff only . . . ; on the other hand, the charge of failing to report in person as required by N.C. Gen. Stat. § 14-208.9² was based upon Defendant’s failure to report in person for the purpose of providing the written notification.

But the State’s attempted distinction between (a)(2) and (a)(7) is eliminated by North Carolina General Statute § 14-208.9, which applies equally to both subsections. *See* N.C. Gen. Stat. § 14-208.11(a)(2) and (7); *Worley*, 198 N.C. App. at 334, 679 S.E.2d at 861. North Carolina General Statute § 14-208.9 requires a registrant to “report *in person* and provide *written notice* of the new address[.]” N.C. Gen. Stat. § 14-208.9 (emphasis added), and this language is applicable to both § 14-208.11(a)(2) and (a)(7). *See State v. Holmes*, 149 N.C. App. 572, 576, 562 S.E.2d 26, 30 (2002) (“N.C.G.S. § 14-208.9 and the statute in question, § 14-208.11, are both within Article 27A, which defines the sex offender and public protection registration programs. Because they deal with the same subject matter, they must be construed in *pari materia* to give effect to each.”) Because in this case North Carolina General Statute § 14-208.11(a)(2) and (a)(7) have the same elements, one of defendant’s convictions must be vacated for violation of double jeopardy. *See generally State v. Dye*, 139 N.C.

2. To be clear, defendant was not indicted under North Carolina General Statute § 14-208.9; the State charged defendant under § 14-208.11(a)(7) but that statute incorporates the requirements of § 14-208.9 in this case.

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App. 148, 153, 532 S.E.2d 574, 578 (2000) (“Under the circumstances of the instant case, therefore, the Double Jeopardy Clause constituted a bar to defendant’s subsequent prosecution upon the domestic criminal trespass charge, and her conviction must be vacated[.]” (citation omitted)).

Furthermore, to the extent the State argues the legislature intended North Carolina General Statute § 14-208.11(a)(2) and (a)(7) to be punished separately, we disagree. The entirety of the State’s argument focuses upon “the express duty of registered offenders to report in person” versus “the purpose of requiring written notice[.]” but again, in this case both North Carolina General Statute § 14-208.11(a)(2) and (a)(7) required defendant to “report in person *and* provide written notice of the new address” pursuant to North Carolina General Statute § 14-208.9. N.C. Gen. Stat. § 14-208.9 (emphasis added). There is simply no legal or practical difference between the two subsections as applied here. Therefore, we vacate one of defendant’s convictions under North Carolina General Statute § 14-208.11 and remand for defendant to be resentenced on the remaining conviction.

III. Motion to Dismiss

[2] Defendant also contends that “the trial court erred in denying . . . [his] motion to dismiss when the State failed to present sufficient evidence that . . . [he] had changed his address.” (Original in all caps.) Defendant contends that “[t]he undisputed evidence showed that . . . [he] initially registered in September 2011 with an address of . . . Shoals Road. . . . He was incarcerated at times following that registration, but always returned to the same address.” Thus, the only element defendant challenges is whether his address had changed.

When 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. The State is entitled to every reasonable intendment and inference to be drawn from the evidence, and any contradictions and discrepancies are to be resolved in favor of the State. The only issue before the trial court in such instances is whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense. Substantial evidence is relevant evidence that a reasonable mind might accept as

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adequate to support a conclusion. As long as the evidence permits a reasonable inference of the defendant's guilt, a motion to dismiss is properly denied even though the evidence also permits a reasonable inference of the defendant's innocence.

Worley, 198 N.C. App. at 333, 679 S.E.2d at 861 (citations and quotation marks omitted).

The undisputed evidence establishes that although defendant had registered in September of 2011, he was thereafter incarcerated and released in January of 2013. In reversing a decision of this Court, our Supreme Court clarified,

[a]s long as the registrant remains incarcerated, his address is that of the facility or institution in which he is confined. Although the State did not elicit any evidence tending to show the location at which defendant had been incarcerated prior to his release from the custody of the Division of Adult Correction on 14 November 2012, his address necessarily changed when he was released from incarceration. As a result, in accordance with N.C.G.S. § 14-208.9(a), defendant was required to report in person and provide written notice of the new address not later than the third business day after the change to the sheriff of the county with whom the person had last registered. Although defendant had last registered with the Gaston County Sheriff's Office, he failed to report in person or provide written notice of the fact that his address had changed from the facility or institution in which he had been incarcerated to his new residence following his release from the custody of the Division of Adult Correction on 14 November 2012.

State v. Barnett, 368 N.C. 710, 714-15, 782 S.E.2d 885, 889-90 (2016) (citations, quotation marks, ellipses, brackets, and footnote omitted).

Defendant argues in response to *Barnett* that he was only in prison for a month, not long enough to establish a new address. But our Supreme Court did not establish a minimum time period of incarceration for the facility imprisoning a registrant to be considered a new address; rather, the Court stated, “[a]s long as the registrant remains incarcerated, his address is that of the facility or institution in which he is confined.” *Id.* at 714, 782 S.E.2d at 889. Defendant was not merely in jail overnight but rather was incarcerated for “a 30-day contempt period[,]” so *Barnett*

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still controls. *See id.* By showing defendant had been incarcerated for approximately a month and then released, the State established that defendant had a new address, *see id.*, and thus the trial court properly denied defendant's motion to dismiss. This argument is overruled.

IV. Sentencing

Defendant next contends that “[t]he trial court sentenced . . . [him] in violation of N.C. GEN. STAT. § 15A-1335 when [it] imposed a sentence of 117-153 months when . . . [he] had previously been sentenced to 87-117 months for the same conduct.” As an initial matter, the State contends that because defendant challenges his presumptive range sentence, defendant has no right to appeal. But since we are vacating one of defendant's convictions he will necessarily need to be resentenced. Thus, we need not address this issue.

V. *State v. Barnett*

[3] Defendant next contends that the trial court erred by not allowing his counsel to refer to *State v. Barnett*, 239 N.C. App. 101, 768 S.E.2d 327 (2015) in his closing argument. But since defendant's trial, this Court's opinion in *State v. Barnett* was reversed by the Supreme Court in *Barnett*, 368 N.C. 710, 782 S.E.2d 885. Even if defendant should have been allowed to argue based upon *State v. Barnett*, 239 N.C. App. 101, 768 S.E.2d 327, at the time of his trial, there is no way to correct the error now. And even if this Court granted a new trial as defendant requests, defendant would not now be allowed to rely upon *State v. Barnett*, 239 N.C. App. 101, 768 S.E.2d 327, as it is not the law. Therefore, this issue is moot. *See generally Roberts v. Madison Cty. Realtors Ass'n, Inc.*, 344 N.C. 394, 398–99, 474 S.E.2d 783, 787 (1996) (“A case is moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy.” (quotation marks omitted)).

VI. Indictments

[4] Defendant argues that the indictments are fatally defective because they fail to allege an essential element of North Carolina General Statute § 14-208.11(a)(2) and (a)(7). Defendant's argument contends

[t]he indictments in this case are fatally defective because they failed to allege that Mr. Reynolds changed his address which is an essential element of the offense of failing to report or notify of an address change. Rather, the indictments only allege Mr. Reynolds failed to appear in person

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and provide written notice of his address after his release from incarceration.

(Quotation marks omitted.) “We review the issue of insufficiency of an indictment under a *de novo* standard of review.” *State v. Marshall*, 188 N.C. App. 744, 748, 656 S.E.2d 709, 712 (2008).

The question of what is required in an indictment for crimes under North Carolina General Statute § 14-208.11 has been answered previously by this Court and our Supreme Court; for a thorough review consider our Supreme Court’s recent opinion of *State v. Williams*, 368 N.C. 620, 781 S.E.2d 268 (2016). Ultimately, the *Williams* Court

acknowledged the general rule that an indictment using either literally or substantially the language found in the statute defining the offense is facially valid and that the quashing of indictments is not favored. Here, defendant’s indictment included the critical language found in N.C.G.S. § 14–208.11, alleging that he failed to meet his obligation to report as a person required by Article 27A of Chapter 14. This indictment language was consistent with that found in the charging statute and provided defendant sufficient notice to prepare a defense. Additional detail about the reporting requirement such as that found in section 14–208.9 was neither needed nor required in the indictment.

Because defendant’s indictment substantially tracks the language of section 14–208.11(a)(2), the statute under which he was charged, thereby providing defendant adequate notice, we conclude that the Court of Appeals’ analysis in *Williams* is consistent with the applicable statutes and holdings cited above. Accordingly, we hold that defendant’s indictment is valid and conferred jurisdiction upon the trial court.

368 N.C. 620, 626, 781 S.E.2d 268, 272–73 (2016) (citations and quotation marks omitted).

Here, one indictment alleged that

as a person required by Article 27A of Chapter 14 of the General Statutes to register as a sex offender, fail to notify the last registering Sheriff, Graham Atkinson, of an address change by failing to appear in person and

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provide written notice of his address after his release from incarceration[, and]

the other indictment alleged that

as a person required by Article 27A of Chapter 14 of the General Statutes to register as a sex offender, fail to report in person to the Sheriff's Office as required by N.C.G.S. 14-208.9(a) by failing to appear in person and provide written notice of his address after his release from incarceration.

Each indictment "substantially tracks the language of . . . the statute under which he was charged, thereby providing defendant adequate notice[.]" *Id.* at 626, 781 S.E.2d at 273. Therefore, this argument is overruled.

VII. Jury Instructions

Lastly, defendant contends that "the trial court plainly erred when it varied from the pattern instruction and failed to instruct on all elements of the offense of failure to report an address change." (Original in all caps.) This argument is tied to defendant's double jeopardy argument as he contends that "had the jury been properly instructed, they probably would have found . . . [him] guilty of only one offense, as even the trial court recognized that pattern instruction 'lumps it all into one charge,' although in this case the State 'broke it up into two.'" Because we are vacating one of defendant's convictions, we need not address this issue.

VIII. Conclusion

In conclusion, we vacate one of defendant's two convictions under North Carolina General Statute § 14-208.11(a) on the basis that his right to be free from double jeopardy was violated. Since we are vacating one conviction, we remand for resentencing. As to all other issues, we find no error.

VACATED in part; NO ERROR in part; REMANDED FOR RESENTENCING.

Chief Judge McGEE and Judge CALABRIA concur.

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[253 N.C. App. 369 (2017)]

STATE OF NORTH CAROLINA, PLAINTIFF
v.
ROCKY DARYL WHITEHURST, JR., DEFENDANT

No. COA16-1021

Filed 2 May 2017

1. Criminal Law—guilty plea—motion to withdraw—coercion—timing

Defendant did not establish a fair and just reason to withdraw a guilty plea where the record did not support his contention that the plea was entered hastily or that he moved promptly to withdraw the plea. There was no authority for the proposition that the incarceration is per se evidence of coercion.

2. Criminal Law—guilty plea—motion to withdraw—strength of State’s evidence—sufficient

Defendant failed to effectively challenge the strength of the State’s evidence against him on a motion to withdraw his plea. The prosecutor’s summary indicated that the case was simple and straightforward, defendant did not identify evidentiary issues, and defendant did not contend that the case presented complex legal or forensic issues.

3. Criminal Law—guilty plea—motion to withdraw—assertion of innocence—Alford pleas not sufficient

Defendant’s assertion of an *Alford* plea was not a sufficient assertion of innocence for a withdrawal of his plea.

4. Criminal Law—guilty plea—withdrawal of plea—burden not shifted to State

The burden did not shift to the State to show that it was prejudiced in a hearing on a motion to withdraw a guilty plea where defendant did not meet his burden of showing a fair and just reason to withdraw his plea.

5. Sentencing—restitution—amount—evidence not sufficient

An order of restitution was reversed and remanded where there was no evidence to support the amount.

Appeal by defendant from judgment entered 5 August 2015 by Judge J. Carlton Cole in Pasquotank County Superior Court. Heard in the Court of Appeals 3 April 2017.

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[253 N.C. App. 369 (2017)]

Attorney General Joshua H. Stein, by Special Deputy Attorney General Keith Clayton, for the State.

Ward, Smith & Norris, P.A., by Kirby H. Smith, III, for defendant-appellant.

ZACHARY, Judge.

Rocky Daryl Whitehurst, Jr. (defendant) appeals from the judgment entered upon his entry of a plea of guilty to the offense of obtaining property by false pretenses. On appeal, defendant argues that the trial court erred by denying his motion to withdraw his guilty plea. We conclude that the trial court did not err by denying his motion. Defendant also argues, and the State agrees, that the trial court erred by ordering defendant to pay \$200 in restitution when no evidentiary support was offered for the amount of restitution. We conclude that the trial court erred in entering its restitution award.

I. Background

On 9 March 2015, the Grand Jury for Pasquotank County returned an indictment charging defendant with obtaining property by false pretenses and possession of stolen property. Defendant was arrested for these offenses on 24 April 2015, and was placed in custody. On 8 June 2015, defendant appeared before the trial court. Defendant asked to have counsel appointed to represent him on the instant charges, and expressed a wish to resolve the case on that day if possible. Accordingly, the trial court appointed counsel for defendant and held the case open.

Later that day, defendant again appeared before the court. Defendant's attorney informed the trial court that defendant would plead guilty to one count of obtaining property by false pretenses, pursuant to a plea arrangement. The trial court asked defendant the questions on the plea transcript form, and defendant answered under oath. Defendant entered a plea of guilty pursuant to *North Carolina v. Alford*, 400 U.S. 25, 37-39, 27 L. Ed. 2d 162, 171-72 (1970), which held that a defendant may enter a guilty plea containing a protestation of innocence when the defendant intelligently concludes that a guilty plea is in his best interest. Defendant acknowledged that under the terms of the plea arrangement he would plead guilty to one count of obtaining property by false pretenses and receive a probationary sentence, and that the State would dismiss the charge of possession of stolen property. After the plea transcript was completed, the prosecutor summarized the factual basis for the charge against defendant. Defendant did not object to

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the prosecutor's summary of the factual support for the charges. Prior to sentencing, the trial court adjourned for the day. The next day, 9 June 2015, defendant appeared in court for sentencing. His counsel asked for a continuance and the trial court continued defendant's sentencing until 5 August 2015.

On 3 August 2015, defendant filed a motion asking the trial court to allow him to withdraw his plea of guilty. The trial court conducted a sentencing proceeding on 5 August 2015, at which defendant's counsel asked the court to set aside defendant's plea. After hearing from defense counsel and the State, the trial court denied defendant's motion to withdraw his plea of guilty, sentenced defendant to a suspended term of 8 to 19 months' imprisonment, and placed defendant on 36 months of supervised probation. Defendant appealed to this Court.

II. Denial of Defendant's Motion to Withdraw Guilty Plea

A. Standard of Review

"In reviewing a trial court's denial of a defendant's motion to withdraw a guilty plea made before sentencing, 'the appellate court does not apply an abuse of discretion standard, but instead makes an independent review of the record.' " *State v. Robinson*, 177 N.C. App. 225, 229, 628 S.E.2d 252, 254 (2006) (quoting *State v. Marshburn*, 109 N.C. App. 105, 108, 425 S.E.2d 715, 718 (1993)). "There is no absolute right to withdraw a plea of guilty, however, a criminal defendant seeking to withdraw such a plea before sentencing is 'generally accorded that right if he can show any fair and just reason.' " *Marshburn*, 109 N.C. App. at 107-08, 425 S.E.2d at 717 (quoting *State v. Handy*, 326 N.C. 532, 536, 391 S.E.2d 159, 161 (1990)). "The defendant has the burden of showing that his motion to withdraw is supported by some fair and just reason." *Marshburn* at 108, 425 S.E.2d at 717 (internal quotation omitted). "There is no established rule in North Carolina governing the standard by which a judge is to decide a motion to withdraw a plea of guilty prior to sentencing." *Handy*, 326 N.C. at 538, 391 S.E.2d at 162. However:

[s]ome of the factors which favor withdrawal include whether the defendant has asserted legal innocence, the strength of the State's proffer of evidence, the length of time between entry of the guilty plea and the desire to change it, and whether the accused has had competent counsel at all relevant times. Misunderstanding of the consequences of a guilty plea, hasty entry, confusion, and coercion are also factors for consideration.

Handy at 539, 391 S.E.2d at 163.

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B. Record on Appeal

It is well-established that “[t]he appellate courts can judicially know only what appears of record.” *State v. Price*, 344 N.C. 583, 593, 476 S.E.2d 317, 323 (1996) (internal quotation omitted). Thus, “[t]his Court’s review on appeal is limited to what is in the record or in the designated verbatim transcript of proceedings. Rule 9(a), N.C. Rules App. Proc. An appellate court cannot assume or speculate that there was prejudicial error when none appears on the record before it.” *State v. Moore*, 75 N.C. App. 543, 548, 331 S.E.2d 251, 254 (1985). In this case, defendant’s appellate arguments are largely based upon certain assertions which, upon examination of the record, we determine to be inaccurate. As a result, we find it necessary to clarify the factual history of this case, as reflected by the record on appeal.

The transcript of defendant’s appearance in court on 8 June 2015 establishes that defendant asked to have counsel appointed and expressed a wish to resolve the pending charges that day if possible, as indicated in the following dialogue:

THE COURT: Mr. Whitehurst, your new court date will be August 3rd.

DEFENDANT: Is there any way I can handle it today? I was supposed to already have a lawyer.

PROSECUTOR: We can see if anyone is able to talk to Mr. Whitehurst.

On appeal, defendant asserts that on 8 June 2015 he asked “if he could handle his case that day, so he could get out of jail,” and that he “clearly stated when he was brought to court on 8 June 2015, that he wanted to handle his case that day, so he could get out of jail.” On the basis of these contentions, defendant argues that defendant entered a plea of guilty “for the express purpose of getting out of jail” and that there is “no doubt that [defendant] would not have entered a guilty plea” had he not been in custody. (emphasis added). There is no support in the record for the assertion that defendant informed the trial court that he wanted to resolve his case promptly “so he could get out of jail.” A review of the transcript shows that defendant neither mentioned the fact of his incarceration nor shared any other information related to his motivation for seeking a prompt resolution of the charges against him, and we disregard defendant’s appellate contentions to the contrary.

As discussed above, the proceedings concluded on 8 June 2015 after defendant had pleaded guilty to obtaining property by false pretenses,

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but before defendant had been sentenced. Defendant contends on appeal that the court recessed overnight because defendant “objected as the State was presenting the factual basis for his plea,” and that “[w]ith [defendant] disputing the factual basis for his plea, the trial court decided to adjourn court for the day[.]” Defendant further asserts that “[w]hen [defendant] disputed the factual basis for his plea, the court halted the proceedings and ordered [defendant] returned to the jail until the following day.”

However, the record does not support this assertion. The transcript includes no statements by defendant or his counsel indicating that defendant disputed the accuracy of the prosecutor’s factual summary. We note that the prosecutor’s summary included a recitation of items that had been stolen and were later sold to a pawn shop by defendant and two codefendants. After the prosecutor listed the stolen objects, the following dialogue took place:

PROSECUTOR: Two shovels, a Pepsi hat, toys and bottles, a Pepsi thermometer and a Pepsi carton. And that would be the showing.

THE COURT: Mr. Sellers?

DEFENSE COUNSEL: Yes, your Honor.

THE COURT: Anything as to the facts?

DEFENSE COUNSEL: Your Honor, Mr. Whitehurst was aware of at least one thermometer. (indiscernible).

THE COURT: Bring him back tomorrow. Mr. Sheriff, if you will adjourn us.

We discern nothing in this colloquy to indicate that defendant disputed the State’s proffer of a factual basis for the charges. In fact, his counsel acknowledged that defendant was “aware of at least one thermometer” among the stolen items. We conclude that the record does not establish that defendant objected to the prosecutor’s summary of the evidence and that the transcript does not indicate a specific reason for the court’s decision to resume the proceedings on the following day. In considering the merits of defendant’s appellate arguments, we will disregard his contention that defendant objected to the State’s summary of the factual basis for the charges.

Defendant has also mischaracterized in two respects the proceedings that occurred on 9 June 2015. First, defendant repeatedly states on

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appeal that when he appeared in court on 9 June 2015, “the trial court refused to hear” his case because he “was dressed inappropriately for court[,]” that he “was unable to enter the courtroom due to being inappropriately dressed,” and that the trial court “would not hear [his] motion on June 9, 2015, because [he] was not dressed appropriately for court.” The transcript, however, reflects that at the outset of the hearing on 9 June 2015, defendant’s counsel noted that defendant was wearing shorts because he had just been released from custody, and asked that the sentencing be continued. When the prosecutor indicated that the parties might have a disagreement regarding the amount of restitution, the trial court granted the continuance that had been requested by defendant. The trial court neither “refused to hear” defendant’s sentencing proceeding nor made any comment concerning defendant’s appearance. This assertion is simply not supported by the record.

In addition, defendant repeatedly asserts that during defendant’s brief appearance before the trial court on 9 June 2015, he “moved to withdraw his *Alford* plea entered the previous day[.]” Defendant contends that he “promptly” moved to set aside his plea, on the grounds that on the day after pleading guilty defendant “immediately came to court and asked to withdraw his *Alford* plea[.]” However, a review of the transcript of the court proceedings conducted on 9 June 2015 shows that neither defendant nor his trial counsel asked to withdraw his guilty plea or made any statements concerning defendant’s satisfaction with the terms of the plea arrangement. In addition, the written motion for withdrawal of the guilty plea was filed on 3 August 2015, approximately 55 days after defendant entered his plea, rather than the next morning as defendant alleges. We conclude that there is no evidence that defendant moved to withdraw his plea of guilty prior to 3 August 2015.¹

In sum, the record establishes the following: (1) On 8 June 2015, defendant expressed a desire to resolve the case on that day, but neither stated that he was motivated by a wish to be released from jail nor indicated any other specific reason for this course of action; (2) At the plea hearing conducted on 8 June 2015, defendant did not object to the prosecutor’s summary of the factual support for the charges against defendant; (3) On 9 June 2015, the trial court did not express an opinion regarding defendant’s clothing or refuse to consider defendant’s

1. On 16 April 2016, eight months after defendant’s sentencing hearing, the trial court signed a written order denying defendant’s motion to withdraw his guilty plea, which included a finding that defendant moved to withdraw his guilty plea on 9 June 2015. We conclude that this finding, which is contradicted by the transcript of the 9 June 2015 hearing, was erroneously included in the written order.

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sentencing hearing because of defendant's "inappropriate" attire; and (4) On 9 June 2015, defendant did not move to withdraw his plea of guilty or make any other representation regarding his satisfaction with the plea arrangement.

C. Discussion

[1] On appeal, defendant argues that the trial court erred by denying his motion to withdraw his plea of guilty on the grounds that at the hearing on 5 August 2015 he offered a "fair and just reason" for withdrawal. We disagree.

Defendant maintains that he "hastily entered his *Alford* plea while he was under duress." Defendant has not identified any evidence that his plea was entered in haste and defendant does not dispute that he was arrested on the present charges in April, 2015, and entered a plea of guilty more than a month later. We conclude that there is no evidence that defendant's plea was entered "hastily." Defendant's assertion that he entered a plea "under duress" is supported solely by the fact that defendant was in custody when he pleaded guilty. Defendant appears to suggest that any guilty plea entered while a defendant is incarcerated is entered under duress, because there is "no stronger form of coercion or duress than being held in jail against one's will." Defendant cites no authority for the proposition that the fact that a defendant is incarcerated is *per se* evidence of coercion, and we decline to adopt the position proposed by defendant.

Defendant argues next that he "promptly moved to withdraw his *Alford* guilty plea the next day" after its entry. We have concluded that the record shows that defendant moved to withdraw his plea of guilty on 3 August 2015, rather than on "the next day" after he pleaded guilty. On appeal, defendant does not explain his delay or offer any argument that his motion of 3 August 2015 should be treated as one that was made promptly after the entry of the plea. We conclude that defendant has failed to establish any right to relief on the basis of the timing of his motion to withdraw his plea of guilty.

[2] Defendant also contends that the "State's case against [him] was weak." The basis for this assertion is not entirely clear. On 8 June 2015, the prosecutor summarized the factual basis for the charges against defendant. The prosecutor stated that certain items were reported stolen by their owner; that defendant and two others pawned the items in a local pawn shop; and that the items were recovered at the pawn shop. The prosecutor's summary, which defendant does not challenge, indicates that the case against defendant was simple and straightforward.

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Defendant does not identify evidentiary issues as to the identity of either the stolen items or the individuals who pawned them, and does not contend that the case presented complex legal or forensic issues. We conclude that defendant has failed to effectively challenge the strength of the State's evidence against him.

[3] In addition, defendant maintains that he “asserted his legal innocence by contesting the factual basis for his plea” and by entering an *Alford* plea. As discussed above, there is no evidence that defendant challenged the factual basis for his plea. Defendant also argues that his decision to enter an *Alford* guilty plea is evidence of his assertion of innocence. Defendant supports this contention with a quotation from *State v. Chery*, 203 N.C. App. 310, 314, 691 S.E.2d 40, 44 (2010), in which we held that, for purposes of analyzing the defendant's motion to withdraw his guilty plea, “there is no material difference between a no contest plea and an *Alford* plea.” However, in *Chery* this Court *rejected* the defendant's argument that his entry of an *Alford* plea established his assertion of legal innocence:

As one of the bases for his motion to withdraw his plea, defendant relies heavily upon the fact that he entered a no contest/*Alford* plea rather than pleading guilty to the conspiracy charge. . . . [Defendant] assert[s] that his plea, in and of itself, equated to a conclusive assertion of innocence. . . . We hold the fact that the plea that defendant seeks to withdraw was a no contest or an *Alford* plea does not conclusively establish the factor of assertion of legal innocence for purposes of the *Handy* analysis.

Chery, 203 N.C. App. at 314-15, 691 S.E.2d at 44. We conclude that defendant has failed to show that he has asserted his legal innocence. As a result, we do not consider this contention as a basis for withdrawal of his guilty plea.

[4] Defendant also asserts that the withdrawal of his guilty plea would not have prejudiced the State. However, defendant has not shown that the factors identified in *Handy* support withdrawal of his plea, and we conclude that defendant has failed to establish that he had a fair and just reason to withdraw his plea of guilty. “[T]he burden does not shift to the State to show prejudice until the defendant has established a fair and just reason existed to withdraw his plea. Because defendant has failed to meet his burden of showing a fair and just reason existed to withdraw his plea, we do not address prejudice against the State.” *Chery*, 203 N.C. App. at 318, 691 S.E.2d at 46-47 (citations omitted).

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III. Restitution

[5] Defendant next argues, and the State agrees, that the trial court erred by ordering him to pay restitution in the absence of any evidence to support the amount of restitution. We conclude that this argument has merit.

“The amount of restitution recommended by the trial court must be supported by evidence adduced at trial or at sentencing. The unsworn statement of the prosecutor is insufficient to support the amount of restitution ordered.” *State v. Shelton*, 167 N.C. App. 225, 233, 605 S.E.2d 228, 233 (2004) (internal quotation and citation omitted).

In this case, the trial court signed an order directing defendant to pay \$200 in restitution on 8 June 2015. No testimony was adduced as to the amount of restitution on 8 June 2015, and the record does not include any other evidence, such as a sworn affidavit, upon which the trial court could have based its restitution order. We conclude that the restitution order must be vacated and remanded to the trial court.

IV. Conclusion

For the reasons discussed above, we conclude that the trial court did not err by denying defendant’s motion to withdraw his plea of guilty. We further conclude that the trial court erred in entering its restitution order.

NO ERROR IN PART, VACATED AND REMANDED IN PART.

Chief Judge McGEE and Judge HUNTER concur.

US CHEM. STORAGE, LLC v. BERTO CONSTR., INC.

[253 N.C. App. 378 (2017)]

US CHEMICAL STORAGE, LLC, PLAINTIFF

v.

BERTO CONSTRUCTION, INC., DEFENDANT

No. COA16-628

Filed 2 May 2017

1. Appeal and Error—appealability—interlocutory appeal—substantial right—forum selection clause

An interlocutory appeal was heard where it involved a forum selection clause, which is a substantial right.

2. Jurisdiction—personal—forum selection clause

The trial court erred by concluding that a forum selection clause was not binding upon plaintiff where a New Jersey corporation had chosen a North Carolina corporation as a subcontractor to provide hazmat and storage supply buildings. The contract, interpreted pursuant to New Jersey law, clearly contained a mandatory forum selection clause vesting exclusive jurisdiction in New York and New Jersey, not North Carolina.

3. Jurisdiction—personal—minimum contacts

A New Jersey corporation did not have sufficient minimum contacts with North Carolina to subject it to personal jurisdiction in North Carolina where the New Jersey corporation contracted with a North Carolina company for the manufacture and delivery of hazmat and supply storage buildings. There was no evidence that the New Jersey company knew that the buildings would be manufactured in North Carolina, and the mere fact that the New Jersey corporation had contracted with a North Carolina company a single time was not sufficient to create a reasonable anticipation that it may be haled into court here.

Judge INMAN concurring in part and dissenting in part.

Appeal by defendant from order entered 26 January 2016 by Judge Lindsay R. Davis, Jr., in Wilkes County Superior Court. Heard in the Court of Appeals 11 January 2017.

Vannoy, Colvard, Triplett & Vannoy, P.L.L.C., by Daniel S. Johnson and Jay Vannoy, for plaintiff-appellee.

US CHEM. STORAGE, LLC v. BERTO CONSTR., INC.

[253 N.C. App. 378 (2017)]

Blanco Tackabery & Matamoros, P.A., by James E. Vaughan and M. Rachael Dimont, for defendant-appellant.

CALABRIA, Judge.

Where a forum selection clause, pursuant to New Jersey law, was valid, mandatory, and enforceable, the trial court erred in denying defendant's motion to dismiss. Where defendant's contacts with the State of North Carolina were insufficient to create personal jurisdiction, the trial court erred in denying defendant's motion to dismiss. We vacate and remand.

I. Factual and Procedural Background

Berto Construction, Inc. ("Berto") is a New Jersey corporation with its principal and only place of business located in Rahway, New Jersey. Berto performs concrete construction in the New Jersey-New York-Pennsylvania tristate area. As part of its business, Berto entered into a contract (the "Contract") with the Port Authority of New York and New Jersey (the "Port Authority") to perform construction. In connection with the Contract, the Port Authority required Berto to furnish and install hazmat and supply storage buildings. The Contract limited the suppliers for this project to one of five manufacturers, one of whom was US Chemical Storage, LLC ("US Chemical"). US Chemical is a North Carolina limited liability company. Berto chose US Chemical as its subcontractor, and the two entered into a subcontract agreement (the "Subcontract").

On 9 September 2015, US Chemical filed a complaint against Berto, alleging breach of contract. Specifically, US Chemical alleged that Berto had agreed to pay US Chemical \$736,400.00, that US Chemical complied with its obligation under the Subcontract, and that Berto failed to pay an overdue balance of \$199,344.25. In response to the complaint, Berto filed a motion to dismiss, pursuant to Rule 12(b)(2) of the North Carolina Rules of Civil Procedure, alleging that the court lacked personal jurisdiction over Berto. In an affidavit in support of the motion, Douglas R. Birdsall ("Birdsall"), a project manager for Berto, alleged that Berto had had no contact with the State of North Carolina prior to its contract with US Chemical; that the Contract was explicitly subject to the jurisdiction and laws of New York and New Jersey; and that in the Subcontract US Chemical agreed to be bound by the terms of the Contract, including a specific provision providing that the Subcontract was subject to New Jersey law. Birdsall further averred

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that US Chemical had failed to satisfactorily perform its work; that its submissions pertaining to the buildings required multiple revisions; that it supplied incorrect piping on three buildings; that it delivered a building to the wrong location; that it failed to provide certain pieces of equipment; that its defective submissions caused delay to the project; and that all of these defects and delays resulted in \$180,933.80 in increased costs to Berto, and the possibility of Berto being assessed for liquidated damages by the Port Authority. Additional arguments, both on the forum selection provision and Berto's minimum contacts, were presented at a hearing on Berto's motion to dismiss.

On 26 January 2016, the trial court entered an order on Berto's motion to dismiss. The trial court found that the Subcontract "provided that it would be governed by New Jersey law and that the plaintiff would be bound to the defendant by the terms of the defendant's contract with the Port Authority[;]" and that the Contract "provided that the defendant agreed to 'irrevocably submit[] [it]self to the jurisdiction of the Courts of the State of New York and to the jurisdiction of the Courts of the State of New Jersey in regard to any controversy' arising out of the project." The trial court then noted that the Subcontract "did not provide, however, that the parties selected these courts as the exclusive jurisdictions for any disputes arising out of the project[;]" and concluded that US Chemical's suit "is not barred by the parties' subcontract, because the forum selection clause is permissive, not mandatory[.]" With respect to minimum contacts, the trial court noted that

North Carolina extends the jurisdiction of its courts to actions arising out of "services actually performed . . . for the defendant by the plaintiff within this State if such performance within this State was authorized or ratified by the defendant"; and actions relating to "goods . . . or other things of value shipped from this State by the plaintiff to the defendant on his order or direction." N.C. Gen. Stat. § 1-75.4(5)(b), (d).

The trial court found that, with Berto's knowledge, US Chemical "designed and constructed twelve hazmat and supply storage buildings at its plant in North Carolina[;]" and that "[t]he buildings were shipped from the plaintiff's facility in North Carolina to the defendant[.]" The trial court therefore concluded that the action arose "out of services actually performed by the plaintiff within North Carolina for the defendant," and that it "relates to goods and things of value shipped from North Carolina by the plaintiff to the defendant on its order or direction," and thus that "personal jurisdiction is extended by N.C. Gen. Stat. § 1-75.4(5)(b) & (d)."

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The trial court concluded that the Contract and Subcontract did not grant exclusive jurisdiction to New York or New Jersey, that Berto purposefully availed itself of the privilege of doing business in North Carolina, and that its contacts were sufficient to establish personal jurisdiction. It therefore denied Berto's motion to dismiss.

Berto appeals.

II. Interlocutory Appeal

[1] As a preliminary matter, we note that this is an interlocutory appeal.

“The denial of a motion to dismiss is an interlocutory order which is not immediately appealable unless that denial affects a substantial right of the appellant.” *Carl v. State*, 192 N.C. App. 544, 550, 665 S.E.2d 787, 793 (2008). “The appealing party bears the burden of demonstrating that the order from which he or she seeks to appeal is appealable despite its interlocutory nature.” *Hamilton v. Mortgage Information Services*, 212 N.C. App. 73, 77, 711 S.E.2d 185, 189 (2011) (citing *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994)). Thus, the extent to which an appellant is entitled to immediate interlocutory review of the merits of his or her claims depends upon his or her establishing that the trial court's order deprives the appellant of a right that will be jeopardized absent review prior to final judgment. *Id.*; see also *Harbour Point Homeowners' Ass'n, Inc. v. DJF Enters., Inc.*, 206 N.C. App. 152, 157, 697 S.E.2d 439, 444 (2010).

Richmond Cty. Bd. of Educ. v. Cowell, 225 N.C. App. 583, 585, 739 S.E.2d 566, 568 (2013). Thus, in order for us to hear Berto's appeal, Berto must establish the existence of a substantial right.

Berto correctly argues that the validity of a forum selection clause constitutes a substantial right. *Cox v. Dine-A-Mate, Inc.*, 129 N.C. App. 773, 776, 501 S.E.2d 353, 355 (1998) (holding that the trial court's denial of a defendant's motion to dismiss based on a forum selection clause was appealable). Similarly, Berto correctly argues that N.C. Gen. Stat. § 1-277(b) guarantees the right to immediately appeal an adverse ruling with respect to the jurisdiction of the court over a person or property based upon minimum contacts. See *Credit Union Auto Buying Servs., Inc. v. Berkshire Props. Grp. Corp.*, ___ N.C. App. ___, ___, 776 S.E.2d 737, 739 (2015) (holding that N.C. Gen. Stat. § 1-277(b) guarantees a right

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to immediate appeal that is limited to minimum contacts questions, the subject matter of Rule 12(b)(2)). We hold that Berto has demonstrated the existence of a substantial right that would be jeopardized absent review, and consider Berto's interlocutory appeal.

III. Standard of Review

"The standard of review to be applied by a trial court in deciding a motion under Rule 12(b)(2) depends upon the procedural context confronting the court." *Banc of Am. Sec., LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 693, 611 S.E.2d 179, 182 (2005).

...

"[I]f the defendant supplements his motion to dismiss with an affidavit or other supporting evidence, the allegations [in the complaint] can no longer be taken as true or controlling and plaintiff[] cannot rest on the allegations of the complaint." *Id.* (second and third alterations in original) (internal quotation marks omitted).

Parker v. Town of Erwin, ___ N.C. App. ___, ___, 776 S.E.2d 710, 720-21 (2015).

IV. Analysis

In two separate arguments, Berto contends that the trial court erred in denying its motion to dismiss. We agree.

A. Forum Selection Clause

[2] First, Berto contends that the trial court erred in denying its motion to dismiss based upon the purported forum selection clause. A trial court's interpretation of a forum selection clause is an issue of law that is reviewed *de novo*. *Sony Ericsson Mobile Commc'ns USA, Inc. v. Agere Sys., Inc.*, 195 N.C. App. 577, 579, 672 S.E.2d 763, 765 (2009).

Berto contends that the language of the Contract and the Subcontract clearly and explicitly bound US Chemical to litigate exclusively in the courts of New York or New Jersey. The Contract, parts of which are included in the record on appeal, contains the following provision:

The Contractor hereby irrevocably submits himself to the jurisdiction of the Courts of the State of New York and to the jurisdiction of the Courts of the State of New Jersey in regard to any controversy arising out of connected with, or in any way concerning the Proposal or this Contract.

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This provision was purportedly integrated into the Subcontract by the following language:

The Subcontractor/Supplier agrees to be bound to the Contractor by the terms and conditions of the Contractor's agreement with the Owner, a copy of said agreement being available for inspection at the office of the Contractor.

The Subcontract further stated that “[t]his contract shall be governed by the laws of the State of New Jersey.”

The trial court entered findings consistent with all of these facts, but found nonetheless that “[t]he subcontract did not provide, however, that the parties selected these courts as the exclusive jurisdictions for any dispute arising out of the project.” The trial court therefore concluded that this language did not bar suit by US Chemical, “because the forum selection clause is permissive, not mandatory[.]”

There is no question that, under the Subcontract, US Chemical agreed that the Subcontract would be “governed by the laws of the State of New Jersey.” Further, under New Jersey law, language in an agreement providing that the parties “irrevocably consent[] and submit[] to the jurisdiction of the courts of the State of New Jersey” constitutes an enforceable forum selection clause. *See Hendry v. Hendry*, 339 N.J. Super. 326, 334, 771 A.2d 701, 706 (N.J. Super. A.D. 2001). Additionally, New Jersey courts have allowed a contractual provision to include a forum selection clause by reference. For example, in *Asphalt Paving Sys., Inc. v. Gen. Combustion Corp.*, 2015 WL 167378 (D.N.J. 2015), the plaintiff, Asphalt Paving Systems, entered into a contract with the defendant, General Combustion. The contract provided that it was subject to the standard terms and conditions of third party Gencor. Those terms included a forum selection clause vesting exclusive jurisdiction in Orange County, Florida. *Id.* at *2. The United States District Court, applying the laws of New Jersey, concluded that the forum selection clause was “valid, mandatory, and enforceable.” *Id.* at *5.

The Contract, as interpreted pursuant to New Jersey law, clearly contains a mandatory forum selection clause, vesting exclusive jurisdiction in New York and New Jersey, not North Carolina. The Subcontract, as interpreted pursuant to New Jersey law, clearly integrates that mandatory forum selection clause by reference. As such, the trial court erred in concluding that the forum selection clause was not binding upon US Chemical, and in denying Berto's motion to dismiss.

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B. Minimum Contacts

[3] Second, Berto contends that the trial court erred in denying its motion to dismiss based upon the trial court's lack of jurisdiction. Specifically, Berto contends that it lacked the minimum contacts necessary for the court to establish jurisdiction.

"The standard of review of an order determining personal jurisdiction is whether the findings of fact by the trial court are supported by competent evidence in the record[.]" *Replacements, Ltd. v. MidweSterling*, 133 N.C. App. 139, 140-41, 515 S.E.2d 46, 48 (1999). "Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." *Nat'l Util. Review, LLC v. Care Ctrs., Inc.*, 200 N.C. App. 301, 303, 683 S.E.2d 460, 463 (2009) (quoting *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)). We review *de novo* the issue of whether the trial court's findings of fact support its conclusion of law that the court has personal jurisdiction over defendant. *Id.*

Bell v. Mozley, 216 N.C. App. 540, 543, 716 S.E.2d 868, 871 (2011).

Berto contends that, in rendering its findings of fact with respect to minimum contacts, the trial court failed to consider a number of undisputed facts. However, our standard of review is not whether the trial court made certain findings, but rather whether the findings it *did* make were supported by competent evidence in the record. Notably, the only finding of fact with which Berto takes issue is the trial court's finding that Berto knew that US Chemical, a North Carolina company, would construct its buildings in North Carolina. Upon review of the record, we agree.

There is evidence in the record that Berto, on this single occasion, entered into a contract with a North Carolina company. There is no evidence, however, that Berto knew that the product it purchased would be manufactured in North Carolina. Neither Birdsall's affidavit nor the testimony elicited at the hearing on Berto's motion to dismiss supports a determination that Berto knew that the product it was purchasing would be manufactured in North Carolina.

As the trial court observed in its order, our Supreme Court has addressed a substantially similar matter. In *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 318 N.C. 361, 348 S.E.2d 782 (1986), the plaintiff, a North

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Carolina clothing manufacturer, sued the defendant, a clothing distributor incorporated in New Jersey and doing business in New York. The defendant moved to dismiss based upon, *inter alia*, lack of personal jurisdiction, and when this motion was denied, the defendant appealed. On appeal, our Supreme Court held that the defendant's interactions with the plaintiff created minimal contacts, observing:

Although a contractual relationship between a North Carolina resident and an out-of-state party alone does not *automatically* establish the necessary minimum contacts with this State, nevertheless, a single contract may be a sufficient basis for the exercise of *in personam* jurisdiction if it has a substantial connection with this State. In the instant case, the defendant made an offer to plaintiff whom defendant knew to be located in North Carolina. Plaintiff accepted the offer in North Carolina. The contract was therefore made in North Carolina, as we discussed earlier. The contract was for specially manufactured goods, shirts in this case, for which plaintiff was to be paid over \$44,000. Defendant was told that the shirts would be cut in North Carolina, and defendant also agreed to send its personal labels to plaintiff in North Carolina for plaintiff to attach to the shirts. Defendant was thus aware that the contract was going to be substantially performed in this State. The shirts were in fact manufactured in and shipped from this State. After defendant contacted the plaintiff to complain about the shirts, defendant then returned them to this State. We therefore conclude that the contract between defendant and plaintiff had a "substantial connection" with this State. We further conclude that by making an offer to the North Carolina plaintiff to enter a contract made in this State and having a substantial connection with it, defendant purposefully availed itself of the protection and benefits of our laws.

Id. at 367, 348 S.E.2d at 786-87 (citations omitted).

Notwithstanding the similarities between the two cases, the instant case is distinguishable from *Tom Togs* in one very specific way: The defendant in *Tom Togs* "was told that the shirts would be cut in North Carolina, and defendant also agreed to send its personal labels to plaintiff in North Carolina for plaintiff to attach to the shirts. Defendant was thus aware that the contract was going to be substantially performed in this State." *Id.* at 367, 348 S.E.2d at 787. In the instant case, however, there

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was no such evidence in the record. The only evidence of contact was the fact that Berto knowingly contracted with a North Carolina company. Any other finding that Berto had contacts with this State is an inference unsupported by the evidence.

To establish minimum contacts with the forum state, the “relationship between the defendant and the forum must be such that he should reasonably anticipate being haled into court there.” *Id.* at 365-66, 348 S.E.2d at 786 (citation and quotation marks omitted). The mere fact that a defendant has contracted with a North Carolina company one single time is insufficient to create in the defendant a reasonable anticipation. We therefore hold that Berto did not have sufficient minimum contacts with the State of North Carolina to subject it to personal jurisdiction here. The trial court erred in denying Berto’s motion to dismiss.

V. Conclusion

The Subcontract, by its terms, was properly governed by New Jersey law. Pursuant to New Jersey law, the forum selection provision of the Contract was properly integrated into the Subcontract, and was valid, mandatory, and enforceable between Berto and US Chemical. Additionally, there was insufficient evidence in the pleadings and produced at the hearing to demonstrate that Berto had minimum contacts with the State of North Carolina necessary to support personal jurisdiction. For both reasons, the trial court erred in denying Berto’s motion to dismiss. The trial court’s order denying Berto’s motion is vacated, and this matter is remanded to the trial court.

VACATED AND REMANDED.

Judge McCULLOUGH concurs.

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

Judge Douglas McCullough concurred in this opinion prior to 24 April 2017.

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

I concur with the majority’s holding that New Jersey law governs the enforceability of the Subcontract between US Chemical and Berto, including the forum selection clause incorporated by reference in the

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Subcontract, so that US Chemical is prohibited from bringing its suit against Berto in North Carolina. However, I write separately to explain why New Jersey law applies, because its application to determine the validity of the forum selection clause is not dictated by the choice of law provision in the Subcontract. I dissent in part because I disagree with the majority's holding that Berto has not made sufficient minimum contacts with North Carolina to subject it to the jurisdiction of our courts.

I. Forum Selection Clause

We apply *de novo* review to the trial court's interpretation of a forum selection clause. *Sony Ericsson Mobile Commc'ns. USA, Inc. v. Agere Sys.*, 195 N.C. App. 577, 579, 672 S.E.2d 763, 765 (2009) (citation omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Id.* (internal quotation marks and citations omitted).

N.C. Gen. Stat. § 22B-3 provides, in pertinent part, that "any provision in a contract entered into in North Carolina that requires the prosecution of any action . . . to be instituted or heard in another state is against public policy and is void and unenforceable." N.C. Gen. Stat. § 22B-3 (2015). Accordingly, if the Subcontract between US Chemical and Berto was made in North Carolina, the forum selection clause in the contract would be void and unenforceable. On the other hand, if the Subcontract was made outside North Carolina, the statutory bar would not apply.

"The general principle recognized in all jurisdictions is that ordinarily the execution, interpretation and validity of a contract is to be determined by the law of the State or county in which it is made." *Bundy v. Commercial Credit Co.*, 200 N.C. 511, 516, 157 S.E. 860, 863 (1931). In *Bundy*, the defendant, a Maryland company, appealed from a jury verdict awarding the receiver of an insolvent North Carolina company compensation for interest charged and paid in violation of North Carolina's usury laws. *Id.* at 513-14, 157 S.E. at 861-62. The defendant argued that because the contract was entered into in Maryland, where the interest charged was lawful, the trial court applied the wrong law. *Id.* at 515-16, 157 S.E. at 862. The North Carolina Supreme Court, citing testimony presented before the trial court that the last signature on the contract was made in Baltimore, held that "it is clear that the contract was executed in Baltimore, Maryland, because the last act essential to the completion of the agreement was performed at that place." *Id.* at 515, 157 S.E. at 862. The Supreme Court further explained that

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the test of the place of a contract is as to the place at which the last act was done by either of the parties essential to a meeting of the minds. Until this act was done there was no contract, and upon its being done at a given place, the contract became existent at the place where the act was done.

Id. (internal quotation marks and citation omitted).

Although *Bundy* pre-dated N.C. Gen. Stat. § 22B-3, its reasoning has been followed in modern decisions interpreting forum selection clauses. In *Szymczyk v. Signs Now Corp.*, 168 N.C. App. 182, 187-88, 606 S.E.2d 728, 733 (2005), this Court upheld a Florida forum selection clause because the franchise agreement at issue was last signed by the defendant in Florida. “Just as in *Bundy*, the last act of signing the contract was an essential element to formation. As the contract was formed in Florida, N.C. Gen. Stat. § 22B-3 does not apply to the forum selection clause in the instant agreement.” *Id.* at 187, 606 S.E.2d at 733.

Here, the trial court did not make a factual finding of where the contract was made, and the Subcontract does not indicate where it was signed. It appears on the face of the Subcontract that it was signed first by a representative of US Chemical on 1 October 2012 and last by a representative of Berto on 9 October 2012. Berto argues on appeal that because US Chemical’s representative admitted in testimony before the trial court that no one from Berto ever came to North Carolina in connection with the Subcontract, this Court should determine on appellate review that the Subcontract was signed last outside of North Carolina. Ordinarily the issue of where a specific action—such as the signing of a document—occurred would seem to be factual and beyond the scope of review of this Court. However, in light of the holding in *Bundy*, which was explicitly based upon trial testimony, and the holding of *Szymczyk*, which followed *Bundy* and did not cite any factual finding by the trial court on this issue, I find Berto’s argument compelling in the absence of any contrary evidence offered by US Chemical.

II. Minimum Contacts

Because I concur with the majority’s holding that the forum selection clause incorporated by reference in the Subcontract precludes US Chemical from bringing suit alleging breach of the Subcontract against Berto in North Carolina, I believe it is unnecessary for this Court to reach the issue of personal jurisdiction. However, because the majority reaches that issue and holds that Berto had not made minimum contacts with North Carolina to subject it to the jurisdiction of our courts, I respectfully dissent.

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I would hold that Berto made sufficient minimum contacts with North Carolina to subject itself to the jurisdiction of our courts because Berto initiated contact with a North Carolina manufacturer and entered into an agreement for the North Carolina manufacturer to design and construct storage buildings and ship them from North Carolina to New York.

The trial court's finding that Berto's project manager contacted US Chemical in North Carolina to propose the Subcontract is undisputed and binding on appeal. Berto's trial counsel admitted in argument to the trial court that "Berto researched the different potential subcontractors" approved by the Port Authority and then contacted US Chemical. US Chemical's representative testified before the trial court that at all relevant times, US Chemical has had only one manufacturing facility, in Wilkesboro, North Carolina. Because the most basic research of any manufacturing company to perform the Subcontract would include at least a cursory assessment of the manufacturing facility—*i.e.*, where the manufacturer would perform the vast majority of its contractual duties—the evidence presented to the trial court was competent and sufficient to support the trial court's finding that "[w]ith the defendant's knowledge, the plaintiff designed and constructed twelve hazmat and supply storage buildings at its plant in North Carolina pursuant to the subcontract."

Additional evidence before the trial court revealed that very little of the work performed pursuant to the Subcontract occurred outside of North Carolina. US Chemical's contractual duties did not include off-loading the shipment of storage buildings or installing the storage buildings. The only service performed by US Chemical on site at the Port Authority was to adjust shelving inside the buildings. Because I agree with the trial court's conclusion that the action arises out of services actually performed by US Chemical within North Carolina for Berto, and relates to goods and things of value shipped from North Carolina by US Chemical to Berto on Berto's order or direction, I would hold that Berto is subject to personal jurisdiction based on North Carolina's long-arm statute, N.C. Gen. Stat. § 1-75.4(5)(b) & (d) (2015). I also agree with the trial court's conclusion that Berto purposefully availed itself of the privilege of doing business in North Carolina and that its contacts with North Carolina were sufficient to satisfy the due process requirement of the United States Constitution.

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WIDENI77, PLAINTIFF

v.

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, AND I-77 MOBILITY
PARTNERS LLC, AND STATE OF NORTH CAROLINA, DEFENDANTS

No. COA16-818

Filed 2 May 2017

1. Constitutional Law—North Carolina—legislature—delegation of power

The delegation of power by the N.C. Department of Transportation for a traffic congestion management project was constitutional where the legislative goals and polices set forth in the statute, combined with procedural safeguards, were sufficient.

2. Constitutional Law—North Carolina—public purpose—traffic congestion relief project

The trial court did not err by concluding that expenditures from a traffic congestion improvement project that would include tolls constituted a public purpose pursuant to Article V, Section 2(1) of the North Carolina Constitution.

3. Highways and Streets—toll roads—number of toll roads not reduced

A highway congestion management project that included tolls did not violate N.C.G.S. § 136-89.199, the Turnpike Statute, where the project did not reduce the number of non-toll general purpose lanes.

4. Highways and Streets—toll roads—Turnpike statute—not applicable

The Turnpike Statute, N.C.G.S. § 136-89(5), did not apply to a traffic congestion management project that was governed by N.C.G.S. § 136-89.18(39) et seq., the P3 Statute, which begins “Notwithstanding the provisions of N.C.G.S. § 89-136-89(a)(5).”

5. Taxation—highway tolls—not a tax

The Court of Appeals rejected plaintiff’s argument that the General Assembly unconstitutionally delegated its power to tax by authorizing tolls as a part of a highway congestion management program. It has previously been settled in N.C. that a toll is not a tax.

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Appeal by plaintiff from order entered 24 February 2016 by Judge W. Osmond Smith III in Mecklenburg County Superior Court. Heard in the Court of Appeals 8 February 2017.

Arnold & Smith, PLLC, by Paul A. Tharp and Matthew R. Arnold, for plaintiff.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Scott T. Slusser, for the North Carolina Department of Transportation and the State of North Carolina.

Gibson, Dunn & Crutcher LLP, by Mitchell A. Karlan and Jerilin Buzzetta, and Parker Poe Adams & Bernstein LLP, by Michael G. Adams and Morgan H. Rogers, for I-77 Mobility Partners LLC.

CALABRIA, Judge.

WidenI77 (“plaintiff”) appeals from an order granting summary judgment in favor of the North Carolina Department of Transportation (“NCDOT”), I-77 Mobility Partners LLC (“Mobility”), and the State of North Carolina (“State”) (collectively referred to as “defendants”) and dismissing plaintiff’s claims with prejudice. For the reasons stated herein, we affirm the order of the trial court.

I. Background

On 26 June 2014, NCDOT and Mobility, a Delaware limited liability company, entered into a comprehensive agreement (the “Comprehensive Agreement”) for the I-77 HOT Lanes Project (the “Project”). The I-77 corridor is “one of the most congested corridors in the [S]tate” and the Project offered a “comprehensive congestion management solution for approximately [twenty-six] miles of the I-77 corridor through the use of HOV3+ policy and managed lanes and supports future expansion of transit.” The Comprehensive Agreement was a product of the State’s “desires to facilitate private sector investment and participation in the development of the State’s transportation system via public-private partnership agreements[]” pursuant to N.C. Gen. Stat. § 136-18(39) *et seq.* (“the P3 Statute”).

The P3 Statute provides, in pertinent part, that the NCDOT is vested with the power to

enter into partnership agreements with private entities,
and authorized political subdivisions to finance, by tolls,

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contracts, and other financing methods authorized by law, the cost of acquiring, constructing, equipping, maintaining, and operating transportation infrastructure in this State, and to plan, design, develop, acquire, construct, equip, maintain, and operate transportation infrastructure in this State.

N.C. Gen. Stat. § 136-18(39) (2015).

Through the Comprehensive Agreement, NCDOT granted Mobility “the exclusive right, and [Mobility] accepts the obligation, to finance, develop, design, construct, operate and maintain the Project[.]” This included the exclusive right to impose tolls and incidental charges upon the users of the High Occupancy Toll (“HOT”) lanes; to establish, modify, and adjust the rate of such tolls and incidental charges in accordance with law; and to enforce and collect the tolls and incidental charges from the users of the HOT lanes in accordance with the terms and conditions of the Comprehensive Agreement.

On 20 January 2015, plaintiff filed a “Complaint for Declaratory Judgment and Preliminary and Permanent Injunctive Relief.” Plaintiff sought a declaration as to the constitutionality of the P3 Statute and the Comprehensive Agreement between the NCDOT and Mobility. Plaintiff’s arguments included the following, *inter alia*: the General Assembly unconstitutionally delegated authority to the NCDOT to set toll rates without adequate standards and safeguards for which to exercise that power, to contract with Mobility and allow an unlimited rate of return on investment, and to contract with Mobility and allow the NCDOT and the State to compensate Mobility for its tax liabilities; violation of taxing power; violation of the public purpose doctrine; violation of due process; contrary to public policy; lack of authority; illegal contract; and motion for preliminary and permanent injunction.

On 9 March 2015, the trial court entered an order finding that plaintiff “ha[d] not shown a sufficient likelihood of success on the merits to justify granting a preliminary injunction” and denying plaintiff’s motion for a preliminary injunction.

On 15 June 2015, Mobility filed a motion for summary judgment. On 19 June 2015, the State and the NCDOT filed a motion for summary judgment. On 13 November 2015, plaintiff filed a motion for summary judgment.

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On 24 February 2016, the trial court entered an order concluding as follows:

4. As to the Motions for Summary Judgment filed by each party, it should be noted that it is not within the province, function or duty of the Court to determine the desirability or wisdom of the legislation or the contract at issue. These policy decisions are within the purview of the legislature and the North Carolina Department of Transportation. The subject legislation is not unconstitutional as applied, nor is the contract unlawful.

5. As to the Motions for Summary Judgment filed by each party, there is no genuine issue as to any material fact, that Defendants are entitled to a judgment as a matter of law, and that Plaintiff is not entitled to judgment as a matter of law.

Accordingly, the trial court granted defendants' motions for summary judgment and denied plaintiff's motion for summary judgment. Plaintiff's claims were dismissed with prejudice.

On 22 March 2016, plaintiff filed notice of appeal.

II. Standard of Review

"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) (citation omitted). "In ruling on a motion for summary judgment the evidence is viewed in the light most favorable to the non-moving party." *Hinson v. Hinson*, 80 N.C. App. 561, 563, 343 S.E.2d 266, 268 (1986) (citation omitted). Rule 56 of the North Carolina Rules of Civil Procedure provides that summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2015).

The showing required for summary judgment may be accomplished by proving an essential element of the opposing party's claim does not exist, cannot be proven at trial, or would be barred by an affirmative defense . . . or by showing through discovery that the opposing party

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cannot produce evidence to support an essential element of her claim[.]

Dobson v. Harris, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000).

III. Discussion

On appeal, plaintiff argues that the trial court erred by: (A) concluding that the North Carolina General Assembly's delegation of power to the NCDOT and NCDOT's arrangement with Mobility did not constitute an unconstitutional delegation of power; (B) concluding that the expenditure by the NCDOT and the State served a public purpose and was constitutional under Article V, Section 2(1) of the North Carolina Constitution; (C) concluding that the Comprehensive Agreement did not violate the Turnpike Statute; and (D) concluding that the North Carolina General Assembly did not unconstitutionally delegate its authority to tax to the NCDOT in violation of Article I, Section 8 and Article II, Section 23 of the North Carolina Constitution and the Due Process Clause of the United States Constitution. We address each argument in turn.

A. Delegation of Power

[1] Plaintiff argues that the trial court erred by concluding that the General Assembly's delegation of power to the NCDOT and NCDOT's arrangement with Mobility did not constitute an unconstitutional delegation of power. Specifically, plaintiff contends that the General Assembly's delegation of power pursuant to the P3 Statute "features an absolute, unfettered, unlimited, unilateral and therefore unconstitutional delegation of authority to an agency and private company." Plaintiff maintains that the P3 Statute grants unto Mobility the absolute authority to set toll rates without any meaningful input or control by the NCDOT or General Assembly. We are not convinced by plaintiff's arguments.

"It is well settled in this State that the courts have the power, and it is their duty in proper cases, to declare an act of the General Assembly unconstitutional - but it must be plainly and clearly the case. If there is any reasonable doubt, it will be resolved in favor of the lawful exercise of their powers by the representatives of the people." *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 892 (1961) (citation omitted). "In passing upon the constitutionality of a legislative act it is not for this Court to judge its wisdom and expediency. These matters are the province of the General Assembly. Rather, it is the Court's duty to determine whether the legislative act in question exceeds constitutional limitation or prohibition." *Adams v. N.C. Dep't of Natural & Econ. Res.*, 295 N.C. 683, 690, 249 S.E.2d 402, 406 (1978).

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In our determination of whether the P3 Statute violates the rule that the General Assembly cannot delegate its power to legislate, we are directed by *Adams*.

Although this Court noted in *Adams* that the legislature may not abdicate its power to make laws [or] delegate its supreme legislative power to any . . . coordinate branch or to any agency which it may create, we also concluded that strict adherence to ideal notions of the non-delegation doctrine would unduly hamper the General Assembly in the exercise of its constitutionally vested powers[.]

Conner v. N.C. Council of State, 365 N.C. 242, 250-51, 716 S.E.2d 836, 842 (2011) (citations and internal quotation marks omitted) (emphasis in original).

[T]he constitutional inhibition against delegating legislative authority does not preclude the legislature from transferring adjudicative and rule-making powers to administrative bodies provided such transfers are accompanied by adequate guiding standards to govern the exercise of the delegated powers.

. . . .

In the search for adequate guiding standards the primary sources of legislative guidance are declarations by the General Assembly of the legislative goals and policies which an agency is to apply when exercising its delegated powers. We have noted that such declarations need be only as specific as the circumstances permit. When there is an obvious need for expertise in the achievement of legislative goals the General Assembly is not required to lay down a detailed agenda covering every conceivable problem which might arise in the implementation of the legislation. It is enough if general policies and standards have been articulated which are sufficient to provide direction to an administrative body possessing the expertise to adapt the legislative goals to varying circumstances.

Additionally, in determining whether a particular delegation of authority is supported by adequate guiding standards it is permissible to consider whether the authority vested in the agency is subject to procedural safeguards. A key purpose of the adequate guiding standards test is to

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insure that the decision-making by the agency is not arbitrary and unreasoned.

Adams, 295 N.C. at 697-98, 249 S.E.2d at 410-11 (internal citations and quotation marks omitted).

In the case *sub judice*, the P3 Statute provides as follows, in pertinent part:

The said Department of Transportation is vested with the following powers:

. . . .

(39) To enter into partnership agreements with private entities . . . to finance, by tolls, contracts, and other financing methods authorized by law, the cost of acquiring, constructing, equipping, maintaining, and operating transportation infrastructure in this State, and to plan, design, develop, acquire, construct, equip, maintain, and operate transportation infrastructure in this State. An agreement entered into under this subdivision requires the concurrence of the Board of Transportation. The Department shall report to the Chairs of the Joint Legislative Transportation Oversight Committee, the Chairs of the House of Representatives Appropriations Subcommittee on Transportation, and the Chairs of the Senate Appropriations Committee on the Department of Transportation, at the same time it notifies the Board of Transportation of any proposed agreement under this subdivision. . . .

. . . .

(39a) a. The Department of Transportation . . . may enter into up to three agreements with a private entity as provided under subdivision (39) of this section for which the provisions of this section apply.

b. A private entity or its contractors must provide performance and payment security in the form and in the amount determined by the Department of Transportation. . . .

. . . .

d. Article 6H of Chapter 136 of the General Statutes shall apply to the Department of Transportation

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and to projects undertaken by the Department of Transportation under subdivision (39) of this section. The Department may assign its authority under [Article 6H of Chapter 136 of the General Statutes] to fix, revise, charge, retain, enforce, and collect tolls and fees to the private entity.

e. Any contract under this subdivision or under Article 6H of this Chapter for the development, construction, maintenance, or operation of a project shall provide for revenue sharing, if applicable, between the private party and the Department, and revenues derived from such project may be used as set forth in G.S. 136-89.188(a), notwithstanding the provisions of G.S. 136-89.188(d). . . .

. . . .

f. Agreements entered into under this subdivision shall comply with the following additional provisions:

1. The Department shall solicit proposals for agreements.
2. Agreement shall be limited to no more than 50 years from the date of the beginning of operations on the toll facility.
3. Notwithstanding the provisions of G.S. 136-89.183(a)(5), all initial tolls or fees to be charged by a private entity shall be reviewed by the Turnpike Authority Board. Prior to setting toll rates, either a set rate or a minimum and maximum rate set by the private entity, the private entity shall hold a public hearing on the toll rates, including an explanation of the toll setting methodology, in accordance with guidelines for the hearing developed by the Department. After tolls go into effect, the private entity shall report to the Turnpike Authority Board 30 days prior to any increase in toll rates or change in the toll setting methodology by the private entity from the previous toll rates or toll setting methodology last reported to the Turnpike Authority Board.

. . . .

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6. The Turnpike Authority annual report under G.S. 136-89.193 shall include reporting on all revenue collections associated with projects subject to this subdivision under the Turnpike Authority.
7. The Department shall develop standards for entering into comprehensive agreements with private entities under the authority of this subdivision and report those standards to the Joint Legislative Transportation Oversight Committee on or before October 1, 2013.

N.C. Gen. Stat. §§ 136-18(39), (39a)(a)-(b), (39a)(d)-(e), and (39a)(f) (2015).

Guided by the principles stated in *Adams*, we hold that the legislative goals and policies set forth in the P3 Statute, combined with its procedural safeguards, are sufficient to withstand a constitutional challenge.

We are mindful that “there [exists] a strong presumption that enactments of the General Assembly are constitutional.” *Town of Spruce Pine v. Avery County*, 346 N.C. 787, 792, 488 S.E.2d 144, 147 (1997).

The General Assembly has provided that it is the policy that:

[t]he [NCDOT] shall develop and maintain a statewide system of roads, highways, and other transportation systems commensurate with the needs of the State as a whole and it shall not sacrifice the general statewide interest to the purely local desires of any particular area.

N.C. Gen. Stat. § 136-44.1 (2015). Article 6H of Chapter 136 of the General Statutes, applied to the NCDOT and to projects undertaken by the NCDOT under the P3 Statute pursuant to N.C. Gen. Stat. § 136-18(39a)(d), states that:

The General Assembly finds that the existing State road system is becoming increasingly congested and overburdened with traffic in many areas of the State; that the sharp surge of vehicle miles traveled is overwhelming the State’s ability to build and pay for adequate road improvements; and that an adequate answer to this challenge will require the State to be innovative and utilize several new approaches to transportation improvements in North Carolina.

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Toll funding of highway and bridge construction is feasible in North Carolina and can contribute to addressing the critical transportation needs of the State. A toll program can speed the implementation of needed transportation improvements by funding some projects with tolls.

N.C. Gen. Stat. § 136-89.180 (2015).

It is clear that achievement of this stated legislative policy and the fixing, revising, charging, retaining, enforcing, and collecting of tolls require expertise. It would be impractical to require the General Assembly to provide a “detailed agenda covering every conceivable problem which might arise in the implementation of the legislation.” *Adams*, 295 N.C. at 698, 249 S.E.2d at 411; see *Bring v. North Carolina State Bar*, 348 N.C. 655, 659, 501 S.E.2d 907, 910 (1998) (stating that “[i]t is not practical for the General Assembly to micromanage the making of rules for the Board [of Law Examiners] such as what law schools are to be approved. The directions given by the legislature are as specific as the circumstances require”). Our Supreme Court has previously stated that “[a]s a practical matter tolls require little legislative regulation. If they are unreasonably high, motorists will boycott the turnpike; if they are unreasonably low, the bondholders will register their objections in some appropriate manner.” *N.C. Turnpike Authority v. Pine Island, Inc.*, 265 N.C. 109, 115, 143 S.E.2d 319, 324 (1965).

Here, the General Assembly has enacted specific guiding standards within the P3 Statute to govern the NCDOT’s exercise of the delegated powers. For example, the following standards, *inter alia*, exist to provide direction to the NCDOT for the Project: the NCDOT may assign its authority to fix, revise, charge, retain, enforce, and collect tolls and fees to the private entity under N.C. Gen. Stat. § 136-18(39a)(d); the private entity or its contractors must provide performance and payment security in the form and in the amount determined by the NCDOT under N.C. Gen. Stat. § 136-18(39a)(b); any contract under the P3 Statute shall provide for revenue sharing, if applicable, between the private party and the NCDOT pursuant to N.C. Gen. Stat. § 136-18(39a)(e); the NCDOT must solicit proposals for agreements under N.C. Gen. Stat. § 136-18(39a)(f)(1); the agreement shall be limited to no more than fifty years under N.C. Gen. Stat. § 136-18(39a)(f)(2); and the NCDOT shall develop standards for entering into comprehensive agreements with private entities under the P3 Statute and report those standards to the Joint Legislative Transportation Oversight Committee pursuant to N.C. Gen. Stat. § 136-18(39a)(f)(7). Considering the preceding guidelines, we hold that the directions given by the General Assembly are as specific as the circumstances require.

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Furthermore, we hold that there are adequate procedural safeguards in the P3 Statute to ensure adherence to the legislative standards. N.C. Gen. Stat. § 136-18(39a)(f)(3) provides that all initial tolls or fees to be charged by a private entity shall be reviewed by the Turnpike Authority Board. Prior to setting toll rates, the private entity must hold a public hearing on the toll rates, including an explanation of the toll setting methodology, in accordance with hearing guidelines developed by the NCDOT. N.C. Gen. Stat. § 136-18(39a)(f)(3). After the tolls go into effect, Mobility must report to the Turnpike Authority Board thirty days prior to any increase in toll rates or change in the toll setting methodology from the previous toll rates or toll setting methodology last reported to the Turnpike Authority Board. *Id.* N.C. Gen. Stat. § 136-18(39a)(f)(5) also states that sixty days prior to the signing of a concession agreement subject to the P3 Statute, the NCDOT must report to the Joint Legislative Oversight Committee, providing such things as a description of the project, number of years the tolls will be in place, and demonstrated ability of the project team to deliver the project. N.C. Gen. Stat. § 136-18(39a)(f)(5). These procedural safeguards, *inter alia*, ensure that the NCDOT carries out the Project consistent with the policies of the General Assembly.

Based on the foregoing, we conclude that there are adequate guiding standards and procedural safeguards in place to regulate the exercise of authority for this Project. Accordingly, we hold that the trial court did not err by concluding that the General Assembly's delegation of power to the NCDOT constituted a constitutional delegation of power.

B. Public Purpose

[2] Plaintiff's second argument on appeal is that the trial court erred by concluding that the Project's expenditures constituted a public purpose pursuant to Article V, Section 2(1) of the North Carolina Constitution. Plaintiff relies on the holding in *Foster v. North Carolina Medical Care Commission*, 283 N.C. 110, 195 S.E.2d 517 (1973), for his contentions.

Article V, Section 2(1) of the North Carolina Constitution provides that "[t]he power of taxation shall be exercised in a just and equitable manner, for public purposes only, and shall never be surrendered, suspended, or contracted away. Although the constitutional language speaks of the 'power of taxation,' the limitation has not been confined to government use of tax revenues." *Madison Cablevision, Inc. v. City of Morganton*, 325 N.C. 634, 643, 386 S.E.2d 200, 205 (1989).

"The initial responsibility for determining what is and what is not a public purpose rests with the legislature; its determinations are entitled

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to great weight.” *Id.* at 644-45, 386 S.E.2d at 206. “[T]he presumption favors constitutionality. Reasonable doubt must be resolved in favor of the validity of the act.” *Maready v. City of Winston-Salem*, 342 N.C. 708, 714, 467 S.E.2d 615, 619 (1996) (citations omitted).

The General Assembly’s adoption of the P3 Statute leaves no doubt that our legislature has determined that the NCDOT’s partnership agreements with private entities to finance the cost of acquiring, constructing, equipping, maintaining, and operating transportation infrastructure in this State is a public purpose within the meaning of Article V, Section 2(1) of the North Carolina Constitution. However, “[i]t is the duty and prerogative of this Court to make the ultimate determination of whether the activity or enterprise is for a purpose forbidden by the Constitution of the state.” *Madison Cablevision*, 325 N.C. at 645, 386 S.E.2d at 206.

Our Supreme Court has stated that:

[a] slide-rule definition to determine public purpose for all time cannot be formulated; the concept expands with the population, economy, scientific knowledge, and changing conditions. As people are brought closer together in congested areas, the public welfare requires governmental operation of facilities which were once considered exclusively private enterprises and necessitates the expenditure of tax funds for purposes which, in an earlier day, were not classified as public. Often public and private interests are so co-mingled that it is difficult to determine which predominates. It is clear, however, that for a use to be public its benefits must be in common and not for particular persons, interests, or estates; the ultimate net gain or advantage must be the public’s as contradistinguished from that of an individual or private entity.

Martin v. North Carolina Housing Corp., 277 N.C. 29, 43, 175 S.E.2d 665, 672-73 (1970) (internal citations and quotation marks omitted).
Our Courts

ha[ve] not specifically defined public purpose but rather ha[ve] expressly declined to confine public purpose by judicial definition[, leaving] each case to be determined by its own peculiar circumstances as from time to time it arises. Two guiding principles have been established for determining [whether a government expenditure] is for a public purpose: (1) it involves a reasonable connection with the convenience and necessity of the particular

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municipality, and (2) the activity benefits the public generally, as opposed to special interests or persons[.]

Madison Cablevision, 325 N.C. at 646, 386 S.E.2d at 207 (internal citations and quotation marks omitted). We apply these foregoing principles to the present case.

As to the first prong of this test, “whether an activity is within the appropriate scope of governmental involvement and is reasonably related to communal needs may be evaluated by determining how similar the activity is to others which this Court has held to be within the permissible realm of governmental action.” *Maready*, 342 N.C. at 722, 467 S.E.2d at 624.

Numerous cases demonstrate the spectrum of facilities and activities which have been deemed to constitute a public purpose. Aid to railroad: *Wood v. Commissioners of Oxford*, 97 N.C. 227, 2 S.E. 653 (1887); Airport facilities: *Greensboro-High Point Airport Auth. v. Johnson*, 226 N.C. 1, 36 S.E.2d 803 (1946); Port Terminal Facilities: *Webb v. Port Comm'n of Morehead City*, 205 N.C. 663, 172 S.E. 377 (1934); Railway Terminal Facilities: *Hudson v. City of Greensboro*, 185 N.C. 502, 117 S.E. 629 (1923); Air Cargo Facilities: *Piedmont Triad Airport Auth. v. Urbine*, 354 N.C. 336, 554 S.E.2d 331 (2001). These cases establish that providing public transportation infrastructure has long been held to be within the permissible scope of governmental action.

As to the second prong of the *Madison Cablevision* test,

activities are considered constitutional so long as they *primarily* benefit the public and not a private party: It is not necessary, in order that a use may be regarded as public, that it should be for the use and benefit of every citizen in the community. Moreover, an expenditure does not lose its public purpose merely because it involves a private actor. Generally, if an act will promote the welfare of a state or a local government and its citizens, it is for a public purpose.

Peacock v. Shinn, 139 N.C. App. 487, 493-94, 533 S.E.2d 842, 847 (2000) (internal citations and quotation marks omitted) (emphasis in original).

Keeping these principals in mind, the expenditure in the present case clearly serves a public purpose. The General Assembly recognized that the State’s road system was becoming increasingly congested and overburdened with traffic. The legislature sought to alleviate the transportation needs of the State by authorizing the NCDOT to enter into

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agreements with private entities to finance transportation infrastructure in this State pursuant to the P3 Statute. The expenditure the P3 Statute authorizes should “provide immediate travel time reliability along I-77 from Uptown Charlotte to the Lake Norman area[.]” a stated purpose of the Project. Although Mobility will finance, construct, operate, and maintain the Project, gaining incidental private benefit, the government expenditure primarily benefits the public. Mobility’s involvement as a private actor and the possibility that not every citizen in the community may use the Project’s toll lanes do not negate the public purpose of the expenditure.

Plaintiff cites to the holding in *Foster* and argues that the facts before us are “more constitutionally troubling[.]” In *Foster*, the North Carolina Medical Care Commission Hospital Facilities Act, enacted in 1971 and found in N.C. Gen. Stat. §§ 131-138 to 131-162, was challenged. *Foster*, 283 N.C. at 113-14, 195 S.E.2d at 520. The act in question vested in the North Carolina Medical Care Commission the authority to effectuate a plan to issue revenue bonds to finance construction of public and private hospital facilities. *Id.* at 115-16, 195 S.E.2d at 521-22. The *Foster* Court noted that while it was “well settled that the expenditure of tax funds for the construction of a hospital, to be owned and operated by the State, a county, a city, town or other political subdivision of the State, is an expenditure for a public purpose[.]” it also recognized that “[i]t does not necessarily follow . . . that the construction and operation of the privately owned hospital is for a public purpose, within the meaning of the constitutional limitation upon the use of tax funds.” *Id.* at 125, 195 S.E.2d at 527. The Court reasoned that “[w]hile the Act now before us provides for ownership of the acquired property by a public agency until the bonds issued to finance the contemplated construction are retired, the Act has no purpose separate and apart from the operation by and ultimate conveyance of the hospital facility to the lessee thereof.” *Id.* at 127, 195 S.E.2d at 528. Accordingly, the Court held that “the expenditure of public funds raised by taxation to finance, or facilitate the financing of, the construction of a hospital facility to be privately operated, managed and controlled is not an expenditure for a public purpose” and was prohibited by Article V, Section 2(1) of the North Carolina Constitution. *Id.* at 127, 195 S.E.2d at 528-29.

We find *Foster* distinguishable. In *Foster*, the North Carolina Supreme Court held that there was no purpose separate from the operation by and ultimate conveyance of the hospital facility to the lessee. Once the bonds were paid, the North Carolina Medical Care Commission was to convey title to such facility to the lessee, a private entity. Here, the Project is to

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provide travel time reliability and Mobility's private benefit is incidental to the public purpose. Under Article 2 of the Comprehensive Agreement, all of the infrastructure constructed by Mobility will be owned by the State. Mobility has "no fee title, leasehold estate, possessory interest, permit, easement or other real property interest of any kind in or to the Project or the Project Right of Way" and Mobility's property interests are "limited to contract rights constituting intangible personal property (and not real estate interests)." Furthermore, the Comprehensive Agreement limits Mobility's role in the Project to fifty years.

For the reasons stated above, we hold that the trial court did not err by concluding that the Project's expenditures constituted a public purpose pursuant to Article V, Section 2(1) of the North Carolina Constitution.

C. Turnpike Statute

[3] Plaintiff's third argument on appeal is that the trial court erred by failing to conclude that the Comprehensive Agreement violated the Turnpike Statute.

First, plaintiff contends that Mobility's design plan for the Project violates N.C. Gen. Stat. § 136-89.199 by reducing the number of existing non-toll general purpose lanes from four to three.

N.C. Gen. Stat. § 136-89.199 provides as follows:

Notwithstanding any other provision of this Article, the Authority may designate one or more lanes of any highway, or portion thereof, within the State, including lanes that may previously have been designated as HOV lanes under G.S. 20-146.2, as high-occupancy toll (HOT) or other type of managed lanes; provided, however, that such designation *shall not reduce the number of existing non-toll general purpose lanes*. In making such designations, the Authority shall specify the high-occupancy requirement or other conditions for use of such lanes, which may include restricting vehicle types, access controls, or the payment of tolls for vehicles that do not meet the high-occupancy requirements or conditions for use.

N.C. Gen. Stat. § 136-89.199 (2015) (emphasis added).

A review of the Comprehensive Agreement establishes that plaintiff's argument fails. The Comprehensive Agreement explicitly states that the Project will not reduce the number of existing non-toll general purpose lanes.

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Developer shall design and construct the Project to provide at a minimum the same number of Existing General Purpose Lanes within the Existing ROW as of the Proposal Due Date. Developer shall not eliminate, reduce the width of or otherwise permanently restrict access to existing ramps and loops.

[4] Next, plaintiff argues that the Comprehensive Agreement violates N.C. Gen. Stat. § 136-89.183(5) and is therefore void for illegality. Plaintiff contends that while N.C. Gen. Stat. § 136-89.183(5) requires review by the Board of Transportation, Joint Legislative Transportation Oversight Committee, and Joint Legislative Commission on Governmental Operations thirty days prior to the effective date of any toll or fee, the Comprehensive Agreement fails to require the same. Plaintiff's argument is misplaced.

N.C. Gen. Stat. § 136-89.183(a)(5) gives the Turnpike Authority power “[t]o fix, revise, charge, retain, enforce, and collect tolls and fees for the use of Turnpike Projects” and requires that “[t]hirty days prior to the effective date of any toll or fee . . . the Authority shall submit a description of the proposed toll or fee to the Board of Transportation, the Joint Legislative Transportation Oversight Committee and the Joint Legislative Commission on Governmental Operations for review.” However, N.C. Gen. Stat. § 136-89.183(a)(5) is not applicable to this case. The P3 Statute unambiguously states that:

Notwithstanding the provisions of G.S. 136-89.183(a)(5), all initial tolls or fees to be charged by a private entity shall be reviewed by the Turnpike Authority Board. Prior to setting toll rates, either a set rate or a minimum and maximum rate set by the private entity, the private entity shall hold a public hearing on the toll rates, including an explanation of the toll setting methodology, in accordance with guidelines for the hearing developed by the Department.

N.C. Gen. Stat. § 136-18(39a)(f)(3) (emphasis added). Thus, while N.C. Gen. Stat. § 136-89.183(a)(5) may apply to some tolls of the North Carolina Turnpike Authority, it does not apply to the Project at issue in this case.

Accordingly, we reject plaintiff's argument that the trial court erred by failing to conclude that the Comprehensive Agreement violated the Turnpike Statute.

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D. Authority to Tax

[5] In its last argument on appeal, plaintiff asserts that the trial court erred by failing to conclude that the General Assembly unconstitutionally delegated its authority to tax to the NCDOT, in violation of Article I, Section 8 and Article II, Section 23 of the North Carolina Constitution and the Due Process Clause of the United States Constitution. Specifically, plaintiff argues that while the North Carolina Constitution “forbids the delegation by the General Assembly to a non-elected body the power to impose or forgive taxes[,]” the legislature has granted unto Mobility the authority to impose and collect taxes. Furthermore, plaintiff contends that it was “denied due process in the manner in which these tax liabilities were imposed upon it[.]”

Plaintiff’s entire argument is premised on an issue that has already been decided by our Supreme Court. In *North Carolina Turnpike Authority*, the Supreme Court stated that:

Tolls are not taxes. A person uses a toll road at his option; if he does not use it, he pays no toll. Taxes are levied for the support of government, and their amount is regulated by its necessities. Tolls are the compensation for the use of another’s property or improvements made, and their amount is determined by the cost of the property or improvements.

North Carolina Turnpike Authority, 265 N.C. at 116-17, 143 S.E.2d at 325 (citations and quotation marks omitted). Because tolls do not constitute a tax within the meaning of the Constitution, the limitations of Article I, Section 8 and Article II, Section 23 of the North Carolina Constitution do not apply and plaintiff’s due process argument is similarly without merit.

IV. Conclusion

For the reasons stated above, we affirm the order of the trial court, granting summary judgment in favor of defendants.

AFFIRMED.

Judges McCULLOUGH and INMAN concur.

Judge Douglas McCullough concurred in this opinion prior to 24 April 2017.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 2 MAY 2017)

BINKLEY v. BINKLEY No. 16-846	Forsyth (14CVS5766)	Affirmed
BRAY v. SWISHER No. 16-928	Forsyth (15CVS7690)	Affirmed
BUCKNER v. UNITED PARCEL SERV. No. 16-1110	N.C. Industrial Commission (13-740862)	Affirmed
COHEN v. CONT'L MOTORS, INC. No. 16-792	Nash (15CVS1134)	Affirmed
COOK v. THOMAS No. 16-712	New Hanover (15CVS526)	Reversed
GEOGHAGAN v. GEOGHAGAN No. 16-711	Mecklenburg (09CVD26047)	Dismissed
GROSSLIGHT v. N.C. DEP'T OF TRANSP. No. 16-983	Cumberland (15CVS5109)	Dismissed
IN RE B.D. No. 16-1037	Mecklenburg (15JT118-119)	Affirmed
IN RE B.N.M. No. 16-1012	Watauga (10JA33)	Reversed in part; Affirmed in part
LIPPARD v. HOLLEMAN No. 16-886	Iredell (13CVS2701)	Vacated and Remanded
MEDLIN v. MEDLIN No. 16-863	Yadkin (12CVD348)	Affirmed
OATES v. PARKER No. 16-1053	Sampson (15CVS494)	Affirmed
PHAN v. CLINARD OIL CO., INC. No. 16-1083	Davidson (15CVS3399)	Reversed
ROWE v. ROWE No. 16-1072	Carteret (11CVD1123)	REVERSED IN PART; VACATED IN PART; AND REMANDED.

ROWE v. ROWE No. 16-1073	Carteret (03CVD845)	REVERSED IN PART; VACATED IN PART AND REMANDED.
ST. JOHN v. THOMAS No. 16-847	Union (15CVS3030)	Affirmed
STATE v. BELL No. 16-798	Mecklenburg (14CRS236703-04)	No Error
STATE v. BRADLEY No. 16-917	Mecklenburg (15CRS214973-74) (15CRS24414)	No Error
STATE v. CARPENTER No. 16-973	Avery (13CRS50497)	NO PLAIN ERROR; REMANDED FOR RESENTENCING.
STATE v. CATES No. 16-672	Alamance (13CRS57989)	No Error
STATE v. COLLINS No. 16-901	Columbus (11CRS185-186) (11CRS50217)	No Error
STATE v. DAYE No. 16-1119	Iredell (15CRS2614) (15CRS51896)	Vacated
STATE v. ERVIN No. 16-1126	Mecklenburg (15CRS212728) (15CRS22622) (15CRS34741)	Dismissed in Part; No Error in Part; No plain Error in Part.
STATE v. JENKINS No. 16-717	Mecklenburg (13CRS235628-29) (13CRS45241)	No Error
STATE v. KNOLTON No. 16-671	Scotland (12CRS52648) (12CRS52658) (13CRS336)	No Error
STATE v. LINDSEY No. 16-742	Burke (14CRS1729-30)	No Error

STATE v. NORMAN No. 16-1005	Washington (13CRS50002-05)	VACATED AND REMANDED FOR NEW TRIAL IN 13 CRS 50005; REVERSED IN PART AND REMANDED FOR RESENTENCING IN 13 CRS 50004
STATE v. PANNELL No. 16-852	Swain (14CRS50039)	Reversed and Remanded for Resentencing in Part; No Error in Part.
STATE v. PERRY No. 16-862	Nash (15CRS52463) (15CRS52610) (15CRS52612-13)	No Error
STATE v. STROUD No. 16-989	Mecklenburg (13CRS222266-67) (13CRS222658) (13CRS43492)	No Prejudicial Error
STATE v. VIDOVICH No. 16-773	Randolph (14CRS53004)	No Error
WILSON v. ASHLEY WOMEN'S CTR., P.A. No. 16-1004	Gaston (11CVS4007)	No Error

EDWARDS v. FOLEY

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BARRY D. EDWARDS, XMC FILMS, INCORPORATED, AEGIS FILMS, INC., AND
DAVID E. ANTHONY, PLAINTIFFS

v.

CLYDE M. FOLEY, RONALD M. FOLEY, LAVONDA S. FOLEY, SAMUEL L. SCOTT,
CRS TRADING CO. LLC., BROWN BURTON, RONALD JED MEADOWS, AND
AMERICAN SOLAR KONTROL, LLC, DEFENDANTS

No. COA16-1060

Filed 16 May 2017

Appeal and Error—interlocutory orders and appeals—no substantial right alleged—motion to amend brief improper after other party filed brief

Defendants’ appeal from an interlocutory order granting plaintiffs’ motion for summary judgment in a dispute between minority shareholders was dismissed. Defendants failed to allege a substantial right was affected and were not permitted correct their mistake by moving to amend their principal brief after plaintiffs already filed their brief pointing out the error.

Appeal by Defendants from order entered 28 June 2016 by Judge James G. Bell in Robeson County Superior Court. Heard in the Court of Appeals 4 May 2017.

Ward and Smith, P.A., by Alexander C. Dale, Edward J. Coyne, III, and Knight Johnson, LLC, by Bryan M. Knight, for the Plaintiffs-Appellees.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Kimberly M. Marston and Walter L. Tippett, Jr., for the Defendants-Appellants.

DILLON, Judge.

Defendants appeal from an order granting Plaintiffs’ motion for summary judgment. For the following reasons, we dismiss Defendants’ appeal as interlocutory.

I. Background

Clyde Foley is a co-founder of XMC Films (“XMC”), a Virginia corporation that produces coated film products. This matter involves a dispute between Mr. Foley and other minority shareholders and XMC and its current management.

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Plaintiffs filed numerous claims against Defendants. In response, Defendants filed a motion to dismiss, answer, counterclaims, and a third-party complaint.¹

Plaintiffs and Defendants filed cross-motions for summary judgment. The trial court granted Plaintiffs' motion for summary judgment on Defendants' counterclaims but *denied* Defendants' motion for summary judgment on Plaintiffs' claims.

Defendants appealed the trial court's order granting Plaintiff's summary judgment motion on Defendants' counterclaims *and* denying Defendants' motion for summary judgment; however, in their appellate brief, Defendants failed to articulate any substantial right affected by the trial court's interlocutory order. After Plaintiffs filed their appellee brief pointing out this deficiency, Defendants requested that this Court allow them to amend their brief. For the reasons below, we denied Defendants' motion to amend their principal brief and hereby dismiss their appeal from the trial court's interlocutory order.

II. Analysis

“An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.” *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). As a general rule, there is no right of appeal from an interlocutory order. *See Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994). However, a party is permitted to appeal an interlocutory order if “[1] . . . the trial court certifies in the judgment that there is no just reason to delay the appeal[.]” or if “[2] the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits.” *Id.* at 379, 444 S.E.2d at 253 (internal marks and citations omitted). “Under either of these two circumstances, it is the appellant's burden to present appropriate grounds for this Court's acceptance of an interlocutory appeal[.]” *Id.*

In the present case, because the trial court declined to certify the matter for immediate appeal, it was Defendants' burden to establish on appeal that the order affected a substantial right.

1. In their third-party complaint, Defendants asserted claims against Aegis Films, Inc. and David E. Anthony. Aegis Films and Mr. Anthony were subsequently designated as Plaintiffs in the main action in a consent order realigning the parties.

EDWARDS v. FOLEY

[253 N.C. App. 410 (2017)]

Rule 28(b) of the North Carolina Rules of Appellate Procedure provides, in relevant part:

An appellant's brief *shall* contain . . . [a] *statement of the grounds for appellate review*. Such statement *shall* include citation of the statute or statutes permitting appellate review. . . . When an appeal is interlocutory, the statement *must 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) (emphasis added). While our Supreme Court has held that “noncompliance with ‘nonjurisdictional rules’ such as Rule 28(b) ‘normally should not lead to dismissal of the appeal[.]’” *Larsen v. Black Diamond French Truffles, Inc.*, ___ N.C. App. ___, ___, 772 S.E.2d 93, 95 (2015) (quoting *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., Inc.*, 362 N.C. 191, 198, 657 S.E.2d 361, 365 (2008)), when an appeal is interlocutory, Rule 28(b)(4) is *not* a “nonjurisdictional” rule. *Larsen*, ___ N.C. App. at ___, 772 S.E.2d at 96. “Rather, the *only way* an appellant may establish appellate jurisdiction in an interlocutory case (absent Rule 54(b) certification) is by showing grounds for appellate review based on the order affecting a substantial right.” *Id.*

Here, Defendants failed to allege in their principal brief any substantial right affected by the trial court's interlocutory order. After Plaintiffs filed their appellee brief identifying Defendants' failure to properly allege grounds for appeal, Defendants moved for leave to amend their principal brief. Based on our holding in *Larsen*, we denied Defendants' motion and hereby dismiss the appeal.

In *Larsen*, the appellants failed to allege a substantial right deprivation in their principal brief. *Id.* at ___, 772 S.E.2d at 95. After appellees pointed out the failure in their appellee brief, appellants filed a reply brief alleging the substantial right deprivation. *Id.* We dismissed the appeal, stating as follows:

[W]e will not allow [appellants] to correct the deficiencies of their principal brief in their reply brief. Because it is the appellant's burden to present appropriate grounds for this Court's acceptance of an interlocutory appeal, and [appellants] have not met their burden, [the] appeal must be dismissed.”

Id. at ___, 772 S.E.2d at 96 (internal marks and citations omitted).

HANNA v. WRIGHT

[253 N.C. App. 413 (2017)]

We see no functional difference between the appellants' attempt in *Larsen* to correct their mistake in a reply brief and Defendants' attempt in the present case to correct their mistake by moving to amend their principal brief *after* Plaintiffs have already filed their brief. Accordingly, based on the reasoning in *Larsen*, we are compelled to dismiss the appeal.

DISMISSED.

Judges DIETZ and TYSON concur.

STEPHEN HANNA, PLAINTIFF

v.

STEPHEN SIDNEY WRIGHT, DEFENDANT

No. COA16-1134

Filed 16 May 2017

Appeal and Error—interlocutory orders and appeals—undetermined money judgment—substantial right—failure to show business kept from operating as a whole

Defendant's appeal from an interlocutory order regarding the undetermined amount of a money judgment in a breach of contract case arising from the sale of a track loader was dismissed. Although the inability to practice one's livelihood and the deprivation of a significant property interest affect substantial rights, an order that does not prevent the business as a whole from operating does not affect a substantial right.

Appeal by defendant from order of default judgment and preliminary injunction, and an order setting the cash bond to stay execution of the judgment and preliminary injunction, entered 14 June 2016 by Judge Amber Davis in Currituck County District Court. Heard in the Court of Appeals 19 April 2017.

*Brett Alan Lewis, for plaintiff-appellee.**Phillip H. Hayes, for defendant-appellant.*

MURPHY, Judge.

HANNA v. WRIGHT

[253 N.C. App. 413 (2017)]

Stephen Sidney Wright (“Defendant”) appeals from the trial court’s order of default judgment and preliminary injunction, and order setting the cash bond to stay execution of the judgment and preliminary injunction. After careful review, we dismiss Defendant’s appeal as interlocutory.

Background

In March 2013, Plaintiff contracted to provide Defendant a 2006 MTL20 Track Loader (“Track Loader”). After the contract was formed, Defendant took possession of the Track Loader in March 2013. On 16 February 2016, Plaintiff filed a civil summons and complaint in Currituck County District Court against Defendant alleging breach of this contract, including a request for injunctive relief. Defendant was served with the civil summons and complaint on 22 February 2016. On 30 March 2016, Plaintiff moved for entry of default, which was granted by the Currituck County Clerk of Superior Court. On 25 April 2016, Plaintiff filed a motion for default judgment. On 9 June 2016, Defendant through counsel filed a motion to set aside entry of default and default judgment, and a proposed answer. That same day, the trial court granted the default judgment and preliminary injunction. The trial court decreed that Plaintiff was entitled to take possession of the Track Loader. The trial court further ordered that Plaintiff was “entitled to a money judgment for rent-money owed upon future motion in the cause for damages[.]” The trial court entered the order on 14 June 2016. Defendant appealed from this order on 14 July 2016. The amount of the money judgment to be entered against Defendant has not yet been determined.

Analysis

At the outset, we note that the present appeal is interlocutory because the amount of the money judgement to be entered has not yet been determined. *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) (explaining that an appeal is interlocutory if it “directs some further proceeding preliminary to the final decree”). Therefore, we must review whether we have jurisdiction over this appeal because “whether 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, internal quotation marks, and brackets omitted).

HANNA v. WRIGHT

[253 N.C. App. 413 (2017)]

“Generally, there is no right of immediate appeal from an interlocutory order.” *Feltman v. City of Wilson*, 238 N.C. App. 246, 250, 767 S.E.2d 615, 618 (2014) (citation omitted). For an interlocutory appeal to be heard, the appellant must establish (1) that the trial court’s order certified the case for appeal pursuant to N.C. R. Civ. P. 54(b); or (2) the order deprived the appellant of “a substantial right that will be lost absent review before final disposition of the case.” *Bessemer City Express, Inc. v. City of Kings Mountain*, 155 N.C. App. 637, 639, 573 S.E.2d 712, 714 (2002) (citing N.C.G.S. §§ 1-277(a) and 7A-27(d)(1) (2001)). Here, Defendant admits his appeal is interlocutory, but argues that we may hear this interlocutory appeal because the order affects a substantial right.¹ Specifically, he argues that the right of possession of the Track Loader, for which he claims to have made partial payment, as a means of earning a living “will be irreparably prejudiced if not reviewed before entry of the final money judgment.” We disagree.

“Although our courts have recognized the inability to practice one’s livelihood and the deprivation of a significant property interest to be substantial rights,” we have not recognized that an order that does not prevent the business *as a whole* from operating affects a substantial right. *Bessemer City Express, Inc.*, 155 N.C. App. at 640, 573 S.E.2d at 714. Here, Defendant did not show how his business would be kept from operating as a whole as a result of the appealed order. Although he alleges that the loss of the Track Loader would irreparably prejudice him, he does not allege, nor does the record show, how the mere loss of the possession of the Track Loader would cause such prejudice. Nor does he argue that losing possession of the Track Loader would prevent Defendant from practicing his livelihood *as a whole*. As it was Defendant’s burden to establish that a substantial right would be lost absent review before final disposition of the case, we cannot simply read the extent to which his business will be affected into the record. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994) (“[I]t is the appellant’s burden to present appropriate grounds for this Court’s acceptance of an interlocutory appeal[.]”)

The amount of the money judgment to be entered against Defendant remains outstanding. Defendant’s argument on appeal does not evince sufficient grounds for an interlocutory appeal. Thus, we have no jurisdiction to hear this matter at this time.

1. The trial court did not certify its order for immediate appeal pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure.

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[253 N.C. App. 416 (2017)]

Conclusion

For the reasons stated above, Defendant's interlocutory appeal is dismissed.

DISMISSED.

Judges CALABRIA and DIETZ concur.

GEORGE HENDERSON, PLAINTIFF

v.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, VINCENT JACOBS
(CAROLINA BASKETBALL CLUB-CBC (INDIVIDUALLY); DENNIS COVINGTON
CAROLINA BASKETBALL CLUB-CBS (INDIVIDUALLY); AND
CAROLINA BASKETBALL CLUB, LLC., DEFENDANTS

No. COA16-977

Filed 16 May 2017

1. Appeal and Error—interlocutory orders and appeals—Rule of Appellate Procedure 2—writ of certiorari—dismissal of one but not all defendants

The Court of Appeals exercised its authority under Rule of Appellate Procedure 2 to consider plaintiff's appeal in a personal injury case as a petition for writ of certiorari in order to review the trial court's interlocutory order dismissing one but not all defendants.

2. Immunity—statutory immunity—personal injury claims—lease of school gymnasium to non-school group

The trial court did not err by granting defendant Board of Education's motion to dismiss personal injury claims based on the doctrine of statutory immunity. The Board properly followed its own rules and regulations when it leased the school gymnasium to defendant Carolina Basketball Club on the date plaintiff referee was injured.

3. Immunity—statutory immunity—governmental immunity—contract to lease school gymnasium to non-school group—third-party beneficiary

Although plaintiff contended defendant Board of Education waived governmental immunity by entering into a contract with defendant Carolina Basketball Club, the Board was required to do

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so under the mandate of N.C.G.S. § 115C-524(c). Although plaintiff claimed he was a third-party beneficiary of the contract, plaintiff's argument was premised upon common law immunity instead of statutory immunity.

Appeal by plaintiff from order entered 24 March 2016 by Judge Robert C. Ervin in Mecklenburg County Superior Court. Heard in the Court of Appeals 21 February 2017.

The Law Office of Java O. Warren, by Java O. Warren, for plaintiff-appellant.

Campbell Shatley, PLLC, by Christopher Z. Campbell and Chad Ray Donnahoo, for defendant-appellees.

BRYANT, Judge.

Where defendant Board complied with its own rules and regulations when it entered into a valid contract permitting a basketball club to use a school's gymnasium for its basketball tournament, defendant Board is entitled to statutory immunity pursuant to N.C. Gen. Stat. § 115C-524(c), and the trial court did not err in dismissing plaintiff's claims pursuant to Rules 12(b)(1), (2), and (6). We affirm.

On 22 September 2012, plaintiff George Henderson was employed to referee a basketball tournament at Hawthorne High School in Mecklenburg County from 9:00 a.m. to 7:00 p.m. TSO, a third-party referee company, contracted with plaintiff to referee the game. The tournament was sponsored, organized, and conducted by Carolina Basketball Club ("defendant CBC"). Defendants Vince Jacobs and Dennis Covington are the owners and/or agents of defendant CBC. The Charlotte-Mecklenburg Board of Education ("defendant Board"), owns, leases, and/or manages Hawthorne High School, including the gymnasium basketball court. Defendant CBC paid to defendant Board the required facilities fee for use of the basketball court for the tournament.

Prior to 22 September 2012, plaintiff had never refereed at the Hawthorne High School gymnasium. His referee duties included running up and down the sides of the gymnasium basketball court during the game while monitoring the play of the participants. Plaintiff alleges that while running up and down the sides of the court as he officiated, he stepped onto a warped and uneven area of the court immediately adjacent to the playing area. Plaintiff immediately fell to the floor, at

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which point he felt severe pain in his left knee. Plaintiff also alleges that after his fall, other officials informed him that they run around this warped area of the basketball court to avoid tripping over it. Plaintiff alleges that, *inter alia*, his injuries include “anterior cruciate and lateral collateral ligament tear of the left knee and avulsion fracture of proximal lateral fibula,” as a result of which he has undergone several surgeries and incurred medical expenses in excess of \$300,000.00.

On 12 March 2015, plaintiff George Henderson commenced this action by filing a complaint against defendant CBC, and the filing of an amended complaint on 22 September 2015, which added defendants Jacobs and Covington, and defendant Board. On 7 December 2016, defendants Jacobs and CBC filed their answer to plaintiff’s amended complaint. On 14 December 2016, defendant Board timely filed its answer denying plaintiff’s allegations, asserting a defense for failure to state a claim, and asserting cross-claims against the remaining defendants. Defendant Covington never answered plaintiff’s amended complaint. On 3 February 2016, defendant Board filed a motion to dismiss pursuant to North Carolina Rules of Civil Procedure 12(b)(1), (2), and (6).

On 15 March 2016, a hearing was held on defendant Board’s motion in Mecklenburg County Superior Court, the Honorable Robert C. Ervin, Judge presiding. By order filed 24 March 2016, Judge Ervin granted defendant Board’s motion to dismiss plaintiff’s claims against defendant Board with prejudice.

Almost two months later, on 11 May 2016, plaintiff and defendants Jacobs and CBC filed a joint motion for entry of judgment to revise the 24 March 2016 order *nunc pro tunc*, pursuant to Rules 54(b), 60(b)(2), and 60(b)(6) of the North Carolina Rules of Civil Procedure, to certify the matter for immediate appeal.¹ The next day, on 12 May 2016, plaintiff filed notice of appeal from the 24 March 2016 order.

[1] As an initial matter, we note that plaintiff appeals from an order dismissing one but not all of the parties to the action. The order from which plaintiff appeals dismissed plaintiff’s claims with prejudice only as to defendant Board. However, in defendant Board’s brief to this Court, it acknowledges that “[s]ubsequent to the filing of this appeal, [p]laintiff dismissed all remaining [d]efendants.” Yet the record contains no evidence of the voluntary dismissal(s) with prejudice as to the remaining defendants—Vincent Jacobs, Dennis Covington, and Carolina

1. There is no indication in the record that a ruling was obtained on this motion.

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Basketball Club, LLC—nor has plaintiff filed a supplement to the record on appeal. Accordingly, plaintiff's appeal "appears to be interlocutory." See *Reeger Builders, Inc. v. J.C. Demo Ins. Grp., Inc.*, No. COA13-622, 2014 WL 859327, at *2 (N.C. Ct. App. Mar. 4, 2014) (unpublished) (citing *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950)).

However, because "[w]e believe that dismissing this appeal as interlocutory would likely waste judicial resources[,]” *Legacy Vulcan Corp. v. Garren*, 222 N.C. App. 445, 447, 731 S.E.2d 223, 225 (2012) (citing *Brown v. City of Winston-Salem*, 171 N.C. App. 266, 269, 614 S.E.2d 599, 601 (2005)), we “consider plaintiff's brief as a petition for writ of certiorari.” *Reeger Builders*, 2014 WL 859327, at *2 (citing N.C. R. App. P. 21 (2013)) (considering the plaintiffs' brief as a petition for writ of certiorari as the plaintiffs' appeal was interlocutory where the trial court dismissed one but not all of the parties to the action and the plaintiffs stated in brief that they had settled with the remaining defendants, but no evidence in the record showed that plaintiffs entered a voluntary dismissal with prejudice as to the remaining defendants). “We exercise our authority under Rule 2 to consider [p]laintiff's appeal as a petition for writ of certiorari, and we grant certiorari to review the trial court's interlocutory order.” *Legacy Vulcan Corp.*, 222 N.C. App. at 447, 731 S.E.2d at 225 (citation omitted); see also *id.* (quoting N.C. R. App. P. 21(a)(1) (2011)) (“The writ of certiorari may be issued in appropriate circumstances . . . when no right of appeal from an interlocutory order exists[.]”).

On appeal, plaintiff contends the trial court erred in granting defendant's motion to dismiss pursuant to Rules 12(b)(1), (2), and (6) (I) under the doctrine of statutory immunity; (II) under the doctrine of governmental immunity; and (III) as to intended third-party beneficiaries.

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

Stanback v. Stanback, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citations omitted). “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).

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I. Statutory Immunity

[2] Plaintiff first argues the trial court erred in granting defendant Board's motion to dismiss for failure to state a claim for which relief could be granted pursuant to the doctrine of statutory immunity. Specifically, plaintiff contends that defendant Board cannot establish that it complied with its own rules and regulations when it entered into the agreement with defendant CBC permitting defendant CBC to use the gymnasium for its basketball tournament. Plaintiff contends that defendant Board failed to require that defendant CBC have liability insurance, per its rules and regulations. We disagree.

"A county or city board of education is a governmental agency, and therefore is not liable in a tort or negligence action except to the extent that it has waived its governmental immunity pursuant to statutory authority." *Seipp v. Wake Cnty. Bd. of Educ.*, 132 N.C. App. 119–20, 121, 510 S.E.2d 193, 194 (1999) (quoting *Beatty v. Charlotte-Mecklenburg Bd. of Educ.*, 99 N.C. App. 753, 755, 394 S.E.2d 242, 244 (1990)). North Carolina General Statutes section 115C-524(c) provides boards of education with specific statutory immunity from any liability for personal injuries suffered by an individual participating in non-school related events and activities on school grounds:

Notwithstanding the provisions of G.S. 115C-263 and 115C-264, local boards of education may adopt rules and regulations under which they may enter into agreements permitting non-school groups to use school real and personal property, except for school buses, for other than school purposes so long as such use is consistent with the proper preservation and care of the public school property. *No liability shall attach to any board of education or to any individual board member for personal injury suffered by reason of the use of such school property pursuant to such agreements.*

N.C. Gen. Stat. § 115C-524(c) (2015) (emphasis added).

In *Seipp*, the PTA sponsored a haunted house at an elementary school in Wake County. 132 N.C. App. at 120, 510 S.E.2d at 193–94. In order to hold the event at the school, the PTA was required to comply with the Wake County Board of Education's ("the Board") rules regarding facility use by (1) submitting a signed and completed facility use application; (2) attaching a processing fee; (3) showing proof of liability insurance; and (4) executing a hold harmless agreement. *Id.* at 121–22, 510 S.E.2d at 195. Because the PTA did not submit an application pursuant to the Board's

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rules, this Court held that the use of the school for the haunted house event—where the plaintiff in *Seipp* was injured—was not used pursuant to an agreement made within the meaning of N.C.G.S. § 115C-524(b).² *Id.* at 122, 510 S.E.2d at 195. In other words, because the agreement with the PTA was not entered into pursuant to the Board’s own rules, the Board was not entitled to the immunity granted under section 115C-524(b). *Id.* at 121–22, 510 S.E.2d at 195. *But see Royal v. Pate*, No. COA06-571, 2007 WL 1246432, at *3 (N.C. Ct. App. May 1, 2007) (unpublished) (distinguishing *Seipp* and holding that because an agreement between a school board and a recreation commission for use of the school board’s softball batting cage was consistent with the board’s rules and regulations, the school board and board member were protected by statutory immunity pursuant to N.C.G.S. § 115C-524(b) (2005)).

In the instant case, defendant Board entered into a validly executed agreement with defendant CBC on 21 September 2012, and defendant CBC paid defendant Board \$170.00—the required facilities fee—for the use of the gymnasium basketball court. Further, plaintiff makes no allegation that defendant CBC was using the facility for a non-permitted use. Defendant CBC also agreed to indemnify and hold harmless defendant Board against claims associated with defendant CBC’s use of the facility. Indeed, there is nothing to support plaintiff’s claim that defendant Board “did not procure insurance for the event” and plaintiff does not allege that defendant Board failed to comply with the agreement requiring defendant CBC to procure insurance.

Thus, where plaintiff’s own complaint makes clear that defendant Board followed its own rules and regulations when it leased the gymnasium to defendant CBC on the date plaintiff was injured therein, defendant Board is entitled to statutory immunity pursuant to N.C.G.S. § 115C-524(c). Accordingly, the trial court did not err in dismissing plaintiff’s claim pursuant to Rules 12(b)(1), (2), and (6) based on statutory immunity, and plaintiff’s argument is overruled.

II. Governmental Immunity

[3] “A county or city board of education is a governmental agency and its employees are not ordinarily liable in a tort or negligence action

2. On 11 June 2015, the North Carolina legislature enacted Senate Bill No. 315, which split section 115-524(b) into two subsections—(b) and (c)—and added a fourth, subsection (d). N.C. Sess. Laws 2015-64, § 1, eff. June 11, 2015. *Seipp* predates the 2015 amendment, but as the substance of the law did not materially change after the legislature split section (b) of N.C.G.S. § 115-524 into two subsections, *Seipp* remains instructive. *See* 132 N.C. App. at 121, 510 S.E.2d at 194 (citing to N.C.G.S. § 115C-524(b) (1997)).

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unless the board has waived its sovereign immunity.” *Herring v. Liner*, 163 N.C. App. 534, 537, 594 S.E.2d 117, 119 (2004) (citing *Ripellino v. N.C. Sch. Bds. Ass’n*, 158 N.C. App. 423, 427, 581 S.E.2d 88, 91–92 (2003)). In the instant case, plaintiff did not allege in his amended complaint that defendant Board waived its governmental immunity. Instead, plaintiff contends defendant Board waived governmental immunity by entering into a contract with defendant CBC. *See Smith v. State*, 289 N.C. 303, 320, 222 S.E.2d 412, 423–24 (1976) (“[W]henever the State of North Carolina, through its authorized officers and agencies, enters into a valid contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract.”). For the reasons that follow, *see infra* Section III, this argument is without merit.

III. Intended Third-Party Beneficiaries

Plaintiff lastly claims that he is a third-party beneficiary of the contract between defendant CBC and defendant Board and, therefore, he can recover for his personal injury and related damages through the theory of contract. We disagree.

“North Carolina recognizes the right of a third-party beneficiary . . . to sue for breach of a contract executed for his benefit.” *Town of Belhaven, NC v. Pantego Creek, LLC*, ___ N.C. App. ___, ___, 793 S.E.2d 711, 719 (2016) (alteration in original) (quoting *Babb v. Bynum & Murphrey, PLLC*, 182 N.C. App. 750, 753, 643 S.E.2d 55, 57 (2007)). However, plaintiff’s argument is premised upon notions of common law immunity and not the statutory immunity at issue in this case.

This case involves the application of N.C.G.S. § 115C-524(c), which provides that “[n]o liability shall attach to any board of education . . . for personal injury suffered by reason of the use of such school property pursuant to such agreements.” *Id.* § 115C-524(c) (emphasis added). Thus, in those situations covered by N.C.G.S. § 115C-524(c) (i.e., when a school permits a non-school group to use school property), school boards are *required* to enter into “agreements” with those non-school groups and are not liable for damages related to any “personal injury” which might occur as a result of those agreements. *See id.* In other words, in order for a school board to be entitled to the statutory immunity granted by section 115C-524(c), a school board *must* enter into a contract. It is therefore contradictory for plaintiff to argue that defendant Board has somehow waived immunity by complying with the mandate of the statute which, absent that compliance, will not grant that immunity; the existence of a contract cannot be both a requirement for and an exception to the application of statutory immunity. Plaintiff’s

IN RE K.B.

[253 N.C. App. 423 (2017)]

argument is overruled, and the trial court's order dismissing plaintiffs' claims as to defendant Board is

AFFIRMED.

Judges INMAN and ZACHARY concur.

IN THE MATTER OF K.B.

No. COA16-970

Filed 16 May 2017

1. Child Abuse, Dependency, and Neglect—dependency—petition failed to allege—sufficiency of allegations

The trial court did not err by adjudicating a minor child as a dependent juvenile. Although the Department of Social Services did not check the box alleging dependency on the petition form, the allegations attached to the petition were sufficient to put respondent mother on notice that dependency would be at issue.

2. Child Abuse, Dependency, and Neglect—child abuse—sufficiency of findings—physical injury by other than accidental means

The trial court did not err by adjudicating a minor child as an abused juvenile. The trial court's findings supported the conclusions that respondent parents created a substantial risk of physical injury to the minor child by other than accidental means, and that respondents inflicted or allowed to be inflicted on the minor child serious physical injury by other than accidental means.

3. Child Abuse, Dependency, and Neglect—child neglect—failure to provide proper supervision—failure to keep medications current

The trial court did not err by adjudicating a minor child as a neglected juvenile. The findings showed that respondent mother failed to provide proper supervision for the minor child including that she was unable to provide appropriate discipline or nurturing to deal with the child's emotional and behavioral issues. Further, respondent did not follow instructions to take the minor child to a psychiatrist, and she let the child's prescription lapse for two weeks for a medication that could not just be stopped without causing side effects.

IN RE K.B.

[253 N.C. App. 423 (2017)]

Appeal by respondent-mother from orders entered 25 May 2016 by Judge William A. Marsh, III, in Durham County District Court. Heard in the Court of Appeals 17 April 2017.

Senior Assistant County Attorney Cathy L. Moore for petitioner-appellee Durham County Department of Social Services.

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

Rebekah W. Davis for respondent-appellant mother.

ELMORE, Judge.

Respondent-mother appeals from the trial court's orders adjudicating her son, K.B. (Kirk)¹, an abused, neglected, and dependent juvenile. For the following reasons, we affirm.

I. Background

Respondent-mother and respondent-father adopted Kirk when he was five years old. When Kirk was two years old, he tested positive for cocaine and was removed from his biological mother's home. Kirk was placed in a foster home where he resided for three years. His biological mother relinquished her parental rights and his biological father's parental rights were terminated by the court. Although Kirk's foster mother wished to adopt him, his foster father did not. Kirk was quickly placed for adoption with respondents in July 2011 and the adoption was finalized in December 2011.

Shortly after adopting Kirk, respondent-mother became pregnant with twins, a boy and a girl. Kirk began to act out and exhibit behavioral issues. Respondent-mother attributed Kirk's change in behavior to his past experience of being displaced by a new baby boy in his foster home.

From 21 February 2012 to 9 November 2015, the Durham County Department of Social Services (DSS) received fifteen Child Protective Services (CPS) reports regarding Kirk. DSS substantiated three reports filed 7 May 2012, 11 September 2013, and 26 September 2013 for neglect due to improper discipline. Respondent-mother admitted to hitting Kirk with a ruler in 2012, and Kirk was found to have thirty to fifty belt marks on his buttocks, right thigh, and hip in September 2013. Respondent-father

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

IN RE K.B.

[253 N.C. App. 423 (2017)]

admitted that he and respondent-mother spanked Kirk as a form of discipline. After the September 2013 reports, DSS began in-home services with the family. They completed the services and the case was closed in July 2014.

Because respondents continued to have issues with Kirk's behavior, he was placed in a kinship placement from 26 September to 7 October 2013, a therapeutic foster home from 23 October 2013 to 31 March 2014, and the Wright School from 2 February to 10 September 2015.

After Kirk returned home from the Wright School, DSS received a CPS report on 9 November 2015 alleging that Kirk had " 'black and bruising' around the left eye, . . . bruising around the lips, scratches on the bridge of the nose, and below the lips, [Kirk's] right pointer finger [was] swollen from the knuckle to the tip and the side of the fingers on the right hand [were] punctured." The report also alleged that respondents did not seek a psychiatrist for Kirk as recommended upon his release from the Wright School and allowed Kirk's prescription for Prozac to lapse from 30 October to 10 November 2015, at a minimum.

DSS filed a petition on 13 November 2015 alleging that Kirk was an abused juvenile in that respondents "inflicted or allowed to be inflicted on the juvenile a serious physical injury by other than accidental means." Specifically, the petition alleged that on or about 8 November 2015, Kirk "sustained a black eye, and broken right index finger. The injuries are unexplained. Neither parent or grandmother could provide an explanation for the injuries. After a visit to his psychiatrist, it was stated that his injuries are not self-inflicted." DSS also alleged that Kirk was a neglected juvenile in that he "does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker." Specifically, the petition alleged that on or about 9 November 2015, respondent-father and the grandmother "were home at the time [Kirk] sustained the injuries but neither could provide an explanation as to what happened to the child." As a result, DSS was granted nonsecure custody of Kirk.

The trial court held an adjudication hearing on 13 to 14 April 2016, and on 9 to 10 May 2016. Dr. Beth Herold was accepted as an expert in the field of child physical abuse, child neglect, and child maltreatment. Dr. Herold treated Kirk in November 2015 after receiving a referral from DSS. When she saw Kirk, he "had a broken finger," "bruises on his face, he had a busted lip, and he had an injury to his chest, some sort of a contusion. He had a purple and yellow bruise and some linear marks through it." Kirk offered multiple explanations for his injuries, claiming

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“that he got hit with a rake, that he was wrestling with his father, that he was doing cartwheels, that he dropped a weight on his finger, and that he did it himself.” Dr. Herold testified that Kirk’s injuries were not consistent with his explanations or with typical self-injury behavior. She opined that it was “highly probable” Kirk was physically abused.

The DSS social worker, Pamela Stanton, testified that at the time of the CPS report respondent-mother told her that Kirk had been off Prozac for at least a week and that “she was sure that some of his behaviors that he was experiencing or displaying in school [were] due to that.” Stanton also testified that Kirk gave multiple histories for his injuries, including that he had punched himself in the face, but none explained the severity of injuries he sustained. She testified further that DSS did not receive any reports regarding injuries to Kirk while he was in his other placements outside respondents’ home, and that there were instances where mental health treatment was recommended for Kirk but never accessed by respondents. Finally, Stanton testified that respondent-mother previously requested Kirk be removed from her home in 2012 and April 2014, when she told DSS: “I need someone to come get this boy, because if I lay my hands on him, it won’t be good.”

Respondent-mother testified that she only asked Kirk to be removed from her home when it became “a safety concern,” and that she had not spanked Kirk since 2013. She claimed that she was not home when Kirk sustained the injuries in November 2015 and did not know how Kirk was injured: “I was at work during the time that he allegedly snuck out of the home. By the time I got home, he visually had marks on him.”

After the hearing, the trial court entered an order on 25 May 2016 adjudicating Kirk an abused, neglected, and dependent juvenile. Respondent-mother entered written notice of appeal.²

II. Discussion

A. Adjudication of Dependency

[1] Respondent-mother first argues the trial court erred in adjudicating Kirk a dependent juvenile because the petition only alleged that Kirk was abused and neglected. We disagree.

“The pleading in an abuse, neglect, or dependency action is the petition.” N.C. Gen. Stat. § 7B-401 (2015). In an adjudicatory hearing on a juvenile abuse, neglect, or dependency petition, a trial court is required

2. Respondent-father did not appeal and is not a party to this appeal.

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to “adjudicate the existence or nonexistence of any of the *conditions alleged in a petition*.” N.C. Gen. Stat. § 7B-802 (2015) (emphasis added). “If the court finds . . . that *the allegations in the petition* have been proven by clear and convincing evidence, the court shall so state” in a written order. N.C. Gen. Stat. § 7B-807(a) (2015) (emphasis added).

“[A]llegations in a petition may include specific factual allegations attached to a form petition for support.” *In re D.C.*, 183 N.C. App. 344, 349, 644 S.E.2d 640, 643 (2007) (citation omitted) (internal quotation marks omitted). Moreover, “[w]hile it is certainly the better practice for the petitioner to ‘check’ the appropriate box on the petition for each ground for adjudication, if the specific factual allegations of the petition are sufficient to put the respondent on notice as to each alleged ground for adjudication, the petition will be adequate.” *Id.* at 350, 644 S.E.2d at 643.

A “dependent juvenile” is defined as

[a] juvenile in need of assistance or placement because (i) the juvenile has no parent, guardian, or custodian responsible for the juvenile’s care or supervision or (ii) the juvenile’s parent, guardian, or custodian is unable to provide for the juvenile’s care or supervision and lacks an appropriate alternative child care arrangement.

N.C. Gen. Stat. § 7B-101(9) (2015).

Here, DSS did not “check the box” alleging dependency on the form petition filed on 13 November 2015. The allegations attached to the petition, however, were sufficient to put respondent-mother on notice that dependency would be at issue during the adjudication hearing. The attached specific statement of facts alleged:

The child [Kirk] (9 years old) has “black and bruising” around the left eye, bruising around the lips, scratches on the bridge of the nose, and below the lips, the child’s right pointer finger is swollen from the knuckle to the tip and the side of the fingers on the right hand are punctured all [sic] the injuries listed above were unexplained by the legal custodians.

The legal custodian was unable to provide an alternative placement resource for the child. The child is diagnosed with ODD, PTSD, Adjustment DX, reactive attachment DX and suicidal thoughts. The child was prescribed the

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following medications Prozac 10mg and adderal [sic] 40 mg.

The legal custodian reported the child left the home several times over the weekend and the injuries were sustained.
The legal custodian failed to provide proper supervision.

(Emphasis added.) These allegations encompass the language reflected in the statutory definition of dependency—specifically, that respondent-mother failed “to provide for [Kirk’s] care or supervision and lacks an appropriate alternative child care arrangement.” N.C. Gen. Stat. § 7B-101(9). Moreover, the first sentence of the trial court’s order entering stipulations for adjudication provides: “This matter coming on to be heard before the undersigned judge [], on the Durham County Department of Social Services (DSS) *petition alleging abuse, neglect and dependency.*” (Emphasis added.) The record shows that respondent-mother had adequate notice that dependency would be at issue during the adjudication phase of the proceedings.

B. Adjudication of Abuse

[2] Respondent-mother next argues the trial court erred in adjudicating Kirk an abused juvenile because the court’s findings of fact do not support its conclusions that Kirk was abused.

We review a trial court’s adjudication order “to determine ‘(1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact.’” *In re T.H.T.*, 185 N.C. App. 337, 343, 648 S.E.2d 519, 523 (2007) (quoting *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000)), *aff’d as modified*, 362 N.C. 446, 665 S.E.2d 54 (2008). “If such evidence exists, the findings of the trial court are binding on appeal, even if the evidence would support a finding to the contrary.” *Id.* (citation omitted). Unchallenged findings of fact are deemed supported by sufficient evidence and are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). “The trial court’s ‘conclusions of law are reviewable *de novo* on appeal.’” *In re D.H.*, 177 N.C. App. 700, 703, 629 S.E.2d 920, 922 (2006) (quoting *Starco, Inc. v. AMG Bonding & Ins. Servs.*, 124 N.C. App. 332, 336, 477 S.E.2d 211, 215 (1996)).

Respondent-mother contends that the evidence of abuse did not meet the clear and convincing standard. She argues that the trial court’s findings of fact and conclusion of law stating that respondents’ failure to properly supervise Kirk and maintain his medication led to a risk of injury would support neglect, not abuse.

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An “abused juvenile” is defined in relevant part as

[a]ny juvenile less than 18 years of age whose parent, guardian, custodian, or caretaker:

- a. Inflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means;
- b. Creates or allows to be created a substantial risk of serious physical injury to the juvenile by other than accidental means

N.C. Gen. Stat. § 7B-101(1) (2015).

The trial court concluded that Kirk was abused in that respondents “create[d] or allow[ed] to be created a substantial risk of serious physical injury to the juvenile by other than accidental means,” and that respondents “inflict[ed] or allow[ed] to be inflicted on the juvenile serious physical injury by other than accidental means.” In support of its conclusions, the trial court made the following findings of fact relevant to abuse:

14. From February 21, 2012 to November 9, 2015, Durham DSS received a total of fifteen (15) reports of abuse or neglect regarding the child

. . . .

13. [sic] Since being placed in [respondent-mother’s] home, [Kirk] has been placed in a kinship placement from September 26, 2013 to October 7, 2013; a therapeutic foster home from October 23, 2013 to March 31, 2014; and the Wright School from February 2, 2015 to September 10, 2015. The child experienced no substantial injuries in any of the placements outside of the parents’ home.

. . . .

16. At various times, [Kirk]’s medication regimen has been: Adderall since 2010 for ADHD, ceased when placed with [respondents]; restarted Adderall XR 40mg daily in 2012, and from 2/2015 - 5/2015 he was in residential care at the Wright School where Fluoxetine 10mg daily was added. While at Wright School, [Kirk] was taken off of Depakote and was given Celexa. When discharged from Wright School, [Kirk] was being weaned off of Celexa and Prozac because of stomach pain. [Kirk] was on Adderall

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and Prozac at home until the parents let prescription for Prozac lapse on October 29, 2015.

17. The child has had various diagnoses over time, including but not limited to Reactive Attachment Disorder (RAD), PTSD, ADHD, ODD, Adjustment Disorder, and Disruptive Behavior.

18. Durham DSS received a report of abuse on November 9, 2015, stating that: The child has “black and bruising” around the left eye, the child has bruising around the lips, scratches on the bridge of the nose, and below the lips, the child’s right pointer finger is swollen from the knuckle to the tip and the side of the fingers on the right hand are punctured. The reporter says that the child is prescribed Adderall and was prescribed Prozac while in the Wright School. The reporter says that upon the child’s discharge from the Wright School the parents did not seek a psychiatrist to manage the child’s prescriptions and the child has been out of the medications for approximately two weeks. The reporter says that the mother says that the father will have the prescriptions filled. The reporter says that when the child is not taking the Prozac he is irritable and cries. He was without the Prozac from October 30, 2015, until November 10, 2015, at a minimum.

19. At the direction of Durham DSS, the parents took the child to the Duke ER the night of November 9, 2015, because of the injury to the finger. The orthopedic consult found “a moderately displaced fracture of the middle phalanx of the index finger. Minimal clinical deformity and neurovascularly intact. The doctors were unable to determine injury mechanism or age of fracture from x-rays or exam. Being worked up for NAT [non-accidental trauma] due to conflicting stories and bruised chest and eyes.” The child received an ED psychiatric evaluation at that time.

....

25. The CME and Dr. Knutson concluded that the child’s injuries were not self-inflicted.

26. The discharge recommendations from the Wright School were not followed by the parents.

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27. On November 13, 2015, the child had two black eyes, a fractured finger, bruising around his lips, scratches across his nose and a puncture wound on [his] finger. Various conflicting explanations were given for these injuries.

28. It is the recommended and customary practice of CPS investigators to seek out and review prior CPS reports and the investigative records for same. Social Worker Pam Stanton did so in [Kirk's] case, reviewing records of the CPS reports described in paragraph 12 above, and examining photographs of prior injuries found within those records. The patterns of conduct evident in the prior reports were duly considered in DSS's decision to substantiate physical abuse in its most recent investigation. The social worker and her superiors also relied on statements from mother and information gathered since November 15, 2015, the records of the Wright School, and the 2013 and 2015 CANMEC reports, in its substantiation.

29. This Court does not need to determine what is or is not in the parents' hearts or whether or not they love the child. The Court would like to believe they do and have become frustrated in their efforts. However, they are not capable of parenting this child in an appropriate manner. There are too many reports, whether the reports are looked at in isolation or looking at the totality of this child's experience. Because of his emotional difficulties, he is a difficult child to parent, and it appears he did not meet their expectations; and they are unable to meet his needs for appropriate discipline, or emotional and medical nurturing. Perhaps, he needs them to be hypervigilant, and they should be, because of what appears to be a pattern of injuries any conscientious parent would take into account and have more supervision. Given their work schedules and the creation of their own family perhaps they do not have the time or capacity to do what is needed for [Kirk]. The extent of his injuries and the lack of reasonable explanation for them creates a condition which is likely to lead to serious physical injury. While the medical professional is saying more likely than not, the Court believes that the totality of the circumstances is clear and convincing.

30. To make sure that he does not hurt himself, accidentally or deliberately, the parents have a duty to take proper

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precautions. The Court received and credits the testimony of Dr. Herold that children with emotional difficulties who cut and jab themselves do so because the body provides a release of dopamine which has a calming effect. The injuries noted in [Kirk] are not of the kind typically self-inflicted by children seeking this dopamine release. Dr. Herold explained injuries are also possible from regular childhood activities and when children misjudge their capabilities and that this is not self-harm for the purposes of our evaluation.

31. Various agencies and professionals have attempted to support [respondents] with parenting tools, and sometimes our ways of learning are difficult to change. The belt loop marks from the past are inappropriate.

32. [Respondent-mother] testified that she no longer physically disciplines [Kirk] for fear of getting in trouble. When asked if she resented the frequent CPS reports concerning her family, she stated that they had resulted in a situation in which she had in her home “a child I can’t discipline[.]” Physical punishment has diminishing returns. You cannot beat incorrect behavior out of a child. It is unfortunate that she does not recognize this.

33. The parents are incapable of learning correct discipline and care at this time. Unless they acknowledge their role in causing this child physical and emotional harm, accept him and his special needs, and commit to the hard work necessary to safely meet those needs, they will likely continue to be unable to parent this child.

Respondent-mother challenges Findings of Fact Nos. 25, 27, and 29 as not supported by the evidence. We address each in turn.

Respondent-mother first challenges Finding of Fact No. 25, in which the court found that the child medical exam (CME) and psychiatrist, Dr. Katherine Hobbs Knutson, concluded that Kirk’s injuries were not self-inflicted, as not supported by the evidence. Indeed, neither the CANMEC report nor Dr. Knutson specifically concluded that the injuries presented by Kirk were not self-inflicted. Rather, the CANMEC report and Dr. Knutson expressed concern that Kirk was physically abused because his injuries were not consistent with the typical self-injury behavior of cutting, burning, pinching or hitting, and that it would be rare to cause the extent of physical injury presented by Kirk by hitting himself. The

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report and Dr. Knutson then concluded that it was “highly probable” that Kirk was physically abused. During the hearing, Dr. Herold testified that “[p]robable is one step below clear and one step above suspicious,” and that she could not “say with 100 percent certainty” that Kirk was physically abused. Because the CANMEC report and Dr. Knutson did not definitively conclude that the injuries were not self-inflicted, but only that they were not consistent with typical self-injurious behavior, we hold Finding of Fact No. 25 is not supported by the evidence.

Respondent-mother challenges the portions of Findings of Fact Nos. 27 and 29 in which the court found that conflicting explanations were given for Kirk’s injuries. Respondent-mother argues this finding is not supported by the evidence because once Kirk stated that he hit himself in the eye and caused the bruises, he never wavered from this explanation. Respondent-mother contends that the alleged inconsistencies in the CANMEC report were exaggerated and inaccurate. However, Dr. Herold testified at the hearing that Kirk gave multiple histories for the injuries, including that he was hit by a rake, that he was wrestling with his father, that he was doing cartwheels, that he dropped a weight on his finger, and that he did it to himself.

Stanton also testified at the hearing that Kirk offered multiple explanations for the injury to his finger, including someone stepping on it and playing with a weight, and that Kirk initially said he did not know what happened to his eye, then said he was hit with a rake, and finally stated that he hit himself in the face. In the Center for Child and Family Health report, admitted into evidence at the hearing, the clinician noted that during her interview with respondent-mother in December 2015, respondent-mother “asserted that [Kirk] gave several stories [for his injuries] including a rake hurting him, a friend hurt him, and that he had done it himself because he was worried about being in trouble when asked about how he had hurt his eye.”

Further, the CANMEC report indicates that respondent-mother told the clinician that “[w]hen the DSS worker came, [Kirk] kept changing his story.” Dr. Herold also concluded in the CANMEC report:

The histories surrounding [Kirk’s] injuries have been inconsistent. The histories have ranged from dropping a weight on his finger, to doing cart wheels, to someone stepping on his finger. With regards to the bruises on his eyes, histories have included being hit by a friend [], hitting himself, and getting hit with a rake. When asked about the large bruise on his chest, [Kirk] reported not knowing

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it was there and not knowing how he sustained it. He then reported that he hit himself in the chest as well as him wrestling with his father.

This is competent evidence to support the trial court's findings that Kirk gave inconsistent explanations for his injuries.

Respondent-mother also challenges the portion of Finding of Fact No. 29, in which the court found: "The extent of his injuries and the lack of reasonable explanation for them creates a condition which is likely to lead to serious physical injury. While the medical professional is saying more likely than not, the Court believes that the totality of the circumstances is clear and convincing." Respondent-mother argues that this finding is not supported by the evidence because the evidence supports only a conclusion that it was less than clear that Kirk had been abused. Respondent-mother also challenges Conclusion of Law No. 2, in which the court concluded that the experts were "being cautious" in their assessments that it was only "highly probable" Kirk was physically abused.

The experts based their conclusions that Kirk was physically abused on the extent of the unexplained injuries and their belief that Kirk could not have caused such injuries to himself. However, the trial court appears to base its conclusion that Kirk was abused, in part, on respondents allowing Kirk to cause the injuries to himself. The trial court's findings support this conclusion.

Respondent-mother stipulated, and the trial court found, that she allowed Kirk's Prozac prescription to lapse for a period of time, and respondent-mother admitted to the examining doctors that she believed Kirk's lack of medication caused his behavior problems. The trial court also found that respondents did not follow up with a psychiatrist after his discharge from the Wright School as recommended, and failed to properly supervise Kirk "[t]o make sure that he does not hurt himself." These findings show that despite being aware of Kirk's mental health and behavior issues, respondents failed to provide adequate supervision and properly maintain Kirk's medication which caused his unbalanced behavior in early November. Even if inflicted by Kirk on himself, the injuries were nevertheless the result of physical harm "by other than accidental means" that respondents allowed to occur due to their failure to maintain Kirk's medication and provide adequate supervision to meet Kirk's special needs.

The court also found that Kirk did not experience any substantial injuries in any of the placements outside of respondents' home. This

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finding shows that Kirk's other placements were able to provide proper supervision and prevent Kirk from causing any self-harm. It was only in respondents' care that Kirk was able to cause significant injury to himself. Therefore, the trial court's findings support the conclusions that Kirk was abused in that respondents created a substantial risk of physical injury to Kirk by other than accidental means, and that respondents inflicted or allowed to be inflicted on Kirk serious physical injury by other than accidental means.

C. Adjudication of Neglect

[3] Finally, respondent-mother argues the trial court erred in adjudicating Kirk neglected because the evidence and findings of fact did not support such a conclusion. We disagree.

A "neglected juvenile" is defined in relevant part as

[a] juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare

N.C. Gen. Stat. § 7B-101(15) (2015).

Respondent-mother first challenges Finding of Fact No. 26, in which the court found that respondents did not follow the discharge recommendations from the Wright School. However, the DSS social worker testified that part of Kirk's discharge plan from the Wright School recommended obtaining a psychiatrist for Kirk, which respondents did not do. As a result, Kirk did not have a doctor to refill his Prozac prescription, and the prescription lapsed for nearly two weeks. This is competent evidence to support the trial court's finding.

Respondent-mother also challenges the trial court's Finding of Fact No. 32, in which it found that respondent-mother thought the frequent CPS reports resulted in her having a child in her home that she could not discipline, and that "it is unfortunate that [respondent-mother] does not recognize" that "[y]ou cannot beat incorrect behavior out of a child." However, because we deem this finding unnecessary to support the adjudication of neglect, we need not address this challenge as any error would not constitute reversible error. *See In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240 (2006) ("When . . . ample other findings of fact support an adjudication of neglect, erroneous findings unnecessary to the determination do not constitute reversible error." (citation omitted)).

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The remaining findings are sufficient to support the trial court's conclusion that Kirk is neglected. The trial court found that respondent-mother is "unable to meet [Kirk's] needs for appropriate discipline, or emotional and medical nurturing[,]" did not provide Kirk proper supervision to deal with his emotional difficulties and behavior issues, did not follow the discharge recommendations from the Wright School recommending Kirk see a psychiatrist, and allowed Kirk's prescription for Prozac to lapse for a period of two weeks. Dr. Herold testified at the hearing that "Prozac is not a medication that you want to just stop" and that doing so could cause side effects. These findings show that respondent-mother failed to provide proper supervision for Kirk and failed to keep his medication current.

Additionally, in her brief respondent-mother admitted that the trial court's Findings of Fact Nos. 29–30 and 32–33 "tracked the definition of neglect" while arguing that they did not support an adjudication of abuse. We hold the trial court's findings support its conclusion that Kirk is a neglected juvenile in that respondents failed to provide proper supervision for Kirk.

III. Conclusion

For the reasons stated above, we affirm the trial court's adjudications of abuse, neglect, and dependency. Respondent-mother has not raised any issues on appeal pertaining to the disposition order.

AFFIRMED.

Judges HUNTER, JR. and ZACHARY concur.

IN RE M.B.

[253 N.C. App. 437 (2017)]

IN THE MATTER OF M.B.

No. COA16-1165

Filed 16 May 2017

1. Appeal and Error—mootness—requirements of Interstate Compact on Placement of Children—guardian returned to North Carolina

Although respondent mother argued in a child guardianship case that the trial court erred by appointing the paternal great grandmother as the minor child's guardian without first complying with the requirements of the Interstate Compact on the Placement of Children (ICPC), the issue of the applicability of the ICPC was rendered moot by the great grandmother's return to North Carolina. Respondent failed to show an exception to the mootness doctrine.

2. Guardian and Ward—parental rights—visitation suspended until mental health stabilized

The trial court did not err by allegedly failing to designate what parental rights, if any, respondent mother retained following the establishment of the minor child's guardianship. A parent's rights and responsibilities, apart from visitation, are lost if the order does not otherwise provide. The trial court's order specifically provided that respondent's visitation with the minor child was suspended until she showed that her mental health stabilized.

Appeal by respondent-mother from order signed 29 August 2016¹ by Judge William A. Marsh, III in Durham County District Court. Heard in the Court of Appeals 3 May 2017.

Senior Assistant Durham County Attorney Robin K. Martinek for petitioner-appellee Durham County Department of Social Services.

Miller & Audino, LLP, by Jeffrey L. Miller, for respondent-appellant mother.

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

1. The trial court signed the order on 26 August 2016; however, the file stamp is illegible and, as a result, we cannot determine when the order was formally entered.

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[253 N.C. App. 437 (2017)]

ZACHARY, Judge.

Ms. E.B. (“respondent”) appeals from an order establishing a guardianship for her minor child M.B. (“Max”).² We affirm.

I. Background

The Durham County Department of Social Services (“DSS”) initiated the underlying juvenile case on 10 December 2012, when it obtained non-secure custody of Max and filed a petition alleging that he was a neglected and dependent juvenile. The trial court adjudicated Max to be a dependent juvenile by order entered 16 January 2013. In its disposition order entered 15 March 2013, the trial court continued custody of Max with DSS, granted respondent weekly supervised visitation with Max, and ordered respondent to: (1) obtain substance abuse and mental health evaluations and follow any recommendations; (2) establish and maintain mental health services and comply with all recommendations; (3) submit to testing for Huntington’s disease; (4) obtain stable housing and a stable source of income; and (5) participate in a parenting program. *In re M.B.*, ___ N.C. App. ___, 782 S.E.2d 785 (2016) (unpublished) (“*M.B. I*”)

The court initially set the permanent plan for Max as reunification with a parent, but respondent’s mental health deteriorated and she failed to comply with the trial court’s orders. *See M.B. I*. On 3 April 2014, the trial court appointed a guardian ad litem (“GAL”) for respondent, finding that she lacked sufficient capacity to proceed on her own behalf. In an order entered 28 May 2014, the court ceased reunification efforts with respondent and changed the permanent plan for Max to custody with Ms. J.M. (“Ms. Metz”), his paternal great-grandmother, with an alternative plan of reunification with respondent. Max has lived in the home of Ms. Metz “continuously since June 6, 2014, during which time [Ms. Metz] has been both a placement provider and a guardian of the child.” By order entered 15 December 2014, the trial court changed Max’s permanent plan to guardianship with Ms. Metz, appointed Ms. Metz as his guardian, and suspended respondent’s visitation until she could show that “her mental health has stabilized.”

Respondent attempted to appeal from the trial court’s 15 December 2014 order, but the trial court dismissed her appeal. By order entered 28 May 2015, this Court issued a writ of certiorari to review both the 15 December 2014 permanency planning review order and the order dismissing respondent’s appeal. In our opinion in *M.B. I*, this Court

2. We have used pseudonyms to protect the juvenile’s identity and for ease of reading.

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affirmed the trial court's order dismissing respondent's appeal of right, but vacated and remanded the trial court's permanency planning order because the court had failed to verify that Ms. Metz had adequate financial resources to care for Max.

On 8 August 2016, the trial court conducted another permanency planning review hearing, wherein it considered further evidence of Ms. Metz's financial ability to care for Max. On 26 August 2016, the trial court signed an order appointing Ms. Metz as Max's guardian. In its order, the court found that Ms. Metz, Max, and other members of Ms. Metz's family were living in Cleves, Ohio. The court further found that Ms. Metz had adequate resources to care for Max and that she understood the legal rights and responsibilities she would have as Max's guardian. The court directed respondent to participate in services recommended by DSS, suspended respondent's visitation with Max until she showed to the court that her mental health had stabilized, ceased further reviews in the juvenile case, and released DSS, Max's GAL, and the parties' counsel of further duties. Within a month of the entry of this order, Ms. Metz moved back to Durham, North Carolina. Accordingly, when respondent filed a notice of appeal, she served it on Ms. Metz at her address in Durham, North Carolina.

II. Interstate Compact on the Placement of Children

[1] Respondent first argues that the trial court erred by appointing Ms. Metz as Max's guardian without first complying with the requirements of the Interstate Compact on the Placement of Children ("ICPC" or "Compact"). Respondent contends that because Ms. Metz "was a resident of Ohio at the time" of the entry of the permanency planning order, the trial court's order must be "reversed and vacated, and this matter should be remanded for compliance with the ICPC[.]" We conclude that this argument has been rendered moot by Ms. Metz's return to North Carolina.

An issue "is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy. Black's Law Dictionary 1008 (6th ed. 1990). 'Courts will not entertain or proceed with a cause merely to determine abstract propositions of law.' " *Roberts v. Madison Cty. Realtors Ass'n*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996) (quoting *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978)). "It is well-established that 'courts have no jurisdiction to determine matters purely speculative, enter anticipatory judgments, declare social status, deal with theoretical problems, give advisory opinions, answer moot questions, adjudicate

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academic matters, provide for contingencies which may hereafter rise, or give abstract opinions.’ ” *In re Accutane Litig.*, 233 N.C. App. 319, 326, 758 S.E.2d 13, 19 (2014) (quoting *Baxter v. Jones*, 283 N.C. 327, 332, 196 S.E.2d 193, 196 (1973)). For example, in *In re Stratton*, 159 N.C. App. 461, 583 S.E.2d 323, *appeal dismissed*, 357 N.C. 506, 588 S.E.2d 472 (2003), the respondent appealed from an adjudication of neglect and dependency. During the pendency of the appeal, respondent’s parental rights to the child were terminated. This Court dismissed the respondent’s appeal as moot, holding that the “questions raised by [respondent] on this appeal are now academic given [the trial court’s] order terminating his parental rights.” *Stratton*, 159 N.C. App. at 463, 583 S.E.2d at 324.

In the present case, appellee DSS contends that we should dismiss as moot respondent’s argument that the trial court erred by failing to comply with the ICPC prior to designating Ms. Metz as Max’s guardian. DSS argues that because “the Guardian has moved back to North Carolina, there is no longer an issue of controversy related to the ICPC.” Respondent has requested that this case be remanded for “for further proceedings consistent with the ICPC.” We agree with DSS that “[s]ince the ICPC no longer applies, there is no hearing for the [trial court] to conduct in accordance with the ICPC.”

We note that respondent’s appeal on this issue is premised on the fact that “[Ms. Metz] was a resident of Ohio *at the time*” that the permanency planning order was entered. (emphasis added). At no point in her appellate brief does respondent contend that Ms. Metz continues to reside in Ohio, and respondent has not disputed DSS’s assertion that Ms. Metz no longer lives in Ohio. Moreover, review of the record shows that respondent served her notice of appeal on Ms. Metz at 606 Hugo Street, Durham, North Carolina, 27704. Thus, respondent clearly is aware that Ms. Metz returned to North Carolina shortly after the entry of the order from which she appeals. In addition, respondent does not argue that the facts of this case fall within an exception to the mootness doctrine. We conclude that the issue of the applicability of the ICPC has been rendered moot by Ms. Metz’s return to North Carolina. Accordingly, we do not address this issue.

III. Parental Rights Retained by Respondent

[2] Respondent also argues that the trial court erred in failing to designate what parental rights, if any, she retained following the establishment of the guardianship. Respondent contends that the trial court failed to comply with the requirements of N.C. Gen. Stat. § 7B-906.1(e)(2) (2015), which provides that:

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(e) At any permanency planning hearing where the juvenile is not placed with a parent, the court shall additionally consider the following criteria and make written findings regarding those that are relevant:

. . .

(2) Where the juvenile's placement with a parent is unlikely within six months, whether legal guardianship or custody with a relative or some other suitable person should be established and, if so, the rights and responsibilities that should remain with the parents.

On appeal, respondent asserts that the trial court was required to make findings about her rights in regard to the following:

[A]mong the intended rights for consideration and designation by the court are: (1) the right to attend or know about health care procedures for Max; (2) the right to communicate with the guardian about Max; (3) the right to attend special events in which Max was a participant; (4) the right to know about changes in Max's address or custody; (5) the right to know about Max's illnesses and prescribed treatments; (6) the right to know about Max's progress in school; and, (7) the right to send gifts for Christmas and birthdays.

Respondent has not cited any authority or offered any legal argument in support of her assertion that the rights identified by respondent are "among the intended rights for consideration and designation by the court." Nor has respondent cited any authority holding, as respondent appears to contend, that the trial court was required to make specific findings about every right that respondent might possibly retain. Respondent asserts that N.C. Gen. Stat. § 7B-906.1(e)(2) "requires the lower court to establish the rights and responsibilities" that remain with a respondent following the establishment of a guardianship, and cites *In re R.A.H.*, 182 N.C. App. 52, 641 S.E.2d 404 (2007), for the proposition that "failure to make findings about these rights is reversible error." *R.A.H.* did not, however, articulate a general rule on the extent to which a trial court is required to address specified rights that a parent might retain after guardianship is established. In *R.A.H.* the record showed that the trial court had placed responsibility for determining the appellant's visitation rights with the minor child's guardian. We noted that the trial court may not delegate its responsibility for awarding visitation and remanded "on that issue to the trial court for clarification[.]" *R.A.H.*, 182

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N.C. App. at 61, 641 S.E.2d at 410. *R.A.H.* does not support respondent's contention that the trial court was required to make extensive findings on a number of possible "rights" of a parent. *See also In re T.R.M.*, 188 N.C. App. 773, 780, 656 S.E.2d 626, 631 (2008) (holding under identical language of a prior statute, N.C. Gen. Stat. § 7B-907(b)(2) (2007), that in granting guardianship of a child to the child's grandparents, the trial court sufficiently addressed the respondent-mother's rights and responsibilities "by providing her visitation rights and clear guidance as to the limitations upon those visitation rights").

Respondent would append to N.C. Gen. Stat. § 7B-906.1(e)(2) an additional requirement that a trial court make findings that constitute individual decisions on whether a parent retains every right or responsibility the parent had prior to the grant of custody or guardianship. We conclude that when a child is placed in the custody or guardianship of another person, the parent's rights and responsibilities, apart from visitation, are lost if the trial court's order does not otherwise provide.

Here, the trial court's order specifically provided that respondent's visitation with Max shall remain suspended until she shows that her mental health has stabilized. The court did not list any other right or responsibility that respondent retained to Max, and thus she retained none. Accordingly, we find the trial court complied with the requirements of N.C. Gen. Stat. § 7B-906.1(e)(2), and we overrule this argument.

Respondent does not otherwise challenge the trial court's order granting guardianship of Max to Ms. Metz, and we affirm the order.

AFFIRMED.

Judges ELMORE and HUNTER, JR. concur.

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IN THE MATTER OF T.K.

No. COA16-1047

Filed 16 May 2017

**Jurisdiction—subject matter jurisdiction—juvenile delinquency
—juvenile court counselor signature—approved for filing
language**

The trial court erred by adjudicating a juvenile as delinquent where there was no subject matter jurisdiction. The second petition alleging the juvenile delinquent lacked the requisite signature and “Approved for Filing” language from the juvenile court counselor.

Judge STROUD concurring.

Appeal by Juvenile-Appellant from orders entered 26 May 2016 by Judge Les Turner in Wayne County District Court. Heard in the Court of Appeals 7 March 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Gerald K. Robbins, for the State.

Appellate Defendant Glenn Gerding, by Assistant Appellate Defender Aaron Thomas Johnson, for Juvenile-Appellant.

INMAN, Judge.

The omissions of a signature by a juvenile court counselor, or other appropriate representative of the State, and the words “Approved for Filing” in a petition in a juvenile delinquency case amount to a jurisdictional error that precludes the district court’s authority to consider the matter contained within the petition.

T.K. (Thomas),¹ Juvenile-Appellant, appeals from orders adjudicating him delinquent and imposing a level 2 disposition placing him on twelve months of probation and requiring him to perform 30 hours of community service. Thomas argues that because the petition lacked the requisite signature and “Approved for Filing” language from the juvenile court counselor, the district court lacked jurisdiction to hear the matter.

1. A pseudonym is used to protect the identity of the juvenile.

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After careful consideration, we agree and vacate the trial court's orders and dismiss the petition.

Facts and Procedural Background

At the beginning of the school day on Saint Patrick's Day 2016, before the start of first period, a behavioral specialist at Goldsboro High School, Tamoris Wooten, stood watch in the hallway as the students headed to class. Thomas, walking away from a "ruckus" down the hall, approached Wooten, told him, "I'm going to stand right here," and stated "Sir, I'm not trying to get in trouble this morning." Before Wooten could ask Thomas any questions about what he meant, a second student, Brad,² walked up to Thomas, said a few words, and punched Thomas in the face. Thomas dropped to the floor.

Thomas tried unsuccessfully to climb to his feet while Brad continued punching him. A crowd of around 25 to 30 students gathered around them. Wooten called for staff assistance. Thomas "put his arm up to get [Brad] off of him," and threw one or two punches. Another male staff member helped Wooten separate the boys and Wooten walked with Thomas away from the fight.

As Wooten led Thomas away down the hall to his office, Thomas uttered what was later described as "profanity." Wooten instructed Thomas to stop cursing and to calm down. Thomas stopped cursing by the time they reached Wooten's office and Wooten left him in his office to calm down.

On 26 April 2016, Officer Nicki Artis of the Goldsboro Police Department submitted a complaint with the Clerk of Wayne County Superior Court alleging that Thomas was delinquent because he committed a simple affray, a Class 2 misdemeanor, in violation of N.C. Gen. Stat. § 14-33(a) at his school on 17 March 2016. On 5 May 2016, a juvenile court counselor signed the complaint and marked it "Approved for Filing" as a petition. The petition was then filed with the Wayne County District Court and the matter was scheduled for hearing on 26 May 2016.

On the day of the hearing, Officer Artis signed a second petition related to the same incident, alleging that Thomas was delinquent because he committed disorderly conduct at school. This second petition alleged that Thomas had disturbed the discipline at Goldsboro High School by "arguing loudly in a Goldsboro High School hallway with

2. A pseudonym is used to protect the identity of the juvenile.

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another student, [Brad], which ultimately led to a physical altercation” This second petition was not signed by a court counselor, nor was it marked as “Approved for Filing,” but it was nevertheless filed with the district court.

During the hearing, the State dismissed the simply affray charge and proceeded only on the disorderly conduct petition. The trial court adjudicated Thomas delinquent for disorderly conduct, imposed a Level 2 disposition, ordered Thomas to be placed on a 12 month probation, and ordered him to perform 30 hours of community service.

Thomas timely appealed.

Analysis

Before a court can address any matter on the merits, it must have jurisdiction. Thomas asserts that the trial court lacked subject matter jurisdiction to consider the second petition filed against him because the juvenile court counselor failed to sign the petition and mark whether the petition was “Approved for Filing” as required by N.C. Gen. Stat. § 7B-1703. We agree.

“A universal principle as old as the law is that the proceedings of a court without jurisdiction of the subject matter are a nullity.” *Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E.2d 806, 808 (1964) (citation omitted). “Subject matter jurisdiction is the indispensable foundation upon which valid judicial decisions rest, and in its absence a court has no power to act[.]” *In re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d 787, 790 (2006) (citations omitted).

“Our General Assembly ‘within constitutional limitations, can fix and circumscribe the jurisdiction of the courts of this State.’ ” *Id.* (quoting *Bullington v. Angel*, 220 N.C. 18, 20, 16 S.E.2d 411, 412 (1941)). “Where jurisdiction is statutory and the Legislature requires the Court to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the Court to certain limitations, an act of the Court beyond these limits is in excess of its jurisdiction.” *Eudy v. Eudy*, 288 N.C. 71, 75, 215 S.E.2d 782, 785 (1975), *overruled on other grounds by Quick v. Quick*, 305 N.C. 446, 290 S.E.2d 653 (1982). “[W]here it is required by statute that [a] petition be signed and verified, these essential requisites must be complied with before the petition can be used for legal purposes.” *In re Green*, 67 N.C. App. 501, 503, 313 S.E.2d 193, 194-95 (1984) (citation omitted).

The General Assembly, by enacting the Juvenile Code, imposed specific requirements that must be satisfied before a district court obtains

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jurisdiction in juvenile cases. For a petition alleging a juvenile delinquent, the Juvenile Code states that

[e]xcept as provided in [N.C. Gen. Stat. §] 7B-1706, if the juvenile court counselor determines that a complaint should be filed as a petition, the counselor shall file the petition as soon as practicable, but in any event within 15 days after the complaint is received, with an extension for a maximum of 15 additional days at the discretion of the chief court counselor. The juvenile court counselor shall assist the complainant when necessary with the preparation and filing of the petition, *shall include on it the date and the words “Approved for Filing”, shall sign it*, and shall transmit it to the clerk of superior court.

N.C. Gen. Stat. § 7B-1703 (2015) (emphasis added). This Court has stated that “[w]e cannot overemphasize the importance of the intake counselor’s evaluation in cases involving juveniles alleged to be delinquent or undisciplined.” *In re Register*, 84 N.C. App. 336, 346, 352 S.E.2d 889, 894-95 (1987). The role of the counselor is “to ensure that the needs and limitations of the juveniles and the concern for the protection of public safety have been objectively balanced before a juvenile petition is filed initiating court action.” *Id.* at 346, 352 S.E.2d at 895. Our courts have not previously addressed whether the signature and the “Approved for Filing” designation on a juvenile petition are prerequisites to the district court’s jurisdiction.

In *In re D.S.*, 364 N.C. 184, 194, 694 S.E.2d 758, 764 (2010), the North Carolina Supreme Court held that the Legislature did not intend the time deadlines imposed by N.C. Gen. Stat. § 7B-1703 to “function as [a] prerequisite[] for district court jurisdiction over allegedly delinquent juveniles.” The Court looked to the Legislature’s intent in imposing the deadline at issue in that case. *Id.* at 192, 694 S.E.2d at 763. The Court further noted that its decision was “consistent with the conclusions reached in prior North Carolina appellate decisions that have addressed Chapter 7B timeline requirements and jurisdiction, particularly in the context of abuse, neglect, and dependency and termination of parental rights.” *Id.* at 194, 694 S.E.2d at 764 (citations omitted). *In re D.S.* does not address whether the statute’s requirements for signature and approval for filing by a juvenile court counselor or other appropriate representative of the State are prerequisites to district court jurisdiction.

In the absence of precedent on the precise issue before us, we turn to analogous case authority for guidance. In a case involving a petition

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to adjudicate a juvenile as abused or neglected, this Court held that “the failure of the petitioner to sign and verify the petition before an official authorized to administer oaths rendered the petition fatally deficient and inoperative to invoke the jurisdiction of the court over the subject matter.” *In re Green*, 67 N.C. App. 504, 313 S.E.2d at 195 (vacating the trial court’s denial of a motion to dismiss because “the trial court lacked jurisdiction over the subject matter”). In *In re Green*, the Juvenile Code required the petition alleging abuse and neglect to be signed and verified pursuant to N.C. Gen. Stat. § 7A-544 and N.C. Gen. Stat. § 7A-561(b).³ *Id.* Because the petition lacked the necessary signatures and verification, our Court concluded that the trial court necessarily lacked jurisdiction over the matter. *Id.*

The State urges us to extend the holding in *In re D.S.* to recognize failures to comply with the signature and “Approved for Filing” requirements for a petition alleging delinquency as non-jurisdictional errors. Such an extension would conflict with the purpose of the Juvenile Code. Section 7B-1500 articulates the following purposes and policies underlying the statutes related to delinquent juveniles:

- (1) To protect the public from acts of delinquency.
- (2) To deter delinquency and crime, including patterns of repeat offending:
 - a. By providing swift, effective dispositions that emphasize the juvenile offender’s accountability for the juvenile’s actions; and
 - b. By providing appropriate rehabilitative services to juveniles and their families.
- (3) *To provide an effective system of intake services for the screening and evaluation of complaints* and, in appropriate cases, where court intervention is not necessary to ensure public safety, to refer juveniles to community-based resources.
- (4) To provide uniform procedures that assure fairness and equity; that protect the constitutional rights of juveniles, parents, and victims; and that encourage the court and others involved with juvenile offenders to proceed

3. The relevant sections of N.C. Gen. Stat. § 7A have been re-codified under N.C. Gen. Stat. § 7B and are sufficiently similar for our purposes.

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with all possible speed in making and implementing determinations required by this Subchapter.

N.C. Gen. Stat. § 7B-1500 (2015) (emphasis added). The juvenile court counselor's role in signing and approving a petition for delinquency is the only indication on the face of a petition that a complaint against a juvenile has been screened and evaluated by an appropriate authority. Not unlike the signature of a Grand Jury foreperson with the indication "true bill" on an indictment sought by a prosecutor, the juvenile court counselor's signature and approval for filing on a petition reflects that the complaint has not simply been asserted, but that it has satisfied the first test of validity in the court system.

Consistent with our precedent in *In re Green*, the Supreme Court's precedent in *In re D.S.*, and the Legislature's intent in drafting the Juvenile Code, we conclude that a petition alleging delinquency that does not include the signature of a juvenile court counselor, or other appropriate representative of the State,⁴ and the language "Approved for Filing," the petition fails to invoke the trial court's jurisdiction in the subject matter.

Here, the petition alleging Thomas delinquent for disorderly conduct at school failed to include a signature from the juvenile court counselor and does not indicate whether or not it was "Approved for Filing." The trial court therefore was without jurisdiction to proceed on the merits of this petition. Because we conclude that the trial court lacked subject matter jurisdiction, we deem it unnecessary to discuss Thomas's other assignments of error.

VACATED AND DISMISSED.

Judge BRYANT concurs.

Judge STROUD concurs by separate opinion.

4. N.C. Gen. Stat. § 7B-1704 (2015) provides an alternate route for the district court's jurisdiction when a juvenile counselor denies approval of filing a petition. In such instances, the district attorney may approve the filing if the record affirmatively discloses that the juvenile counselor denied the approval. See *In re Register*, 84 N.C. App. at 343-44, 352 S.E.2d at 893. Our ruling today does not address and should not interfere with the appeal process delineated in N.C. Gen. Stat. §§ 7B-1704 or 7B-1705.

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STROUD, Judge, concurring.

I concur in the result reached by the majority, since I tend to agree that the juvenile court counselor's signature on the petition may be necessary to invoke jurisdiction, although I also note that the juvenile court counselor was present and participating in the hearing. I write separately to concur because I believe that even if the court had jurisdiction, the adjudication and disposition orders would have to be reversed. It is unusual for a concurring opinion to address an issue which perhaps need not be addressed since the adjudication is being vacated. Yet I also recognize the possibility of further appellate review and feel compelled to note other errors in this adjudication and disposition.

Mr. Tamoris Wooten, a behavioral specialist at Goldsboro High School testified that Thomas told him he had prior juvenile court involvement, but on the day of this incident, was almost done with his probation. No doubt Thomas had been encouraged during his involvement with juvenile court not to engage with other students who may cause a "ruckus" and instead to seek assistance from school personnel if problems occurred. Indeed, when a "ruckus" did occur, Thomas did exactly "the right thing" – as the lower court even noted – by going directly to Mr. Wooten to try to protect himself and avoid getting into trouble. But then, right in front of Mr. Wooten, another student punched Thomas in the face and attempted to continue punching him as he was on the ground.

After another staff member arrived and the boys were separated, Mr. Wooten began walking with Thomas to the office and "was talking to him to try to find out what was going on." Thomas said something Mr. Wooten described as profanity. Mr. Wooten could not remember any particular words or phrases Thomas used. Mr. Wooten told Thomas to stop cursing and he did. There is no evidence that anyone other than Mr. Wooten even heard Thomas, though the hallway they were walking down did have many other students in it.

Perhaps another student, instead of cursing, would have instead cried; both are noises which may attract the attention of other students or school personnel. Since we don't know what the words were, really, all we know is that he made a noise. But there is no doubt Thomas's exclamation – whatever he said – was a response to an attack by another student; it was not something initiated by Thomas with the intent to "[d]isrupt[], disturb[] or interfere[] with the teaching of students . . . or disturb[] the peace, order or discipline" of the school, which is a

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necessary element of the offense for which he was adjudicated as delinquent. N.C. Gen. Stat. § 14-288.4(a)(6) (2015).

Once Thomas had calmed down, he told Mr. Wooten that he and the other student were “in the neighborhood” and had some sort of disagreement a week or so earlier. On the morning of the incident, the issue “just started to boil back up and they were having words with each other” in the cafeteria. Thomas then sought out Mr. Wooten to avoid any trouble, and later in the office, told Mr. Wooten “he didn’t want to get in trouble because he was just coming off from being in trouble with probation and stuff.” Mr. Wooten explained what he was thinking when he was talking to Thomas, “So I’m saying, okay, here’s a kid that’s maybe trying to make the right decision. So then at that point, then I left it alone and I stepped out of the room where he was and left him.”

Though Mr. Wooten had no prior dealings with Thomas and had only been at this particular school for two days, he also testified about his role as a behavioral specialist and noted that he tries to teach students to turn to him for help:

I say, you know, ‘Walk away and let an administrator or let me know, and let us deal with those type of things instead of you guys trying to fight your battles. That’s why I’m here, and that’s why the administration is here. But you guys have got to understand’ – I say, ‘Stop trying to gain hallway cred, which means you’re trying to establish credibility with your friends in the hallway. It’s okay to walk away. That doesn’t make you a coward. That doesn’t make you, as they say, a punk. That doesn’t make you soft. It makes you smart. And if you do it this way, then the outcome could be different for you when we start to do the investigation on what discipline needs to be given out.’

Thomas did exactly that -- he walked away from the issue in the cafeteria and went to Mr. Wooten for help.

As noted by the majority, the simple affray petition was dismissed, leaving the disorderly conduct at school (“disorderly conduct”) petition which was unsigned by the court counselor. The disorderly conduct petition alleged that Thomas had violated North Carolina General Statute § 14-288.4(a)(6) by “arguing loudly in a Goldsboro High School hallway with another student, [Brad], which ultimately led to a physical altercation in the Goldsboro High School hallway[.]” We do not know from the adjudication order exactly what conduct the lower court based the adjudication upon, because the section of the form which is

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to include findings of fact for those facts “proven beyond a reasonable doubt” is entirely blank.

But upon adjudicating Thomas as delinquent, the trial court stated the reasons for adjudication, and it was based solely upon Thomas’s use of profanity:

You did everything right except one thing, close your mouth. You walked away. That’s the right thing to do. You went and found the gentleman. That was absolutely the right thing to do. This kid that came up and blindsided you and punched you, that was wrong. Putting up your arm while you were on the floor, that’s self-defense. It depends on how many punches you threw back before you crossed the line of engaging in the fight rather than self-defense, but that issue is not before me.

The main reason I adjudicated you is because you were engaging in the verbal aspect coming down the hall, and then after you were punched with the profanity. You’ve just got to be a bigger man. I know. I understand anger. I understand you might want to let it rip with profanity. You don’t want anybody talking junk to you. The gentleman said a little pride might have been involved. You did everything right except refrain from talking, the running of the mouth and then the cussing.

Ultimately Thomas was adjudicated under North Carolina General Statute § 14-288.4(a)(6) which provides:

(a) Disorderly conduct is a public disturbance intentionally caused by any person who . . .

. . . .

(6) [d]isrupts, disturbs or interferes with the teaching of students at any public or private educational institution or engages in conduct which disturbs the peace, order or discipline at any public or private educational institution or on the grounds adjacent thereto.

N.C. Gen. Stat. § 14-288.4(a)(6).

Although the petition cites only conduct *prior* to the “physical altercation” –“arguing loudly in a . . . hallway” – the lower court seemingly

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adjudicated Thomas based only on conduct which occurred *after* the altercation, his “cussing,” because there was no evidence Thomas used “profanity” or engaged in “cussing” before the physical altercation as the petition alleged. Thus, even assuming that after the altercation Thomas “cussed” loudly where many students could hear, there was also simply no evidence that by his cursing he intentionally sought to “disrupt[], disturb[], or interfere[] with the teaching of students” or that he intentionally “disturb[ed] the peace, order or discipline” of the school. Mr. Wooten was the only witness for the State and nothing in his testimony indicates Thomas used profanity or cursed for any reason other than the fact that he had just been punched in the face. Indeed, Mr. Wooten testified that Thomas was likely “cursing and making noise” due in part to adrenaline – an adrenaline rush most people would likely experience if suddenly punched in the face.

Several cases which have addressed disorderly conduct in a school demonstrate the necessity of the evidence of intentional disruption of the educational process in the school. *See generally State v. Wiggins*, 272 N.C. 147, 158 S.E.2d 37 (1967); *State v. Midgett*, 8 N.C. App. 230, 174 S.E.2d 124 (1970); *In re M.J.G.*, 234 N.C. App. 350, 759 S.E.2d 361 (2014). In *State v. Wiggins*, our Supreme Court considered convictions arising from a group picketing and marching in front of a school during the school day when classes were in progress. 272 N.C. 147, 155, 158 S.E.2d 37, 43 (1967). The evidence showed that the picketing substantially interrupted the school’s operations:

The marchers carried placards or signs. These signs were utterly meaningless except on the assumption that they related to some controversy between the defendants and the administration of the school, specifically Principal Singleton. Presumably, they were deemed by the defendants sufficient to convey some idea to students or teachers in the school. The site was the edge of a rural road running in front of the school grounds, with only two residences in the vicinity. There is nothing to indicate that the marchers intended or desired to communicate any idea whatsoever to travelers along the highway, or to any person other than students and teachers in the Southwestern High School. As a direct result of their activities, the work of the class in bricklaying was terminated because the teacher could not retain the attention of his students, and

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disorder was created in the classrooms and hallways of the school building itself.

Id.

The defendants in *Wiggins* argued that the statute under which they were convicted was too vague and indefinite to be enforced. *See id.* at 153, 158 S.E.2d at 42. The Court rejected this argument and noted that the statute was clear:

When the words ‘interrupt’ and ‘disturb’ are used in conjunction with the word ‘school,’ they mean to a person of ordinary intelligence a substantial interference with, disruption of and confusion of the operation of the school in its program of instruction and training of students there enrolled. We found no difficulty in applying this statute, in accordance with this construction, to the activities of a group of white defendants in *State v. Guthrie*, 265 N.C. 659, 144 S.E.2d 891. Obviously, the statute applies in the same manner regardless of the race of the defendant. *In State v. Ramsay*, 78 N.C. 448, in affirming a conviction for the similar offense of disturbing public worship, this Court, speaking through Smith, C.J., said:

‘It is not open to dispute whether the acts of the defendant were a disturbance in the sense that subjects him to a criminal prosecution, and that the jury was warranted in so finding, when they had the admitted effect of breaking up the congregation and frustrating altogether the purposes for which it had convened.’

Giving the words of G.S. 14—273 their plain and ordinary meaning, it is apparent that the elements of the offense punishable under this statute are: (1) Some act or course of conduct by the defendant, within or without the school; (2) an actual, material interference with, frustration of or confusion in, part or all of the program of a public or private school for the instruction or training of students enrolled therein and in attendance thereon, resulting from such act or conduct; and (3) the purpose or intent on the part of the defendant that his act or conduct have that effect.

Id. at 154, 158 S.E.2d at 42-43.

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Another case that illustrates an intentional interruption of a school is *State v. Midgett*, wherein the defendants

entered the office of the secretary while the principal, Mr. Simmons, was away from the school; the secretary knew or recognized most of the boys who were there; they informed her that ‘they were going to interrupt us that day’ and she could either leave or stay in the room, but that she could not pass in and out as she normally did; and that if she stayed she could make such telephone calls as she wished. The secretary telephoned Mr. Simmons and then went to get Mr. Hunter, who normally was in charge in Mr. Simmons’ absence. While she was gone, her room was locked, and she was not permitted to return to her office. According to the testimony, filing cabinets and tables were moved against the doors and interior windows to further bar entry.

Daniel Williams testified that he was teaching a class across the hall from the office at the time of the incident. He stated that he left that class to investigate the incident at the office and did not resume teaching that day.

Principal Simmons testified that when he returned to the school a little before 12 noon, he found that the office doors were locked and the bell system was being actuated manually from within the office. He determined that the ‘presence of persons who were not enrolled’ and ‘commotion’ necessitated the dismissal of school, and therefore he ordered the children walked to the buses and sent them home a little after noon and prior to the usual closing.

8 N.C. App. at 231, 174 S.E.2d at 126. This Court determined that this evidence showed a substantial interference with the school. *Id.* at 233-34, 174 S.E.2d at 127-28.

Here, the State has two deficiencies in its evidence: both the intention to disturb and an actual disturbance. *See* N.C. Gen. Stat. § 14-288.4(a)(6). First, there is no evidence that Thomas’s behavior – “cussing” – was intended to disturb school as his brief “cussing” was a response to being attacked. *See id.* Thomas stopped “cussing” when Mr. Wooten told him to; if his intent was to disrupt the school he likely would have gone on “cussing.” Thomas was the victim here, and thus this case stands in stark contrast to *In re M.J.G.*, where a student cursed at teachers and the disposition against him was affirmed. *Contrast In re M.J.G.*, 234 N.C.

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App. at 351-52, 759 S.E.2d at 362-63 (“The juvenile began shouting, ‘I’m tired of this f’ing school, these teachers lying on me, they’re always lying on me.’ The juvenile put his finger less than an inch away from Long’s face, ‘postured up chest to chest’ and said ‘[e]specially you you mother-f***ing b****[.]’ Thereafter, the juvenile backed Ms. Potts against a wall and ‘did the exact same thing to her.’ ”).

Second, there was no evidence of disruption or interruption of the school by Thomas’s cursing. Thomas was accompanied by Mr. Wooten, the behavioral specialist, to the office. Thomas did not take Mr. Wooten away from his work duties; helping Thomas was Mr. Wooten’s work duty. There was no evidence of involvement by any teachers, other than the one who helped to pull Thomas’s attacker off of him and the principal who dispersed students who wanted to see the “fight” Brad started when he attacked Thomas. Mr. Wooten testified that the incident occurred “as the bell rung for them to begin to go to first period” so it appears that classes had not even begun yet which is why so many students were still in the hallway. Thus, at best for the State, some students or others in the school may have heard Thomas cursing in the hall, but there is no evidence of interruption of any class or school activity. In this regard, this case is similar to *In re Eller*, in which our Supreme Court determined there was no evidence of disorderly conduct at school when the juvenile made an aggressive move toward another student and later banged on a radiator in the classroom:

Greer ma[d]e a move toward another student, who was separated by an aisle, causing the other student to dodge Greer’s move. Ms. Weant finished relating the assignment, then approached Greer and asked Greer to show her what was in Greer’s hand. Greer thereupon “willingly” and without delay gave Ms. Weant a carpenter’s nail. The other students observed the discussion and resumed their work when so requested by Ms. Weant[, and on a later date,]

. . . Greer and Eller were seated at the rear of the classroom with their peers in a single, horizontal row parallel to the rear wall situated near a radiator located on the wall. During the course of their instruction time, Greer and Eller “more than two or three times” struck the metal shroud of the radiator. Ms. Weant testified that she saw each child strike the radiator at least once. Each time contact was made, a rattling, metallic noise was produced that caused the other students to look “toward where the sound was coming from” and caused Ms. Weant

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to interrupt her lecture for fifteen to twenty seconds each time the noise was made. Ms. Weant did not intervene other than to silently stare at Greer and Eller for fifteen to twenty seconds and then resume her teaching. She did, however, report the incident to the school principal that afternoon or the following day.

331 N.C. 714, 715-16, 417 S.E.2d 479, 480–81 (1992).

The Supreme Court determined that this evidence did not support a finding of disruption of the school:

Respondents' behavior in the instant case pales in comparison to that encountered in *Wiggins* and *Midgett*, and those cases are readily distinguishable on their facts. Here, even the small classes in which respondents perpetrated their disruptive behavior were not interrupted for any appreciable length of time or in any significant way, and the students' actions merited only relatively mild intervention by their teacher. We agree with respondents that while egregious behavior such as that condemned in *Wiggins* and *Midgett* is not required to violate N.C.G.S. § 14-288.4(a)(6), more than that present in the case at bar is necessary.

Id. at 719, 417 S.E.2d at 482–83.

Thomas's behavior here "pales in comparison to that encountered in *Wiggins* and *Midgett*" and even *Eller*. *Id.* at 715-16, 417 S.E.2d at 480-81. There is no evidence that Thomas's cursing in the hall caused *any* disruption. Thus, even assuming the petition had been signed invoking jurisdiction, the adjudication and disposition orders would necessarily need to be reversed. Furthermore, as to the disposition order specifically, even the State concedes that the disposition order is in error since it has no findings whatsoever to support the disposition.

For the reasons noted above, I concur with the majority opinion vacating the adjudication and disposition orders for lack of subject matter jurisdiction, but even assuming the lower court had jurisdiction to hear this case, I would reverse since there was no evidence Thomas violated North Carolina General Statute § 14-288.4(a)(6).

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MARJORIE C. LOCKLEAR, PLAINTIFF

v.

MATTHEW S. CUMMINGS, M.D., SOUTHEASTERN REGIONAL MEDICAL CENTER,
DUKE UNIVERSITY HEALTH SYSTEM AND DUKE UNIVERSITY AFFILIATED
PHYSICIANS, INC., DEFENDANTS

No. COA16-1015

Filed 16 May 2017

1. Medical Malpractice—motion to dismiss—Rule 9(j) certification—ordinary negligence

The trial court erred by dismissing the complaint of plaintiff patient, who fell off a surgical table during surgery, against all defendants under N.C.G.S. § 1A-1, Rules 12(b)(6) and 9(j) where plaintiff's claims were for ordinary negligence and not medical malpractice. Plaintiff was not required to comply with Rule 9(j). Further, the Court of Appeals did not improperly supplement plaintiff's complaint by addressing Rule 9(j) certification since it was necessary to determine whether the trial court erred in dismissing plaintiff's complaint under Rule 9(j).

2. Process and Service—improper service—private process service—no evidence sheriff unable to fulfill duties

The trial court did not err by dismissing plaintiff patient's negligence claims against defendant hospital under N.C.G.S. § 1A-1, Rule 12(b)(5) based on improper service. Plaintiff used a private process service and there was no evidence that the sheriff was unable to fulfill the duties of a process server as required by statute.

Judge BERGER concurring in part and dissenting in part.

Appeal by Plaintiff from orders entered 2 February 2016 and 4 February 2016 by Judge James Gregory Bell in Robeson County Superior Court. Heard in the Court of Appeals 8 March 2017.

Law Offices of Walter L. Hart, IV, by Walter L. Hart, IV, for Plaintiff-Appellant.

Cranfill Sumner & Hartzog LLP, by Jaye E. Bingham-Hinch, David D. Ward, and Katherine Hilkey-Boyatt, for Defendant-Appellees Matthew S. Cummings, M.D., Duke University Health System, and Duke University Affiliated Physicians, Inc.

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Brotherton Ford Berry & Weaver, PLLC, by Robert A. Ford and Demetrius Worley Berry, for Defendant-Appellee Southeastern Regional Medical Center.

HUNTER, JR., Robert N., Judge.

Marjorie C. Locklear (“Plaintiff”) appeals from an order dismissing her complaint against Defendants Dr. Matthew Cummings, Duke University Health System, and Duke University Affiliated Physicians (collectively “Duke Defendants”) under Rule 9(j), as well as the denial of her motion to amend under Rule 15(a). Plaintiff also appeals from an order dismissing her complaint against Defendant Southeastern Regional Medical Center (“Southeastern”) under Rules 9(j) and 12(b)(5), as well as the denial of her motion to amend under Rule 15(a). After review, we reverse in part and affirm in part.

I. Factual and Procedural Background

On 30 July 2015, one day before the statute of limitations expired, Plaintiff filed a complaint against Defendants, seeking monetary damages for medical negligence. The complaint alleges the following narrative.

On 31 July 2012, Dr. Cummings performed cardiovascular surgery on Plaintiff. During surgery, Dr. Cummings failed to monitor and control Plaintiff’s body and was distracted. Additionally, he did not position himself in close proximity to Plaintiff’s body. While Plaintiff “was opened up and had surgical tools in her[,]” Plaintiff fell off of the surgical table. Plaintiff’s head and the front of her body hit the floor. As a result of the fall, Plaintiff suffered a concussion, developed double vision, injured her jaw, displayed bruises, and was “battered” down the left side of her body. Plaintiff also had “repeated” nightmares about falling off the surgical table. Duke Defendants and Defendant Southeastern acted negligently by retaining physicians, nurses, and other healthcare providers who allowed Plaintiff’s accident to occur.

On 9 September 2015, private process server, Richard Layton, served Duke Defendants by delivering Plaintiff’s civil cover sheet, summons, and complaint to Margaret Hoover, a registered agent for Duke Defendants. On 19 September 2015, Gary Smith, Jr. served Plaintiff’s summons and complaint on Dr. Cummings. Lastly, on 24 September 2015, Smith served Plaintiff’s summons and complaint on Southeastern by delivering the papers to C. Thomas Johnson, IV, Southeastern’s Chief Financial Officer.¹

1. In Smith’s affidavit, he listed Johnson as Southeastern’s registered agent.

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On 10 November 2015, Dr. Cummings and Duke Defendants filed a joint answer and motion to dismiss. Dr. Cummings and Duke Defendants denied the allegations in Plaintiff's complaint and asserted defenses under Rules 12(b)(6) and 9(j) of the North Carolina Rules of Civil Procedure.

On 23 November 2015, Southeastern filed an answer and denied Plaintiff's allegations. Southeastern moved to dismiss Plaintiff's complaint under Rules 12(b)(4), 12(b)(5), 12(b)(6), and 9(j) of the North Carolina Rules of Civil Procedure. On 29 December 2015, Johnson filed an affidavit. In the affidavit, Johnson swore he was the Chief Financial Officer of Southeastern, but not the corporation's registered agent.

On 11 January 2016, the trial court held a hearing on all the Defendants' pending motions. During argument, Plaintiff requested "leave of the Court to amend [the] complaint so that there's no controversy hereafter." Plaintiff moved under Rule 60, not Rule 15(a), because "Rule 60 . . . allows a mere clerical order – error to be corrected." Then, Plaintiff requested leave "pursuant to Rules 15(a) and 60."

On 2 February 2016, the trial court granted Dr. Cummings's and Duke Defendants' motion to dismiss pursuant to Rule 9(j) and denied Plaintiff's motion to amend under Rule 15(a). On 4 February 2016, the trial court granted Southeastern's motion to dismiss pursuant to Rules 9(j) and 12(b)(5) and denied Plaintiff's motion to amend under Rule 15(a). Plaintiff filed timely notice of appeal.

II. Standard of Review

The standard of review of a Rule 12(b)(6) motion to dismiss is *de novo*. *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (2003). Likewise, a trial court's order dismissing a complaint pursuant to Rule 9(j) is reviewed *de novo* on appeal because it is a question of law. *Barringer v. Wake Forest Univ. Baptist Med. Ctr.*, 197 N.C. App. 238, 256, 677 S.E.2d 465, 477 (2009) (citation omitted).

We review the trial court's dismissal under Rule 12(b)(5) *de novo*. *New Hanover Cty. Child Support Enforcement ex rel. Beatty v. Greenfield*, 219 N.C. App. 531, 533, 723 S.E.2d 790, 792 (2012) (citation omitted).

III. Analysis**A. Motions to Dismiss under Rule 12(b)(6) and Rule 9(j)**

[1] Plaintiff argues the trial court erred in dismissing her complaint against all the Defendants under Rule 12(b)(6) and Rule 9(j). Because

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Plaintiff's claims sound in ordinary negligence, not medical malpractice, we agree.

"In North Carolina, the distinction between a claim of medical malpractice and ordinary negligence is significant for several reasons, including that medical malpractice actions cannot be brought [without Rule 9(j) compliance]." *Gause v. New Hanover Reg'l Med. Ctr.*, ___ N.C. App. ___, ___, 795 S.E.2d 411, ___ (2016) (citing N.C. Gen. Stat. § 1A-1, Rule 9(j) (2015)).

"Whether an action is treated as a medical malpractice action or as a common law negligence action is determined by our statutes[.]" *Smith v. Serro*, 185 N.C. App. 524, 529, 648 S.E.2d 566, 569 (2007). N.C. Gen. Stat. § 90-21.11(2)(a) defines a medical malpractice action as "[a] civil action for damages for personal injury or death arising out of the furnishing or failure to furnish professional services in the performance of . . . health care by a health care provider." N.C. Gen. Stat. § 90-21.11(2)(a). "The term 'professional services' is not defined by our statutes but has been defined by the Court as 'an act or service arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual.'" *Gause*, ___ N.C. App. at ___, 795 S.E.2d at ___ (quoting *Sturgill v. Ashe Mem'l Hosp., Inc.*, 186 N.C. App. 624, 628, 652 S.E.2d 302, 305 (2007)). "Our courts have classified as medical malpractice those claims alleging injury resulting from activity that required clinical judgment and intellectual skill." *Id.* at ___, 795 S.E.2d at ___ (citation omitted). "Our courts have classified as ordinary negligence those claims alleging injury caused by acts and omissions in a medical setting that were primarily manual or physical and which did not involve a medical assessment or clinical judgment." *Id.* at ___, 795 S.E.2d at ___ (citation omitted).

In cases of a plaintiff falling, the deciding factor is whether the decisions leading up to the fall required clinical judgment and intellectual skill. Where the complaint alleges or discovery shows the fall occurred because medical personnel failed to properly use restraints, the claim sounded in medical malpractice. *Sturgill*, 186 N.C. App. at 628-30; *Alston v. Granville Health Sys.*, 221 N.C. 416, 421, 727 S.E.2d 877, 881 (2012) ("*Alston II*"). However, when a complaint alleged the plaintiff fell off a gurney in an operating room while unconscious, this Court held the claim sounded in ordinary negligence, not medical malpractice. *Alston v. Granville Health Sys.*, No. 09-1540, 2010 WL 3633738 (unpublished)

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(Sept. 21, 2010) (“*Alston I*”).² The question is whether the actions leading to the fall require specialized skill or clinical judgment. *Gause*, ___ N.C. App. at ___, 795 S.E.2d at ___ (citations omitted).

In her complaint, Plaintiff states, *inter alia*:

23. That, at all times relevant to this action, Defendant Cummings . . . held himself out to possess the special skills and knowledge possessed by other physicians practicing in the specialized field of internal medicine, cardiology, and cardiovascular surgery.

24. That the medical care and treatment rendered to Plaintiff by Defendant Cummings on July 31, 2012 has been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the North Carolina Rules of Evidence, and who is willing to testify that the medical care rendered to Plaintiff fell below the applicable standard of care.

25. That the medical care and treatment of Defendant Cummings has been reviewed by a person that Plaintiff will seek to have qualified by an expert witness under Rule 702 of the North Carolina Rules of Evidence, and who is willing to testify that the medical care rendered to Plaintiff fell below the applicable standard of care.

...

27. That the times, places, and on the occasion herein in question, Defendant Cummings was negligent, and his acts and omissions of negligence include, but are not limited to:

- a) In failing to use his best professional judgment and skill while operating on the Plaintiff;

2. In *Alston I*, this Court reversed the trial court’s dismissal of plaintiff’s complaint and held Rule 9(j) certification was not required, because plaintiff’s claims sounded in ordinary negligence. Following discovery and a motion for summary judgment, the trial court granted summary judgment for defendants and dismissed the plaintiff’s action again. This Court upheld the subsequent dismissal, as discovery showed “the decision to restrain a patient under anesthesia is one that requires use of specialized skill and knowledge and, therefore, is considered a professional service.” *Alston II*, 221 N.C. App. at 421, 727 S.E.2d at 881.

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- b) In failing to properly control Plaintiff's body during the surgery;
- c) In failing to properly monitor Plaintiff's body during surgery;
- d) In allowing himself to be distracted;
- e) In not positioning himself in close proximity to Plaintiff's body;
- f) In not properly supervising and directing the proximity of nurses and other staff in relation to Plaintiff;
- g) In allowing Plaintiff to fall off the operating table;
- h) In failing to use good judgment, reasonable skill, and diligence in the treatment of Plaintiff; and
- i) Defendant Cummings was otherwise careless and negligent.

Plaintiff's complaint sounds in ordinary negligence, not medical malpractice. Although Plaintiff uses language which would seemingly trigger a medical malpractice claim, we conclude the *facts* in Plaintiff's complaint give rise to a claim of ordinary negligence. Plaintiff's factual allegation, namely "Plaintiff was allowed to fall off the operating table while Plaintiff was opened up and had surgical tools in her[,]” forecasts the type of injury resulting from actions not requiring specialized skill or clinical judgment. *Gause*, ___ N.C. App. at ___, 795 S.E.2d at ___ (citations omitted).

Dr. Cummings and Duke Defendants contend Plaintiff failed to argue her action is not medical malpractice, and, thus, Plaintiff is barred from raising this issue on appeal. Defendants further contend we cannot address this issue on appeal, as it would constitute this Court improperly supplementing an appellant's brief. However, in our *de novo* review, we cannot review whether the trial court erred in dismissing Plaintiff's complaint under Rule 9(j) without addressing whether Rule 9(j) certification is required.

Notwithstanding Defendants' arguments, we hold this action sounds in ordinary negligence. Therefore, Plaintiff was not required to comply with Rule 9(j). Accordingly, the trial court erred in dismissing Plaintiff's complaint under Rules 12(b)(6) and 9(j).³

3. Because we reverse the trial court's order on Rule 12(b)(6) and Rule 9(j) grounds, we need not address whether the trial court erred in denying Plaintiff's motion to amend her complaint under Rule 15 of the North Carolina Rules of Civil Procedure.

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The concurring and dissenting opinion asserts our majority supplements Plaintiff's arguments on appeal and improperly concludes Plaintiff's claims sound in ordinary negligence. In support of this contention, the concurring and dissenting opinion cites to the legislative intent of Rule 9(j).

At the outset, as stated above, our majority does not improperly supplement Plaintiff's appeal because, in our *de novo* review, we must decide whether Rule 9(j) certification is required before we can affirm a trial court's dismissal of a complaint for lack of Rule 9(j) compliance.

Next, we note a court's "consideration of a motion brought under Rule 12(b)(6) is limited to examining the legal sufficiency of the allegations contained within the four corners of the complaint." *Hillsboro Partners, LLC v. City of Fayetteville*, 226 N.C. App. 30, 32-33, 738 S.E.2d 819, 822 (2013) (citation omitted). *See also Jackson/Hill Aviation, Inc. v. Town of Ocean Isle Beach*, ___ N.C. App. ___, ___, 796 S.E.2d 120, ___ (2017) (citation omitted). Additionally, "[d]ismissal of an action under Rule 12(b)(6) is appropriate when the complaint 'fail[s] to state a claim upon which relief can be granted.'" *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 368 N.C. 440, ___, 781 S.E.2d 1, 7 (2015) (quoting N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2013)) (second alteration in original). "When the complaint on its face reveals that no law supports the claim [or] reveals an absence of facts sufficient to make a valid claim . . . dismissal is proper." *Id.* at ___, 781 S.E.2d at 8 (citation omitted) (emphasis added). Accordingly, there is no need to delve into the legislative intent behind Rule 9(j). Instead, we look at the four corners of Plaintiff's complaint and acknowledge that Plaintiff revealed facts sufficient to make a valid claim, a claim of ordinary negligence, under our case law. *See id.* at ___, 781 S.E.2d at 8 (citation omitted).

B. Motion to Dismiss under Rule 12(b)(5)

[2] Plaintiff next contends the trial court erred in dismissing her claims against Southeastern under Rule 12(b)(5). We disagree.

Rule 4 of the North Carolina Rules of Civil Procedure governs service of process in North Carolina. Rule 4 states, *inter alia*:

- (a) Summons — Issuance; who may serve.—Upon the filing of the complaint, summons shall be issued forthwith, and in any event within five days. The complaint and summons shall be delivered to some proper person for service. In this State, such proper person shall be the sheriff of the county where service is to be made or some other person duly authorized by law to serve summons.

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. . .

(h) Summons—When proper officer not available.—If at any time there is not in a county a proper officer, capable of executing process, to whom summons or other process can be delivered for service, or if a proper officer refuses or neglects to execute such process, or if such officer is a party to or otherwise interested in the action or proceeding, the clerk of the issuing court, upon the facts being verified before him by written affidavit of the plaintiff or his agent or attorney, shall appoint some suitable person who, after he accepts such process for service, shall execute such process in the same manner, with like effect, and subject to the same liabilities, as if such person were a proper officer regularly serving process in that county.

(h1) Summons—When process returned unexecuted. – If a proper officer returns a summons or other process unexecuted, the plaintiff or his agent or attorney may cause service to be made by anyone who is not less than 21 years of age, who is not a party to the action, and who is not related by blood or marriage to a party to the action or to a person upon whom service is to be made. This subsection shall not apply to executions pursuant to Article 28 of Chapter 1 or summary ejectment pursuant to Article 3 of Chapter 42 of the General Statutes.

N.C. Gen. Stat. § 1A-1, Rule 4 (2016).

Plaintiff argues service by a private process server is permissible under the North Carolina Rules of Civil Procedure if the private process server files an affidavit under N.C. Gen. Stat. § 1-75.10.⁴

Southeastern contends holding Plaintiff’s service was proper conflates Rule 4(a) with Rule 4(h) and Rule 4(h1). We agree.

Here, Plaintiff hired a private process server, Smith, to serve Southeastern. On 24 September 2015, Smith served Johnson, the Chief Financial Officer of Southeastern. On 14 October 2015, Smith signed an “Affidavit of Process Server” asserting he was over the age of 18 years, not a party to the action, and “authorized by law to perform said service.”

4. In support of her argument, Plaintiff also cites *Garrett v. Burris*, No. COA14-1257, 2015 WL 4081832 (unpublished) (N.C. Ct. App. July 7, 2015). However, *Garrett* is an unpublished opinion and is not binding authority.

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In North Carolina, private process service is not always “authorized under law”. The proper person for service in North Carolina is the sheriff of the county where service is to be attempted or some other person duly authorized by law to serve summons. N.C. Gen. Stat. § 1A-1, Rule 4(a). Although Plaintiff’s process server filed the statutorily required affidavit, a self-serving affidavit alone does not confer “duly authorized by law” status on the affiant. Legal ability to serve process by private process server is limited by statute in North Carolina to scenarios where the sheriff is unable to fulfill the duties of a process server. N.C. Gen. Stat. § 1A-1, Rule 4(h), (h1). For example, if the office of the sheriff is vacant, the county’s coroner may execute service. N.C. Gen. Stat. § 162-5. Additionally, if service is unexecuted by the sheriff under Rule 4(a), the clerk of the issuing court can appoint “some suitable person” to execute service under Rule 4(h). Here, the record does not disclose the sheriff was unable to deliver service so that the services of a process server would be needed. This is commonly accepted statutory practice in North Carolina and discussed in treatises dealing with civil procedure. *See* William A. Shuford, *North Carolina Civil Practice and Procedure* § 4.2 (6th ed.); 1 G. Gray Wilson, *North Carolina Civil Procedure* § 4-4, at 4-16 (2016). Accordingly, we affirm the trial court’s order dismissing Plaintiff’s claims against Southeastern under Rule 12(b)(5) of the North Carolina Rules of Civil Procedure.

IV. Conclusion

For the foregoing reasons, we reverse the trial court’s order dismissing Plaintiff’s complaint against Dr. Cummings and Duke Defendants. We affirm the trial court’s order dismissing Plaintiff’s complaint against Southeastern.

REVERSED IN PART; AFFIRMED IN PART.

Judge CALABRIA concurs.

Judge BERGER concurring in part and dissenting in part.

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

Plaintiff failed to comply with Rule 4 of the North Carolina Rules of Civil Procedure when she failed to serve her summons and complaint on Defendant Southeastern Regional Medical Center (“Southeastern”) through a person authorized by law. Therefore, I concur with the majority that the trial court did not err when it granted Southeastern’s

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motion to dismiss pursuant to Rule 12(b)(5) for insufficiency of service of process.

However, Plaintiff pleaded a claim of medical malpractice by a healthcare provider in her complaint, not a claim of ordinary negligence as asserted by the majority. Because this was a medical malpractice claim, Plaintiff did not comply with pleading requirements when she failed to allege that “all medical records pertaining to the alleged negligence . . . have been reviewed” as required by Rule 9(j). Because the amendment of a complaint for medical malpractice to correct a deficient Rule 9(j) certification is improper and does not relate back to the date of filing the complaint, the trial court did not err in denying Plaintiff’s motion to amend which was filed after the statute of limitations had expired. In dismissing Plaintiff’s complaint, the trial court did not err, as stated in the majority’s opinion, and I must respectfully dissent.

On July 30, 2015, Plaintiff filed a complaint for damages and punitive damages in Robeson County Superior Court alleging medical malpractice by Defendants in that:

- (a) Defendant Cummings (“Dr. Cummings”), is a physician practicing in the fields of internal medicine, cardiology, and cardiovascular surgery, and he treated Plaintiff and had a responsibility to treat Plaintiff;
- (b) Dr. Cummings “held himself out to possess the special skills and knowledge possessed by other physicians practicing in the specialized field of internal medicine, cardiology, and cardiovascular surgery[;] and held himself out to possess the special skills and knowledge possessed by other physicians practicing in the specialized field of internal medicine, cardiology, and cardiovascular surgery in his locality or other similar localities with the same training and experience.”
- (c) On July 31, 2012, Dr. Cummings, with the assistance of nurses and staff of Southeastern Regional Medical Center (“Southeastern”), performed cardiovascular surgery on Plaintiff, and during the surgery, Plaintiff suffered injuries when she “was allowed to fall off the operating room table while Plaintiff was opened up and had surgical tools in her.”
- (d) “[T]he medical care rendered to Plaintiff fell below the applicable standard of care.”
- (e) Defendants were negligent in failing to comply with the standard of care set forth in Article 1B of the North Carolina

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General Statutes, entitled “Medical Malpractice Actions”, Section 90-21.12, “Standard of health care”;

- (f) Dr. Cummings failed to use his “best professional judgment and skill while operating on the Plaintiff”; failed “to properly control Plaintiff’s body during the surgery”; failed “to properly monitor Plaintiff’s body during surgery”; was distracted; was not properly positioned during surgery; did not properly supervise or direct nurses and staff regarding proper positioning; and failed “to use good judgment, reasonable skill, and diligence in the treatment of Plaintiff[.]”
- (g) The remaining Defendants were directly and vicariously liable for negligent employment and/or retention of health care professionals and their actions in this matter.
- (h) Plaintiff further alleged that the professional medical care and treatment provided by Defendants was reviewed by an individual “reasonably expected to qualify” and that “Plaintiff will seek to have qualified by an expert witness . . . , and who is willing to testify that the medical care rendered to Plaintiff fell below the applicable standard of care.”

Plaintiff’s complaint was a malpractice action, defined as either:

- a. A civil action for damages for personal injury or death arising out of the furnishing or failure to furnish professional services in the performance of medical, dental, or other health care by a health care provider.
- b. A civil action against a hospital, a nursing home licensed under Chapter 131E of the General Statutes, or an adult care home licensed under Chapter 131D of the General Statutes for damages for personal injury or death, when the civil action (i) alleges a breach of administrative or corporate duties to the patient, including, but not limited to, allegations of negligent credentialing or negligent monitoring and supervision and (ii) arises from the same facts or circumstances as a claim under sub-subdivision a. of this subdivision.

N.C. Gen. Stat. § 90-21.11(2)(a) and (b) (2015).

Plaintiff, throughout her complaint, asserted that Dr. Cummings, Southeastern, Duke University Health System, and Duke University Affiliated Physicians, Inc. had provided professional medical services

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to Plaintiff. She further alleged that Dr. Cummings, while “acting in the course and scope of his employment,” utilized his professional skill and judgment in operating on Plaintiff, and in doing so, failed to position himself to properly control and monitor Plaintiff’s body. Plaintiff further asserted that Dr. Cummings failed to properly supervise other health care professionals during the operation.

Plaintiff’s complaint alleges that each Defendant violated the standard of care set forth in N.C. Gen. Stat. § 90-21.12. Subparagraph (a) of that statute reads as follows:

Except as provided in subsection (b) of this section, in any *medical malpractice* action as defined in G.S. 90-21.11(2)(a), the defendant health care provider shall not be liable for the payment of damages unless the trier of fact finds by the greater weight of the evidence that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time of the alleged act giving rise to the cause of action; or in the case of a *medical malpractice* action as defined in G.S. 90-21.11(2)(b), the defendant health care provider shall not be liable for the payment of damages unless the trier of fact finds by the greater weight of the evidence that the action or inaction of such health care provider was not in accordance with the standards of practice among similar health care providers situated in the same or similar communities under the same or similar circumstances at the time of the alleged act giving rise to the cause of action.

N.C. Gen. Stat. § 90-21.12(a) (emphasis added).

Plaintiff’s brief acknowledges that her complaint was one for medical malpractice. In her Statement of the Case, Plaintiff states, “Marjorie Locklear (“Plaintiff” or “Locklear”) commenced this *medical malpractice action* on 30 July 2015.” (emphasis added). Plaintiff’s brief also focuses on Rule 9(j) certification, which is only applicable to medical malpractice claims.

Plaintiff does not argue that this is an action for ordinary negligence as the majority has found; thus, this argument should be deemed abandoned. “It is not the duty of this Court to supplement an appellant’s

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brief with legal authority or arguments not contained therein. These arguments are deemed abandoned by virtue of [Rule 28(b)(6) of the North Carolina Appellate Procedures].’” *Sanchez v. Cobblestone Homeowners Ass’n of Clayton, Inc.*, ___ N.C. App. ___, ___, 791 S.E.2d 238, 245 (2016) (citation and brackets omitted).

The majority cites to the unpublished opinion *Alston*, wherein this Court held the decedent’s injuries from falling off a gurney in an operating room sounded in ordinary negligence and not medical malpractice. *Alston v. Granville Health Sys.*, 207 N.C. App. 264, 699 S.E.2d 478 (2010), *aff’d*, 221 N.C. App. 416, 727 S.E.2d 877 (2012) (unpublished). This Court held the “[p]laintiff’s sole cause of action [wa]s for ordinary negligence under a theory of *res ipsa loquitur*,” and did not require compliance with Rule 9(j). *Id.* Further, “[b]ecause [p]laintiff herein elected to proceed solely on a *res ipsa loquitur* theory, [p]laintiff is bound by that theory.” *Id.*

The transfer of a patient from the operating table to a gurney before or after surgery, as in *Alston*, is “primarily manual or physical and ... d[oes] not involve a medical assessment or clinical judgment.” *Gause v. New Hanover Regional Medical Center*, ___ N.C. App. ___, ___, 795 S.E.2d 411, 415 (2016).

Conversely, in the case *sub judice*, Plaintiff alleged her injuries occurred from falling off of the operating table *during* the surgery. The positioning and controlling of Plaintiff’s body while on the operating table, during active surgery, while Plaintiff’s opened body contained surgical tools, required “clinical judgment and intellectual skill.” *Id.* Thus, because Plaintiff’s factual allegations sound in medical malpractice, and her complaint specifically alleges medical malpractice, Plaintiff is required to comply with Rule 9(j).

Further, converting Plaintiff’s action into one for ordinary negligence would allow her to circumvent the requirement of expert certification for her medical malpractice complaint. The majority’s finding that this is an action for ordinary negligence creates a loophole for Plaintiff after she improperly filed her medical malpractice claim. Plaintiff’s witnesses for an ordinary negligence claim will still be testifying as to the proper positioning and monitoring of a body during cardiovascular surgery, and the witnesses who will be qualified to testify are the same doctors and nurses who would testify to the proper procedures during a cardiovascular surgery under a medical malpractice lawsuit. The majority’s conversion of Plaintiff’s medical malpractice action into an ordinary negligence action defeats the legislative intent of Rule 9(j).

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Turning to Plaintiff's arguments under Rule 9(j), they fail. In pertinent part, Rule 9(j) states that:

Any complaint alleging medical malpractice by a health care provider pursuant to G.S. 90-21.11(2)a. in failing to comply with the applicable standard of care under G.S. 90-21.12 *shall be dismissed* unless:

(1) *The pleading specifically asserts* that the medical care *and all medical records* pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry *have been reviewed* by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care;

(2) *The pleading specifically asserts* that the medical care *and all medical records* pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry *have been reviewed* by a person that the complainant will seek to have qualified as an expert witness by motion under Rule 702(e) of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care, and the motion is filed with the complaint; or

...

Upon motion by the complainant prior to the expiration of the applicable statute of limitations, a resident judge of the superior court . . . may allow a motion to extend the statute of limitations for a period not to exceed 120 days *to file a complaint* in a medical malpractice action in order to comply with this Rule, upon a determination that good cause exists for the granting of the motion and that the ends of justice would be served by an extension.

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

Thus, dismissal of a medical malpractice action is required unless the pleading requirements of Rule 9(j) are satisfied. Our Supreme Court held that:

Rule 9(j) clearly provides that "*any* complaint alleging medical malpractice . . . *shall be dismissed*" if it does not

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comply with the certification mandate . . . [W]e find the inclusion of “shall be dismissed” in Rule 9(j) to be more than simply “a choice of grammatical construction.” While other subsections of Rule 9 contain requirements for pleading special matters, no other subsection contains the mandatory language “shall be dismissed.” This indicates that medical malpractice complaints have a distinct requirement of expert certification with which plaintiffs must comply. Such complaints will receive strict consideration by the trial judge. Failure to include the certification necessarily leads to dismissal.

Thippen v. Ngo, 355 N.C. 198, 202, 558 S.E.2d 162, 165 (2002) (emphasis in original) (internal citations and brackets omitted). Here, Plaintiff provided proper certification regarding *medical care and treatment*, but failed to comply with Rule 9(j) as there was no allegation concerning review of medical records.

On January 11, 2016, Plaintiff in open court moved to amend the complaint pursuant to Rule 15(a) to comply with Rule 9(j). The trial court correctly denied this motion as it was made nearly six months after the statute of limitations had expired.

This Court previously held that “Rule 9(j) must be satisfied at the time of the complaint’s filing.” *Alston v. Hueske*, ___ N.C. App. ___, ___, 781 S.E.2d 305, 309 (2016). In *Hueske*, as here, the plaintiff sought to amend her complaint to comply with the certification requirements of Rule 9(j). This Court noted that

[b]ecause the legislature has required strict compliance with this rule, our courts have ruled that if a pleader fails to properly plead his case in his complaint, it is subject to dismissal without the opportunity for the plaintiff to amend his complaint under Rule 15(a). To read Rule 15 in this manner would defeat the objective of Rule 9(j) which . . . seeks to avoid the *filing* of frivolous medical malpractice claims.

Id., at ___, 781 S.E.2d at 310 (emphasis in original) (internal citations and quotation marks omitted).

The title of Rule 9, ‘Pleading special matters,’ plainly signals the statute’s tailoring to address distinct situations set out in the statute. [R]elation back is not available through Rule 15(c) of the North Carolina Rules of Civil Procedure

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to comply with Rule 9(j) . . . Rule 9(j) mandates that any complaint which fails to comply with the certification requirement, “*shall be dismissed.*” . . . [A] trial judge can dismiss with prejudice where a complaint does not contain the certification required by Rule 9(j) and the statute of limitations has expired.

Bass v. Durham Cty. Hosp. Corp., 158 N.C. App. 217, 225, 580 S.E.2d 738, 743 (2003) (Tyson, J., dissenting) (internal citations and quotation marks omitted) (emphasis in original), *rev'd for the reasons stated in the dissenting opinion*, 358 N.C. 144, 592 S.E.2d 687 (2004). *See also Thigpen v. Ngo*, 355 N.C. 198, 205, 558 S.E.2d 162, 167 (2002) (“[W]e hold that once a party receives and exhausts the 120-day extension of time in order to comply with Rule 9(j)’s expert certification requirement, the party cannot amend a medical malpractice complaint to include expert certification.”); *Fintchre v. Duke University*, ___ N.C. App. ___, ___, 773 S.E.2d 318, 325 (2015) (“[W]here plaintiff failed to file a complaint including a valid Rule 9(j) certification within the statute of limitations, granting plaintiff’s motion to amend . . . would have been futile . . .”).

Such is the case here. Plaintiff alleged that her care and treatment occurred July 31, 2012, and she filed her action July 30, 2015, one day before the statute of limitations would expire. Plaintiff’s medical malpractice complaint failed to include a required Rule 9(j) certification regarding review of medical records.

Plaintiff failed to seek amendment of her complaint until January 11, 2016, nearly six months after the statute of limitations had expired, and 44 days beyond “[t]he 120-day extension of the statute of limitations available to medical malpractice plaintiffs by Rule 9(j) . . . for the purpose of complying with Rule 9(j).” *Bass* at 225, 580 S.E.2d at 743 (citing N.C. Gen. Stat. § 1A-1, Rule 9(j) (2001)). Allowing an amendment would have been futile, so it cannot be said that the trial court abused its discretion in denying that motion. Plaintiff failed to plead proper Rule 9(j) certification in her complaint before the statute of limitations expiration. If any complaint alleging medical malpractice shall be dismissed for failure to comply with the certification mandate of Rule 9(j), it cannot be said that the trial court erred in granting Defendants’ motion to dismiss.

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[253 N.C. App. 473 (2017)]

GINGER A. McKINNEY, NOW GINGER L. SUTPHIN, PLAINTIFF

v.

JOSEPH A. McKINNEY, JR., DEFENDANT

No. COA16-884

Filed 16 May 2017

1. Appeal and Error—appealability—criminal contempt—appeal from district court to superior court

Defendant father's appeal of the portion of an order finding him in criminal contempt for failure to communicate with plaintiff mother regarding the whereabouts of the parties' minor son was not properly before the Court of Appeals. Criminal contempt orders are properly appealed from district court to the superior court.

2. Contempt—civil contempt—order vacated—compliance prior to entry of order

Defendant father's appeal of the portion of an order finding him in civil contempt for failure to return the parties' minor son back to the mother (after the child ran away from the mother's house to the father's house) was dismissed where the father returned the minor son to the mother prior to the effective date of the order.

3. Attorney fees—criminal contempt—civil contempt—sufficiency of findings

Defendant father's appeal of attorney fees incurred in relation to a criminal contempt finding was dismissed since the appeal of that portion of the order was not properly before the Court of Appeals. The portion related to the civil contempt finding was vacated where the district court made no finding that the father refused to allow the parties' minor child to live with plaintiff mother or refused to obey the custody orders.

Appeal by Defendant from orders entered 25 September 2014 and 22 March 2016 by Judge Teresa H. Vincent in Guilford County District Court. Heard in the Court of Appeals 8 February 2017.

Wyatt Early Harris Wheeler, LLP, by A. Doyle Early, Jr., and Arlene M. Zipp, for the Plaintiff-Appellee.

Wyrick Robbins Yates & Ponton LLP, by Tobias S. Hampson and K. Edward Greene, for the Defendant-Appellant.

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DILLON, Judge.

Joseph A. McKinney, Jr., (“Father”) appeals from two orders of the district court entered during the course of a dispute between Father and Ginger A. McKinney (Sutphin) (“Mother”) regarding the custody of their adolescent son, Max.¹ Specifically, Father appeals (1) the district court’s September 2015 order finding him in civil and criminal contempt (the “Contempt Order”), and (2) the district court’s March 2016 order (the “Fee Award Order”) denying his motion for relief from judgment or new trial and awarding attorney’s fees to Mother.

I. Background

Mother and Father separated in 2002 when Max was two years old. For a period of time, the parties shared custody of Max. In 2009, when Max was ten years old, the parties entered into a consent order (the “2009 Custody Order”) which awarded primary physical custody of Max to Mother and provided a specific schedule for Father’s visitation.

In early 2014, Max expressed a strong desire to move from Greensboro, where he resided with Mother, to live with Father in Wilmington. In May 2014, Father filed a motion to modify custody with the district court.

In June 2014, before Father’s motion to modify custody was heard, Max left Greensboro on his own and traveled to Wilmington to stay with Father. In July 2014, the parties entered into a consent order (the “2014 Consent Order”) providing that Max would return to Greensboro.

However, in August 2014, Max again traveled on his own to Wilmington, staying for approximately one month with Father and attending high school in Wilmington. Mother then filed the second show cause motion based on Father’s failure to return Max to Greensboro.

A hearing was held during the week of 8 September 2014 during which the district court orally rendered its decision, finding Father in criminal and civil contempt for failure to comply with the 2009 Custody Order and the 2014 Consent Order.

On 13 September 2014, Max returned to live with Mother in Greensboro.

On 25 September 2014, the district court entered a written order (the “Contempt Order”), reducing its prior oral decision finding Father in civil and criminal contempt to writing.

1. A pseudonym.

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In December 2014, the district court entered an order on Father's custody modification motion, awarding Father primary physical custody of Max.

On 22 March 2016, the district court entered the Fee Award Order awarding Mother approximately \$51,100 for attorney's fees she incurred in prosecuting her contempt motion.

II. Analysis

Father appeals the Contempt Order finding him in civil and criminal contempt and the Fee Award Order awarding Mother \$51,100.

Regarding the Contempt Order, we dismiss the appeal with respect to the portion finding Father in *criminal* contempt because that appeal must first be taken to superior court. Further, we vacate the Contempt Order to the extent that the district court found Father in civil contempt based on the fact that Father had already returned Max prior to the entry of the Order, thus satisfying the "purge" language.

Regarding the Fee Award Order, we dismiss the appeal to the extent the award is based on the criminal contempt finding. We reverse and remand to the extent the award is based on the civil contempt finding. We address our holdings in greater detail below.

A. Contempt Order

1. Criminal Contempt

[1] In its Contempt Order, the district court found Father in criminal contempt for "failure to communicate with [] Mother" in August 2014 when Max ran away to Wilmington for the second time. The district court sentenced Father to thirty (30) days in jail, but suspended the sentence for twelve (12) months based on certain conditions.²

In support of its order of criminal contempt, the district court essentially found that (1) Max ran away to Wilmington on 13 August 2014 after Max had a disagreement with Mother; (2) Mother sent text messages to

2. We note that the district court provided as one of the conditions of the suspended sentence that "the remaining balance of the sentence can be purged upon the return of custody to the Plaintiff Mother at any time prior to the time the full 30-day sentence has been served." This condition is the type that would be more appropriate for a finding of *civil* contempt. However, we conclude that the district court's finding of contempt was criminal in nature based on other conditions that the district court imposed. The district court imposed the sentence as a means to *punish* Father for what it determined to be a violation of the 2009 Custody Order that occurred from August 13-17, when Father failed to communicate with Mother.

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Father regarding Max's welfare; (3) Father did not respond to Mother's inquiries until 17 August 2014; (4) Father's failure to respond to Mother violated a provision in the 2009 Custody Order that "[t]he parties shall confer with each other on all important matters pertaining to the health, welfare, education, and upbringing of the minor child with a view to arriving at a harmonious policy calculated to promote the best interest of the minor child"; and (5) Father's violation was willful, deliberate, and stubborn.

Our Supreme Court held in a *per curiam* opinion adopting a dissent from our Court that a finding of criminal contempt by the district court should be appealed to superior court and *not* to the Court of Appeals. *Reynolds v. Reynolds*, 356 N.C. 287, 569 S.E.2d 645 (2002); *see also Hancock v. Hancock*, 122 N.C. App. 518, 522, 471 S.E.2d 415, 417 (1996) ("Criminal contempt orders are properly appealed from district court to the superior court, not to the Court of Appeals."). And our General Assembly has directed that an "appeal from a finding of contempt by a judicial official inferior to a superior court judge is by hearing *de novo* before a superior court judge." N.C. Gen. Stat. § 5A-17 (2015). Accordingly, we conclude that Father's appeal of that portion of the Contempt Order finding him in criminal contempt is not properly before us.³ Therefore, we dismiss this portion of Father's appeal.

2. Civil Contempt

[2] On 10 September 2014, the district court rendered its oral order finding Father in civil contempt for "failing to return the child pursuant to the [2009 Custody Order] and the [2014 Consent Order]." On 13 September, before the district court entered its written Contempt order, Max returned to live with Mother in Greensboro. On 25 September, the district court entered the written Contempt Order finding Father in civil contempt and stating that Father could "purge himself of contempt by having [Max] delivered to the Plaintiff Mother[.]"

Our Court has held that a district court "does not have the authority to impose civil contempt after an individual has complied with a court order, even if the compliance occurs after the party is served with a motion to show cause why he should not be held in contempt of court." *Ruth v. Ruth*, 158 N.C. App. 123, 126, 579 S.E.2d 909, 912 (2003).

3. It appears from the record that Father did, in fact, appeal the criminal contempt order to superior court on 15 September 2014. However, the record does *not* include any documentation of the outcome of that appeal and Father has not appealed from any order of the superior court.

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Here, the district court's order became effective on 25 September when the district court reduced its order to writing and the order was filed with the clerk. *See* N.C. R. Civ. P., Rule 58 (“[A] judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court.”); *see also Olson v. McMillian*, 144 N.C. App. 615, 619, 548 S.E.2d 571, 574 (2001) (“When a trial court’s oral order is not reduced to writing, it is non-existent[.]” (internal marks omitted)). Because Father had already returned Max to Mother prior to 25 September, the district court lacked the authority to find Father in civil contempt for failing to return Max. Therefore, we vacate the Contempt Order to the extent the district court found Father in civil contempt.

B. Fee Award Order

[3] In March 2016, the district court ordered Father to pay Mother \$51,100 for attorneys’ fees incurred in connection with Mother’s prosecution of the Contempt Order. To the extent that the Fee Award Order relates to the finding of criminal contempt, we dismiss the appeal. The appeal of the criminal contempt order and related issues lies with the superior court as part of that court’s review of the criminal contempt finding.

We conclude, though, that Father’s appeal of the portion of the Fee Award Order relating to the civil contempt finding is properly before us. We note that we have vacated the district court’s finding that Father was in civil contempt based on the fact that he purged himself of contempt prior to the Contempt Order being entered. However, our Court has held that the moving party may still recover attorneys’ fees even if the other party has purged himself prior to the entry of an order finding him in civil contempt:

As a general rule, attorney’s fees in a civil contempt action are not available unless the moving party prevails. Nonetheless, in the limited situation where contempt fails because the alleged contemnor complies with the previous orders after the motion to show cause is issued and prior to the contempt hearing, an award of attorney’s fees is proper.

Ruth, 158 N.C. App. at 127, 579 S.E.2d at 912.

Here, the district court found Father in civil contempt for his failure to comply with the 2009 Custody Order and the 2014 Consent Order based on Max running away to live with Father for approximately a month in August 2014. The district court’s findings suggest, in part, that

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Max ran away from Mother on his own and arrived at Father's house in Wilmington on 14 August; Father lives a wealthy lifestyle and Max likes the way he lives when he is with him. The district court further found that Father never told Max to run away from Mother; and Father "enticed" Max to stay with him because of Father's lifestyle. We hold that several of the findings made by the district court in support of its civil contempt order are erroneous.

For instance, the district court found that "[t]here was *no evidence* presented that the Defendant Father instructed [Max] that he had to abide by the [custody orders]." However, Father stated several times during his testimony that he told Max that Max needed to go back home to Mother. The district court also found that "[t]here was *no evidence* presented that the Defendant Father secured transportation after August 13, 2014, and told the child to get in the car or plane." But Father did state that he was willing to provide transportation but that Max was simply not willing to go. It was certainly within the district court's discretion to find that Father's testimony was not credible, but the district court did not state that "there was no *credible* evidence . . ." Therefore, these findings are not supported by the evidence.

Further, much of the district court's reasoning in finding Father in civil contempt runs contra to our decision in *Hancock v. Hancock*, 122 N.C. App. 518, 417 S.E.2d 415 (1996). In *Hancock*, we held that a parent was not in civil contempt of a custody order where the mother encouraged her ten-year old child to go on scheduled visits with the father, that she did not force the child to stay or discourage the child from going with the father, that the child refused to go, and that the mother otherwise did not use physical force or a threat of punishment to make the child go with the father. *Id.* at 525, 471 S.E.2d at 419. Based on these findings, we reversed an order finding the mother in civil contempt, stating as follows:

We find no evidence that [the mother] willfully refused to allow the child to visit with the [father]. Nor do we agree with the trial court's finding that "[the mother's] inaction in not requiring the minor child to visit with [the father] amounts to contempt because there is no evidence [the mother] resisted [the father's]" visitation or otherwise refused to obey the visitation order. She simply did not physically force the child to go. Absent any evidence she encouraged [the child's] refusal to go or attempted in any

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way to prevent the visitation, her actions or inactions, even if improper, do not rise to the level of contempt.

Id. at 525-26, 471 S.E.2d at 420-21.

In the present case, the district court made no finding that Father refused to allow Max to live with Mother or refused to obey the custody orders. The district court did not find that Father encouraged Max to stay with him, but rather, found that he told Max that Max should go home. It is true that the district court found that Father did not punish Max or make life uncomfortable for Max while remaining in Wilmington. And these actions and inactions may have been improper, but otherwise do not rise to the level of contempt. *See id.* We do not think that the findings that Father provided a high standard of living for Max which was an “enticement” for Max to prefer living with Father is enough to rise to the level of willfulness, absent a finding supported by the evidence that Father provided a high standard of living *for the purpose* of enticing Max to run away from Mother rather than merely for the purpose of providing for or bonding with Max.

Accordingly, we reverse the district court’s order awarding attorney’s fees incurred in relation to the civil contempt finding. On remand, the district court is free to consider evidence and enter findings regarding whether Father acted willfully in refusing to allow Max to visit with Mother.

III. Conclusion

We dismiss the appeal from the finding of criminal contempt and dismiss the appeal from the portion of the Fee Award Order relating to the finding of criminal contempt. We vacate the finding of civil contempt and reverse the portion of the Fee Award Order relating to the finding of civil contempt. This matter is remanded for action consistent with this opinion.

DISMISSED IN PART, VACATED IN PART, AND REMANDED.

Judges ELMORE and ZACHARY concur.

ORREN v. ORREN

[253 N.C. App. 480 (2017)]

DANIEL R. ORREN, PLAINTIFF

v.

CAROLYN B. ORREN, DEFENDANT

No. COA16-1024

Filed 16 May 2017

Divorce—alimony—cohabitation defense

The trial court acted under a misapprehension of law when it denied plaintiff's request to assert a cohabitation defense, stating that "cohabitation isn't a defense to an alimony claim."

Appeal by plaintiff from order entered 18 April 2016 by Judge Christine Underwood in Alexander County District Court. Heard in the Court of Appeals 8 March 2017.

Homesley, Gaines, Dudley & Clodfelter, LLP, by Edmund L. Gaines and Leah Gaines Messick, for plaintiff-appellant.

Wesley E. Starnes for defendant-appellee.

DIETZ, Judge.

Plaintiff Daniel Orren appeals from the trial court's alimony order. He contends that the trial court erred by denying his request to assert a cohabitation defense at the alimony hearing. The trial court denied Mr. Orren's request in part because the court believed "cohabitation isn't a defense to an alimony claim."

As explained below, this Court has held that cohabitation is a defense to an alimony claim. *Williamson v. Williamson*, 142 N.C. App. 702, 704, 543 S.E.2d 897, 898 (2001). Thus, the trial court acted under a misapprehension of the law when it rejected Mr. Orren's request to assert a cohabitation defense. When a trial court acts under a misapprehension of the law, this Court must vacate the challenged order and remand for the trial court to examine the issue under the proper legal standard. *Stanback v. Stanback*, 270 N.C. 497, 507, 155 S.E.2d 221, 229 (1967). Accordingly, we vacate the trial court's order and remand for further proceedings consistent with this opinion.

Facts and Procedural History

On 17 August 2009, Daniel Orren filed for divorce from his wife, Carolyn Orren, and sought equitable distribution of the parties' property.

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On 2 November 2009, Ms. Orren filed an answer and counterclaims for postseparation support, alimony, and equitable distribution.

In June 2012, following a hearing and a consent agreement, the trial court entered an equitable distribution order. In September 2012, the trial court held a hearing on Ms. Orren's request for alimony. At the end of the hearing, the court took the matter under advisement. Later that month, the court drafted an alimony order and mailed it to the Alexander County Clerk of Superior Court for filing, but the clerk's office did not receive it.

Apparently, over the next three years, neither party informed the trial court that the alimony order had not been entered. Finally, in September 2015, Mr. Orren sought leave from the trial court to assert the defense of cohabitation in response to the pending alimony claim. The trial court then discovered that "the Clerk did not receive the Order prepared by the Court." The trial court explained that "[u]pon learning that the Order had not been filed with the Clerk, the Court sought to retrieve the Order but found it impossible to do so due to an earlier malfunction in the home computer." The trial court therefore "elected to reopen the evidence regarding changes in the parties' circumstances which have occurred [since] September 21, 2012." The court held a hearing on 30 September 2015 to take additional evidence with respect to the alimony claim, but rejected Mr. Orren's request to assert the defense of cohabitation.

On 18 April 2016, the trial court entered an alimony order that awarded Ms. Orren alimony, attorneys' fees, and a "distributive award" from a retirement incentive package that Mr. Orren received after entry of the equitable distribution order but before entry of the alimony order. Mr. Orren timely appealed.

Analysis

Mr. Orren first argues that the trial court abused its discretion by rejecting his request to assert cohabitation as a defense to his ex-wife's alimony claim. As explained below, because the trial court acted under a misapprehension of the law, we vacate the trial court's order and remand for further proceedings.

Among other reasons why the trial court rejected Mr. Orren's request to assert a cohabitation defense, the trial court stated that Mr. Orren's request was futile because "cohabitation isn't a defense to an alimony claim." This statement is wrong. In *Williamson v. Williamson*, the trial court permitted evidence of cohabitation at an initial alimony hearing

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and then ruled that “plaintiff was not obligated for alimony or postseparation support payments from the time defendant’s cohabitation began.” 142 N.C. App. 702, 703, 543 S.E.2d 897, 897 (2001). On appeal, the defendant argued that a court may only modify an *existing* alimony award based on cohabitation and cannot consider cohabitation as a defense to an *initial* alimony award. This Court squarely rejected that argument, holding that cohabitation is a defense to an initial award of alimony:

Defendant argues that this statute refers to a modification of alimony. Defendant asserts “cohabitation” is not a defense in an initial action for alimony. We disagree.

Id. at 704, 543 S.E.2d at 898.

To be sure, as Ms. Orren points out, the cohabitation statute provides that, “[i]f a dependent spouse *who is receiving* postseparation support or alimony from a supporting spouse . . . *engages* in cohabitation, the postseparation support or alimony shall terminate.” N.C. Gen. Stat. § 50–16.9(b) (emphasis added). Thus, the statute addresses situations in which postseparation support or alimony already has been awarded before the cohabitation begins. But *Williamson* did not limit its holding in that way; it held more broadly that cohabitation is “a defense in an initial action for alimony.” *Williamson*, 142 N.C. App. at 704, 543 S.E.2d at 898. Moreover, the alimony statute provides that, “[i]n determining the amount, duration, and manner of payment of alimony, the court shall consider *all relevant factors* . . .” N.C. Gen. Stat. § 50–16.3A(b) (emphasis added). The fact that an award of alimony would immediately be subject to termination based on cohabitation is a “relevant factor” the trial court can consider in its initial alimony award. Simply put, as the Court held in *Williamson*, cohabitation may be asserted as a defense to an initial alimony claim.

When a trial court acts under a misapprehension of the law in a discretionary ruling, this Court must vacate the trial court’s ruling and remand for reconsideration under the correct legal standard. *Stanback v. Stanback*, 270 N.C. 497, 507, 155 S.E.2d 221, 229 (1967); *State v. Grundler*, 249 N.C. 399, 402, 106 S.E.2d 488, 490 (1959). Here, the trial court refused to permit Mr. Orren to assert a cohabitation defense at the alimony hearing in part because “cohabitation isn’t a defense to an alimony claim.” As explained above, that is incorrect; cohabitation *is* a defense to an alimony claim. Thus, we must vacate the trial court’s alimony order and remand for further proceedings.

Mr. Orren also challenges the trial court’s “distributive award” of \$17,497.28 based on Mr. Orren’s receipt of an early retirement incentive

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package. Mr. Orren received the retirement award after entry of the equitable distribution order but before entry of the alimony order three years later. The trial court's alimony order states that "[b]ecause the benefits were accrued during the time the parties were married and owned on the date of separation, the Court elects to classify these benefits as marital property which was not distributed pursuant to the Equitable Distribution Order."

Because we vacate the trial court's order and, on remand, the cohabitation issue might bar some or all of the requested alimony, we decline to address this issue because it may be moot. But we observe that, although receipt of a retirement incentive might be a relevant factor to consider in setting the amount of alimony, *see* N.C. Gen. Stat. § 50-16.3A(b), an alimony order should not (and cannot) be used as a tool to amend an earlier equitable distribution order.

Conclusion

We vacate the trial court's alimony order and remand for further proceedings consistent with this opinion.

VACATED AND REMANDED.

Judges ELMORE and TYSON concur.

PLASMAN v. DECCA FURNITURE (USA), INC.

[253 N.C. App. 484 (2017)]

CHRISTIAN G. PLASMAN, IN HIS INDIVIDUAL CAPACITY AND DERIVATIVELY FOR THE BENEFIT OF, ON BEHALF OF AND RIGHT OF NOMINAL PARTY BOLIER & COMPANY, LLC, PLAINTIFFS

v.

DECCA FURNITURE (USA), INC., DECCA CONTRACT FURNITURE, LLC, RICHARD HERBST, WAI THENG TIN, TSANG C. HUNG, DECCA FURNITURE, LTD., DECCA HOSPITALITY FURNISHINGS, LLC, DONGGUAN DECCA FURNITURE CO., LTD., DARREN HUDGINS, DECCA HOME, LLC, AND ELAN BY DECCA, LLC, DEFENDANTS, AND BOLIER & COMPANY, LLC, NOMINAL DEFENDANT

v.

CHRISTIAN J. PLASMAN A/K/A BARRETT PLASMAN, THIRD-PARTY DEFENDANT

No. COA16-777

Filed 16 May 2017

1. Contempt—civil contempt—jurisdiction—preliminary injunction—appeal from underlying interlocutory order—no substantial right

The North Carolina Business Court had jurisdiction to hold the owners of a closely held business in civil contempt based on their failure to comply with an order enforcing the terms of a preliminary injunction entered against them in federal court. The appeal of an underlying interlocutory order enforcing the injunction did not affect a substantial right and did not stay the contempt proceedings.

2. Appeal and Error—preservation of issues—failure to argue or present at trial

Certain issues in plaintiff business owners' brief were not properly argued or presented, and thus, were deemed abandoned. Certain other issues were preserved since they were specifically argued on appeal.

3. Appeal and Error—interlocutory orders and appeals—contempt order—substantial right

The owners of a closely held business's appeal from a contempt order was properly before the Court of Appeals. The appeal of any contempt order affects a substantial right and is immediately appealable.

4. Injunctions—irreparable harm—ripeness—federal court—impermissible collateral attack of underlying injunction

Whether the issuance of an injunction was necessary to avoid irreparable harm to a furniture manufacturer was an issue ripe for consideration in federal court. The owners of a closely held business who partnered with the furniture manufacturer could not mount an

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impermissible collateral attack on the underlying injunction over three years after its entry.

5. Contempt—civil contempt—willful noncompliance

The judge's finding in a civil contempt case that the owners of a closely held business were in willful noncompliance with an order requiring them to return diverted funds and provide an accounting of those funds was supported by competent evidence. The record revealed instances in which the business owners acted with knowledge of and stubborn resistance to the order's clear directives.

6. Contempt—civil contempt—obligation to return diverted funds

Although the owners of a closely held business argued in a civil contempt case that an injunction and order requiring them to return diverted funds and provide an accounting of those funds to a partner furniture manufacturer were no longer enforceable because the furniture manufacturer refused to comply with the requirement that the business owners be provided with certain information, the business owners' obligation to return diverted funds remained in place.

7. Contempt—civil contempt—present ability to pay—jointly held bank accounts—individually held retirement accounts

The trial court did not err in a civil contempt case by considering the jointly held bank accounts and individually held investment retirement accounts of owners of a closely held business in assessing their present ability to comply with an order requiring them to return diverted funds and provide an accounting of those funds. The protections afforded real property held by spouses as tenants by the entirety did not apply.

Appeal by plaintiffs and third-party defendant from order entered 26 February 2016 by Judge Louis A. Bledsoe, III in Catawba County Superior Court. Heard in the Court of Appeals 21 February 2017.

Law Offices of Matthew K. Rogers, PLLC, by Matthew K. Rogers, for plaintiffs-appellants and third-party defendant-appellant.

McGuireWoods LLP, by Robert A. Muckenfuss, Jodie H. Lawson, and Andrew D. Atkins, for defendants-appellees.

ZACHARY, Judge.

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This appeal comes to the Court as the result of a bitter corporate dispute that has yet to reach the discovery phase nearly five years after the action was filed. Plaintiff Christian G. Plasman (Plasman) and third-party defendant Christian J. Plasman (Barrett) (collectively with Plasman, the Plasmans) appeal from an order of the North Carolina Business Court¹ holding them in civil contempt of court.

The contempt order was entered after the Plasmans failed to comply with a Business Court order enforcing the terms of a preliminary injunction entered against them in federal court. On appeal, the Plasmans argue that the Business Court lacked jurisdiction to enter the contempt order while their appeal from the order enforcing the injunction was pending in this Court. The Plasmans then make a series of arguments that attack the sufficiency of the contempt order itself. After careful review, we conclude that the Business Court retained jurisdiction to enter the contempt order, and that the order should be affirmed in its entirety.

I. Background

In April 2002, Plasman formed Bolier & Company, LLC (Bolier), a closely held North Carolina company offering residential furniture designs that were also suited for use in the hospitality industry. Shortly thereafter, Plasman partnered with Decca Furniture, Ltd. (Decca China), which manufactured Bolier's furniture lines. Decca China then formed Decca Furniture (USA), Inc. (Decca USA) to own Decca China's interest in Bolier. Richard Herbst (Herbst) was Decca USA's president at all relevant times.

In August 2003, Plasman and Herbst executed an operating agreement that granted Decca USA a 55% majority ownership interest in Bolier, and that allowed Plasman to retain a 45% minority ownership interest for himself. The operating agreement also vested Decca USA with the authority to make all employment decisions related to Bolier. In November 2003, Plasman entered into an employment agreement with Bolier, which provided that Plasman could be terminated without cause. Plasman executed the employment agreement on his own behalf, and Herbst signed on behalf of Decca USA and Bolier. Thereafter, Plasman

1. N.C. Gen. Stat. § 7A-27(a)(3) (2015) provides for direct appeal to the North Carolina Supreme Court from certain interlocutory orders entered by a Business Court Judge in an action designated as a mandatory complex business case on or after 1 October 2014. *See* N.C. Sess. Law 2014-102, § 9 ("Section 1 of this act becomes effective October 1, 2014, and applies to actions designated as mandatory complex business cases on or after that date."). Because this action was designated as a mandatory complex business case before 1 October 2014, the appeal is properly before this Court.

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served as President and CEO of Bolier, and his son, Barrett, worked as Bolier's operations manager.

According to defendants, despite the significant investments of Decca USA and Decca China in Bolier's operations, they sustained losses in excess of \$2 million between 2003 and 2012. As a result, Decca USA terminated the employment of Plasmán and Barrett on 19 October 2012. The Plasman, however, refused to accept their terminations and continued to work out of Bolier's office space. During this time, the Plasman set up a new bank account in Bolier's name, and they diverted approximately \$600,000.00 in Bolier customer payments to that account. From these diverted funds, the Plasman paid themselves, respectively, approximately \$33,170.49 and \$17,021.66 in salaries and personal expenses. Plasmán also wrote himself a \$12,000.00 check, dated 5 December 2012, from the new account for "Bolier Legal Fees." Decca USA eventually changed the locks to Bolier's offices.

On 22 October 2012, the Plasman filed the instant action in Catawba County Superior Court alleging claims for, *inter alia*, corporate dissolution, breach of contract, fraud, constructive fraud, and trademark as well as copyright infringement. Two days later, the action was designated as a mandatory complex business case and assigned to the North Carolina Business Court. After removing the case to the United States District Court for the Western District of North Carolina, Decca USA moved Judge Richard L. Voorhees for a preliminary injunction against the Plasman. On 27 February 2013, Judge Voorhees entered an order (the injunction) that enjoined the Plasman from acting on Bolier's behalf in any manner. Judge Voorhees further ordered the Plasman to return all diverted funds to Bolier within five business days, and to provide Decca USA with an accounting of those funds. Judge Voorhees did not require Decca USA to post a security bond pursuant to Rule 65(c) of the Federal Rules of Civil Procedure, but the injunction did contain various terms that were meant to protect Plasmán's rights as a minority owner of Bolier while the litigation continued.

One week after the injunction was entered, the Plasman filed their "Response to Court Order" in federal court, which challenged certain provisions of the injunction and stated that "Plaintiffs have fully complied to the best of their ability with the Court Order signed on February 27, 2013." Shortly thereafter, the Plasman filed another motion that sought to have the federal court provide additional safeguards protecting "Plaintiffs Chris Plasmán and Bolier . . . pending final resolution of the merits." This motion also sought to "clarify the . . . [injunction] . . . to specifically permit [the Plasman] to retain funds paid to Chris Plasmán

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and Barrett Plasmán for wages earned and Bolier . . . expenses paid (including the \$12,000.00 paid as reimbursement for legal expenses) prior to January 14, 2013[.]” Although Judge Vorhees never ruled on these motions, the Plasman’s neither appealed the injunction nor properly sought to have it reconsidered.

The action was remanded to the North Carolina Business Court in September 2014 when Judge Voorhees dismissed the Plasman’s federal copyright claims and declined to exercise supplemental jurisdiction over the state law claims that remained. Upon remand, the parties filed competing motions for consideration by Judge Louis A. Bledsoe, III. In a document entitled “Plaintiffs Motion to Amend Preliminary Injunction, to Dissolve Portions of the Preliminary Injunction and Award Damages, and Motion for Sanctions[.]” the Plasman’s moved Judge Bledsoe to, *inter alia*, amend and dissolve certain portions of the injunction. In contrast, Decca USA sought to enforce the injunction’s terms. Contending that the Plasman’s were in willful violation of the injunction, Decca USA moved Judge Bledsoe to hold the Plasman’s in civil contempt and to impose sanctions against them. After conducting a hearing on the parties’ motions, Judge Bledsoe entered an order on 26 May 2015 (the 26 May Order) denying the Plasman’s motion, and reasoning that because the preliminary injunction was carefully crafted and narrowly tailored, it should not be “modified, amended, or dissolved in any respect.”² Although Judge Bledsoe declined to hold the Plasman’s in contempt, he did grant Decca USA’s motion to enforce the injunction’s requirements. To that end, the Plasman’s were ordered to pay Decca USA \$62,191.15 plus interest and to provide the accounting required by the injunction.

On 25 June 2015, the Plasman’s filed notice of appeal from the 26 May Order. Defendants later filed with this Court a motion to dismiss the Plasman’s appeal, arguing that the 26 May Order was not immediately appealable because it was an interlocutory order that did not affect a substantial right of the Plasman’s.

In July 2015, the Business Court, *sua sponte*, directed the parties to “submit short briefs advising the Court whether this case may proceed with further pleadings and discovery, and to a determination on the merits, or whether this case must be stayed pending resolution” of

2. We also note that, pursuant to the 26 May Order, Judge Bledsoe dismissed claims that were purportedly brought directly in Bolier’s name. Judge Bledsoe found that, as a 45% owner of Bolier, Plasmán was “not authorized to bring direct claims in Bolier’s name, and must instead bring such claims, if at all, as derivative claims on Bolier’s behalf as one of its members.”

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the Plasmans' interlocutory appeal from the 26 May Order. The case was temporarily stayed to allow for the parties' submissions. On 22 September 2015, while the Plasmans' appeal was pending in this Court, defendants filed a motion in the Business Court seeking to have the Plasmans held in contempt for failure to comply with the 26 May Order.

In October 2015, Judge Bledsoe entered an order that reflected his consideration of a stay pending appeal. Relying in part on this Court's decision in *RPR & Assocs., Inc. v. Univ. of N. Carolina-Chapel Hill*, 153 N.C. App. 342, 344, 570 S.E.2d 510, 512 (2002), *cert. denied and disc. review denied*, 357 N.C. 166, 579 S.E.2d 882 (2003), Judge Bledsoe determined that he had the authority to determine whether the 26 May Order was immediately appealable. Exercising that authority, Judge Bledsoe found that "no substantial right of the Plasmans was affected by the May 26 Order" because it "simply ordered [the Plasmans] to comply with the never-appealed, legally valid and binding, 2013 [Injunction] Order requiring [the Plasmans] to return money that the Federal Court found they had diverted from Bolier." Consequently, Judge Bledsoe dissolved the temporary stay that he had entered in July 2015, and determined that the "action [would] proceed in th[e Business] Court during the pendency of the Plasmans' appeal unless otherwise ordered by the Court[.]"

After holding a show cause hearing on defendants' contempt motion, Judge Bledsoe entered an order on 26 February 2016 (the Contempt Order) concluding that the Plasmans were in civil contempt of court because of their willful noncompliance with the 26 May Order. The Contempt Order contained a finding that repeated Judge Bledsoe's previous determination that "the appeal of the May 26 Order was interlocutory, did not affect a substantial right, and . . . did not stay the case." The Plasmans filed notice of appeal from the Contempt Order on 24 March 2016.

Roughly eight months later, in November 2016, this Court filed an opinion that dismissed the Plasmans' interlocutory appeal from the 26 May Order. *See Bolier & Co., LLC v. Decca Furniture (USA), Inc.*, __ N.C. App. __, 792 S.E.2d 865 (2016) (*Bolier I*). This Court reached three conclusions in support of its holding that the Plasmans had failed to demonstrate the loss of a substantial right absent immediate review of the 26 May Order:

First, we conclude that Judge Voorhees' Order was, in fact, appealable. It is well settled that preliminary injunction orders issued by a federal court are immediately appealable. . . .

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Second, Plaintiffs contend that their subsequent filings in federal court tolled their deadline for appealing Judge Voorhees' Order. We disagree. . . .

Had Plaintiffs intended to seek reconsideration of Judge Voorhees' Order so as to toll their deadline for appealing the preliminary injunction, they were required to file a motion that unambiguously sought such relief. However, they failed to do so. While Plaintiffs may have held out hope that the federal court would nevertheless modify its preliminary injunction as a result of their motion, it was still incumbent upon them to protect their appeal rights during the interim by taking an appeal of Judge Voorhees' Order to the Fourth Circuit within the thirty-day deadline provided by Rule 4 of the Federal Rules of Appellate Procedure. . . .

Finally, we reject Plaintiffs' argument that [the 26 May] Order was independently appealable. The specific aspects of [the 26 May] Order cited by Plaintiffs as depriving them of a substantial right are essentially identical to the preliminary injunction terms contained in Judge Voorhees' Order, which Plaintiffs never appealed. Thus, because Judge Bledsoe's Order merely enforces the preliminary injunction entered by Judge Voorhees, our consideration of the substantive issues raised by Plaintiffs in the present appeal would enable them to achieve a "back door" appeal of Judge Voorhees' Order well over three years after its entry.

Id. at ___, 792 S.E.2d at 872 (internal citations omitted). In sum, the *Bolier I* Court determined that the 26 May Order "simply reiterate[d] that [the Plasmans were] . . . bound to comply with the federal preliminary injunction that was entered on 27 February 2013." *Id.* at ___, 792 S.E.2d at 873.

The Plasmans now appeal from the Contempt Order.

II. Trial Court's Jurisdiction To Enter The Contempt Order

[1] As an initial matter, we address the Plasmans' argument that their appeal from the 26 May Order stayed all proceedings in the Business Court and left the trial court without jurisdiction to enter the Contempt Order.

Under North Carolina law, the longstanding general rule is that an appeal divests the trial court of jurisdiction over a case until the appellate

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court returns its mandate. *E.g.*, *Bowen v. Hodge Motor Co.*, 292 N.C. 633, 635, 234 S.E.2d 748, 749 (1977); *Upton v. Upton*, 14 N.C. App. 107, 109, 187 S.E.2d 387, 388 (1972). Our legislature has codified this rule at N.C. Gen. Stat. § 1-294 (2015), which provides that:

When an appeal is perfected as provided by this Article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein, unless otherwise provided by the Rules of Appellate Procedure;³ but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from. . . .

Pending the appeal, the trial judge is *functus officio*, *Bowen*, 292 N.C. at 635, 234 S.E.2d at 749, which is defined as being “without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.” *Black’s Law Dictionary* 743 (9th ed. 2009).

For over a century, the Supreme Court has recognized that an appeal operates as a stay of all proceedings at the trial level as to issues that are embraced by the order appealed. *E.g.*, *Bohannon v. Virginia Trust Co.*, 198 N.C. 702, 153 S.E. 263 (1930); *Pruett v. Charlotte Power Co.*, 167 N.C. 598, 83 S.E. 830 (1914). This is section 1-294 in a nutshell, for the statute itself draws a distinction between trial court’s inability to rule on matters that are inseparable from the pending appeal and the court’s ability to proceed on matters that are “not affected” by the pending appeal. *See* N.C. Gen. Stat. § 1-294 (2015). This jurisdictional issue often arises in the context of interlocutory orders.

In *Veazey v. Durham*, our State’s high court examined the question of the circumstances under which the appeal of an interlocutory order operates as a stay of the proceedings in the trial court. 231 N.C. 357, 57 S.E.2d 377 (1950). Speaking through Justice Ervin, the Supreme Court drew a clear distinction between the effect of immediately appealable and nonappealable interlocutory orders on a trial court’s continuing jurisdiction:

When a litigant takes an appeal to the Supreme Court from an appealable interlocutory order of the Superior Court and perfects such appeal in conformity to law, the appeal

3. The Supreme Court has yet to create exceptions to the general rule codified at section 1-294.

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operates as a stay of all proceedings in the Superior Court relating to the issues included therein until the matters are determined in the Supreme Court. G.S. Sec. 1-294. . . .

But this sound principle is not controlling upon the record in the case at bar. . . .

There is no more effective way to procrastinate the administration of justice than that of bringing cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders. The rules regulating appeals from the Superior Court to the Supreme Court are designed to forestall the useless delay inseparable from unlimited fragmentary appeals, and to enable courts to perform their real function, i.e., to administer 'right and justice * * * without sale, denial, or delay.' N.C. Const. Art. I, Sec. 35.

This being true, *a litigant cannot deprive* the Superior Court of jurisdiction to try and determine a case on its merits *by taking an appeal* to the Supreme Court *from a nonappealable interlocutory order* of the Superior Court. A contrary decision would necessarily require an acceptance of the paradoxical paralogism that a party to an action can paralyze the administration of justice in the Superior Court by the simple expedient of doing what the law does not allow him to do, i.e., taking an appeal from an order which is not appealable. . . .

[W]hen an appeal is taken to the Supreme Court from an interlocutory order of the Superior Court which is not subject to appeal, the Superior Court need not stay proceedings, but may disregard the appeal and proceed to try the action while the appeal on the interlocutory matter is in the Supreme Court.

Id. at 363-64, 57 S.E.2d at 382-83 (emphasis added and internal citations omitted). Justice Ervin then carefully reiterated that *an improper interlocutory appeal never deprives a trial court of jurisdiction over a case*:

We close this opinion with an admonition given by this Court to the trial bench three-quarters of a century ago: "But certainly when an appeal is taken as in this case from an interlocutory order from which no appeal is allowed by The Code, which is not upon any matter of law and which

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affects no substantial right of the parties, it is the duty of the Judge to proceed as if no such appeal had been taken.”

Id. at 367, 57 S.E.2d at 385 (quoting *Carleton v. Byers*, 71 N.C. 331, 335 (1874)).

There is no doubt that the 26 May Order was interlocutory. Ordinarily, “there is no right of immediate appeal from interlocutory orders and judgments.” *Travco Hotels, Inc. v. Piedmont Nat. Gas Co.*, 332 N.C. 288, 291, 420 S.E.2d 426, 428 (1992) (citation omitted). However, an interlocutory order is subject to immediate review⁴ when it “affects a substantial right that ‘will clearly be lost or irremediably adversely affected if the order is not review[ed] before final judgment.’” *Edmondson v. Macclesfield L-P Gas Co.*, 182 N.C. App. 381, 391, 642 S.E.2d 265, 272 (2007) (quoting *Blackwelder v. Dept. of Human Res.*, 60 N.C. App. 331, 335, 299 S.E.2d 777, 780 (1983)); see N.C. Gen. Stat. § 1-277(a) (2015) (“An appeal may be taken from every judicial order or determination of a [trial] judge . . . which affects a substantial right claimed in any action or proceeding[.]”); N.C. Gen. Stat. § 7A-27(b)(3) (2015) (providing a right of appeal from any interlocutory order that, *inter alia*, affects a substantial right).

“Essentially a two-part test has developed—the right itself must be substantial and the deprivation of that substantial right must potentially work injury to [the appellant] if not corrected before appeal from final judgment.” *Goldston v. Am Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990). Our Supreme Court has adopted the dictionary definition of “substantial right”: “‘a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which a [person] is entitled to have preserved and protected by law: a material right.’” *Oestreicher v. Am. Nat. Stores, Inc.*, 290 N.C. 118, 130, 225 S.E.2d 797, 805 (1976) (quoting Webster’s Third New International Dictionary 2280 (1971)). Even so, “the ‘substantial right’ test for appealability of interlocutory orders is more easily stated than applied. It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered.” *Waters v. Qualified Pers., Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978).

4. Immediate review of interlocutory orders is also available when the trial court certifies, pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure, that there is no just reason to delay appeal of its order or judgment. *Sharpe v. Worland*, 351 N.C. 159, 161-62, 522 S.E.2d 577, 579 (1999).

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Apart from the muddy waters of the substantial right test, there is also the issue of what authority a trial court possesses to rule on the interlocutory nature of an appeal. *Veazy* states that the “[trial c]ourt need not stay proceedings, but may *disregard* the appeal and proceed to try the action *while the appeal on the interlocutory matter* is in the Supreme Court.” 231 N.C. at 364, 57 S.E.2d at 383 (emphasis added). Before an interlocutory appeal is properly “disregarded” and the action proceeds, a substantial right analysis must be conducted at the trial level during the pendency of the appeal. To that end, a line of cases from this Court establishes that a trial judge is authorized to determine if an attempted appeal is of a nonappealable interlocutory order⁵ and to decide whether the trial court has jurisdiction to proceed once an appeal has been noticed. *See, e.g., T&T Dev. Co. v. S. Nat. Bank of S.C.*, 125 N.C. App. 600, 603, 481 S.E.2d 347, 349 (1997) (“[B]ecause plaintiffs had no right to appeal the granting of the motion *in limine*, the trial court was not deprived of jurisdiction and did not err in calling the case for trial.”); *Velez v. Dick Keffer Pontiac GMC Truck, Inc.*, 144 N.C. App. 589, 591, 551 S.E.2d 873, 875 (2001) (recognizing that “a litigant cannot deprive the trial court of jurisdiction to determine a case on its merits by appealing from a nonappealable interlocutory order of the trial court”).

In *RPR & Assocs.*, this Court established the parameters of the authority of the trial court in making this determination, stating:

Because the trial court had the authority to determine whether its order affected defendant’s substantial rights or was otherwise immediately appealable, the trial court did not err in continuing to exercise jurisdiction over this case after defendant filed its notice of appeal. The trial court’s determination that the order was nonappealable was reasonable in light of established precedent and the repeated denials by the appellate courts of this State to stay proceedings. Although this Court ultimately held that defendant’s appeal affected a substantial right, it also held that defendant was not immune to suit. Defendant states no grounds, nor has it produced any evidence to

5. This inquiry is not always straightforward, as the appealability of a particular type of order may not be well established. Whether or not an interlocutory order is immediately appealable will ultimately be decided in the appellate division, but the cases that follow focus on the trial court’s decision to continue to exercise jurisdiction over a case during the pendency of an appeal.

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demonstrate how it was prejudiced by the trial court's exercise of jurisdiction over this case.

153 N.C. App. at 349, 570 S.E.2d at 515. With the decision in *RPR & Assocs.*, the concepts of reasonableness and prejudice are injected into the appellate court's analysis.

This Court recently applied *RPR & Assocs.*' analytical framework in the context of a civil contempt order. See *SED Holdings, LLC v. 3 Star Properties, LLC*, __ N.C. App. __, 791 S.E.2d 914 (2016). In *SED Holdings*, the plaintiff secured an injunction that prohibited the defendants from selling or disposing of certain pools of residential mortgage loans. *Id.* at __, 791 S.E.2d at 917. The defendants appealed the injunction. *Id.* This Court determined that the interlocutory appeal affected a substantial right, but ultimately affirmed the injunction. *SED Holdings, LLC v. 3 Star Properties, LLC*, __ N.C. App. __, __, __, 784 S.E.2d 627, 630, 632 (2016) ("*SED I*").

While the appeal in *SED I* was pending, the defendants failed to comply with the injunction, prompting the trial court to hold a series of contempt proceedings. *SED Holdings*, __ N.C. App. at __, 791 S.E.2d at 917. In a show cause order, the trial court specifically "concluded . . . that: (1) the injunction did not affect a substantial right of defendants and was thus not immediately appealable, and (2) the trial court retained jurisdiction to enforce the terms of its injunction while defendants' appeal was pending in [the] Court [of Appeals]." *Id.* at __, 791 S.E.2d at 918. Before the decision in *SED I* was filed, the trial court entered an order holding the defendants in civil contempt. *Id.* On appeal to this Court, the defendants argued that the contempt order was a nullity, as their appeal from the injunction in *SED I* divested the trial court of jurisdiction to hold contempt proceedings on the defendants' willful noncompliance with the injunction's terms. *Id.*

In rejecting the defendants' argument, this Court recognized that

[a]t the very least, *RPR & Assocs.* stands for two general propositions: (1) a trial court properly retains jurisdiction over a case if it acts reasonably in determining that an interlocutory order is not immediately appealable, and (2) that determination may be considered reasonable even if the appellate court ultimately holds that the challenged order is subject to immediate review.

Id. at __, 791 S.E.2d at 920. The *SED Holdings* Court then reasoned as follows:

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It is clear that injunctive orders entered only to maintain the status quo pending trial are not immediately appealable. Then again, reasonable minds may disagree as to whether a particular injunction simply maintains the status quo. Beyond that, our courts have taken a flexible approach with respect to the appealability of orders granting injunctive relief. Most relevant to this case, orders affecting a party's ability to conduct business or control its assets may or may not implicate a substantial right. . . .

Because the injunctive relief was designed to maintain the status quo, and given that established precedent regarding the appealability of such orders is equivocal, the trial court reasonably concluded that its injunction was not immediately appealable. While this Court eventually held in *SED I* that defendants' appeal affected a substantial right, that decision was not dispositive of whether the trial court acted reasonably in determining that the appeal had not divested it of jurisdiction. *RPR & Assocs.*, 153 N.C. App. at 348, 570 S.E.2d at 514. As such, the trial court was not *functus officio*. This Court also held that the trial court's ruling on SED's motion for injunctive relief was not erroneous. Defendants therefore cannot demonstrate how they were "prejudiced by the trial court's [decision to continue to] exercise . . . jurisdiction over this case" by enforcing its injunction. *Id.* Accordingly, pursuant to the principles announced in *RPR & Assocs.*, we conclude that the trial court retained jurisdiction to enter orders related to the contempt proceedings in this case while defendants' interlocutory appeal was pending in this Court.

Id. at ___, 791 S.E.2d at 921-22 (internal citations omitted).

Applying the principles of *Veazy* as well as the analytical framework established in *RPR & Assocs.* and reaffirmed in *SED Holdings* to the present case, we conclude that Judge Bledsoe properly retained jurisdiction to enter the Contempt Order while the Plasman's appeal from the 26 May Order was pending in this Court. After the Plasman's noted their appeal from the 26 May Order, Judge Bledsoe, *sua sponte*, addressed the issue of whether the Business Court's jurisdiction was stayed pending the appeal. Upon careful consideration of the parties' briefs and arguments on this issue, Judge Bledsoe unequivocally concluded that the 26 May Order did not affect any substantial right of the Plasman's. According to Judge Bledsoe, the 26 May Order was

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not immediately appealable because it “simply ordered [the Plasmans] to comply with the never-appealed” injunction order. Judge Bledsoe reiterated this conclusion in the Contempt Order.

This Court agreed with Judge Bledsoe’s analysis, and specifically refused to allow the Plasmans to mount a collateral attack on the injunction via the 26 May Order that was entered to enforce it. *See Bolier I*, ___ N.C. App. at ___, 792 S.E.2d at 872. Consequently, unlike in *SED Holdings*, it is irrelevant whether the injunction at issue maintained the status quo or went further. The May 26 Order, which was the subject of the contempt proceedings, was not an injunction; it was an enforcement mechanism. Given the procedural context of this case, and the Business Court’s careful attention to the effect (or lack thereof) of the Plasmans’ appeal from the 26 May Order on its jurisdiction, Judge Bledsoe’s decision to proceed with the case was proper and reasonable. So too was Judge Bledsoe’s determination that the Plasmans’ pending interlocutory appeal did not deprive him of jurisdiction to enforce the 26 May Order. Furthermore, the Plasmans have not, and cannot, demonstrate that they were prejudiced by Judge Bledsoe’s decision to enforce an order that directed the Plasmans to comply with a prior, never-appealed injunction.

Nevertheless, the Plasmans argue that this Court’s recent decision in *Tetra Tech Tesoro, Inc. v. JAAAT Tech. Servs., LLC*, ___ N.C. App. ___, 794 S.E.2d 535 (2016) should control our analysis. In *Tetra Tech*, after not getting paid for its work on construction projects at Fort Bragg, the plaintiff sued the defendant-general contractor and the trial court later entered an injunction that required the general contractor “to segregate funds related to the construction projects and not to pay those funds out without court approval.” *Id.* at ___, 794 S.E.2d at 537. The defendant moved the trial court, pursuant to Rules 59 and 60 of the North Carolina Rules of Civil Procedure, to modify the injunction. *Id.* Although the trial court refused to modify the injunction in the manner requested by the defendant, the court did modify the injunction’s terms. *Id.* The defendant filed notice of appeal from the denial of its motion to modify and from the underlying injunction “on the ground that the time to appeal that order was ‘tolled’ by its motion to modify, which purportedly was filed under Rules 59 and 60.” *Id.* at ___, 794 S.E.2d at 538. Roughly two months later, the trial court “issued orders holding [the defendant] in contempt for violating the preliminary injunction and dismissing [the defendant’s] counterclaims with prejudice as a sanction.” *Id.* The defendant also appealed from those orders. *Id.*

On appeal, this Court concluded that it lacked jurisdiction to review the defendant’s “appeal from the preliminary injunction order because

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[it] did not appeal that order within thirty days and its motion to modify the preliminary injunction order, purportedly brought under Rules 59 and 60 of the Rules of Civil Procedure, did not toll the time to appeal.” *Id.* at ___, 794 S.E.2d at 540. However, the *Tetra Tech* Court went on to conclude that the trial court’s denial of the defendant’s motion to modify the injunction affected a substantial right and was immediately appealable, and that the trial court’s denial of the defendant’s requested modifications to the injunction did not constitute an abuse of discretion. *Id.* Finally, the *Tetra Tech* Court vacated the contempt and sanctions orders because the defendant’s appeal from the denial of its motion to modify the injunction divested the trial court’s jurisdiction over the matter. *Id.* at ___, 794 S.E.2d at 541.

In holding that “the trial court lacked jurisdiction to conduct a contempt proceeding and impose sanctions[,]” *id.*, the *Tetra Tech* Court relied on *Joyner v. Joyner*, 256 N.C. 588, 124 S.E.2d 724 (1962), in which our Supreme Court addressed an order for alimony pendente lite and child custody and held that the order was not enforceable by contempt while the order was on appeal. The *Tetra Tech* Court then distinguished its holding from the decision in *SED Holdings* as follows:

This Court recently held that there is an exception to the *Joyner* rule: “a trial court properly retains jurisdiction over a case if it acts reasonably in determining that an interlocutory order is not immediately appealable.” *SED Holdings, LLC v. 3 Star Prop., LLC*, __ N.C. App. __, __, 791 S.E.2d 914, 920 (2016). The analysis in *SED Holdings* turned on the fact that the injunction at issue merely maintained the status quo. That is not the case here. This injunction was a mandatory one; it forced a business to segregate its funds, imposed controls on the business’s operations, and forced the business to conduct an accounting and provide the results of that accounting to the opposing party. Thus, when [the defendant] appealed the denial of its motion to modify that injunction, the trial court was divested of jurisdiction to enforce it.

Tetra Tech, __ N.C. App at __ n.3, 794 S.E.2d at 541 n.3.

Despite the Plasman’s argument to the contrary, *Tetra Tech* is easily distinguished from the present case. To begin, the decision in *Joyner*—the only case upon which the *Tetra Tech* Court relied in vacating the contempt order at issue—was rendered upon the “general rule . . . that a duly perfected appeal or writ of error divests the trial court of further

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jurisdiction of the cause in which the appeal has been taken.” *Joyner*, 256 N.C. at 591, 124 S.E.2d at 726. The *Joyner* Court, unlike Judge Bledsoe, apparently had no reason to address the effect of an appeal of a nonappealable interlocutory order on a trial court’s jurisdiction. In addition, *Tetra Tech* involved an appeal from the denial of a motion to modify an injunction that imposed substantial restrictions on the defendant’s ability to conduct its business and required the defendant to provide extensive accountings to the plaintiff. Here, the underlying injunction simply restored the status quo by requiring the Plasmans to provide an accounting of the *diverted* funds, and to return *those funds* to Decca USA’s (or Bolier’s) corporate coffers. Finally, this case involves a trial court’s decision to enforce the terms of an interlocutory order after citing *RPR Assocs.* and making a specific determination that the order was not immediately appealable, whereas *Tetra Tech* involved no such determination. Indeed, the *Tetra Tech* Court may have reached a different decision on the contempt order at issue had it not determined that the defendant’s motion to modify was not immediately appealable.

Because the decisions in *Veazy*, *RPR Assocs.*, and *SED Holdings* control our analysis, we conclude that the Plasmans’ appeal from the 26 May Order, which Judge Bledsoe and this Court determined was not immediately appealable, did not divest the Business Court of jurisdiction over the case. As a result, Judge Bledsoe was not *functus officio* when the Plasmans noted their appeal from the 26 May Order, and the Contempt Order was properly entered. See *Onslow Cty. v. Moore*, 129 N.C. App. 376, 387-88, 499 S.E.2d 780, 788 (1998) (rejecting a party’s argument that, under *Joyner*, “the appeal of an underlying judgment stays contempt proceedings until the validity of the judgment is determined[,]” ’ and concluding that “[b]ecause the order issuing the injunction was interlocutory and no substantial right of [the party] was affected by the denial of immediate appellate review, the trial court was not divested of jurisdiction and could therefore properly hold [him] in contempt for violating the injunction”).

III. Scope Of The Plasmans’ Appeal

[2] Because the Plasmans purport to raise eight issues on appeal, we must determine whether all of those issues are properly before us. The “Issues Presented” section of the Plasmans’ principal brief lists the following issues for our consideration:

- I. Whether The Trial Court Erred In Considering An Appealed Order And Finding Plasman In Contempt Of An Appealed Order?

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II. Whether The Trial Court Erred In Finding That The Purpose Of The Preliminary Injunction Order Is Still Served By Requiring Payment Of Money To Decca USA?

III. Whether The Trial Court Erred By Finding Failure To Pay Money To Defendants After Proper Appeal Amounts To Willful, Bad Faith Non-Compliance?

IV. Whether The Trial Court Erred By Finding That Appellants Diverted Bolier's Money And Directing That Decca USA Be Paid?

V. Whether The Trial Court Erred By Failing To Find That The Federal Court Did Not Issue Required Rule 65 Security, And Failing To Find That Decca USA Has Continuously Deprived Plasman Of Statutorily Protected Member-Manager Rights?

VI. Whether The Trial Court Erred By Failing To Find That Decca USA Failed To Perform Material Terms Of The Preliminary Injunction Thereby Rendering The Injunction Unenforceable?

VII. Whether The Trial Court Erred In Requiring The Appellants To Pay Interest While Appellants Waited On Clarification Of The Court's Order?

VIII. Whether The Trial Court Erred In Considering Jointly Titled Assets And IRAs Exempt From Collection To Determine Appellants Ability To Comply With Order?

(All Caps Omitted).

Issue I has already been addressed and resolved in Section II above. After a careful review of the Plasman's principal brief, we conclude that Issues IV, V, and VII have not been properly argued or presented. As a result, those arguments are deemed abandoned. *See* N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned."). Issues II, III, VI, and VIII have been specifically argued on appeal, and each issue is addressed below.

IV. Discussion of the Contempt Order's Merits

A. Appellate Jurisdiction

[3] The Contempt Order is interlocutory, as it did not resolve all matters before the trial court in this case. *See Veazey*, 231 N.C. at 362, 57 S.E.2d at 381 ("An interlocutory order is one made during the pendency of

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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). As noted above, interlocutory orders are generally not appealable unless certified by the trial court pursuant to Rule 54(b) or unless a substantial right of the appellant would be lost or jeopardized absent immediate review. *See, e.g., Larsen v. Black Diamond French Truffles, Inc.*, __ N.C. App. __, __, 772 S.E.2d 93, 95 (2015). “The appeal of any contempt order . . . affects a substantial right and is therefore immediately appealable.” *Guerrier v. Guerrier*, 155 N.C. App. 154, 158, 574 S.E.2d 69, 71 (2002) (citing *Willis v. Power Co.*, 291 N.C. 19, 30, 229 S.E.2d 191, 198 (1976)). Accordingly, the Plasman’s appeal of the Contempt Order is properly before this Court.

B. Standard of Review and Generally Applicable Law

“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)(citation omitted). Our review of a contempt order, therefore, “is limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law.” *Middleton v. Middleton*, 159 N.C. App. 224, 226, 583 S.E.2d 48, 49 (2003) (citations and internal quotation marks omitted).

N.C. Gen. Stat. § 5A-21(a) (2015) provides:

Failure to comply with an order of a court is a continuing civil contempt as long as:

- (1) The order remains in force;
- (2) The purpose of the order may still be served by compliance with the order;
- (2a) The noncompliance by the person to whom the order is directed is willful; and
- (3) The person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order.

Civil contempt is designed to coerce compliance with a court order. *Adkins v. Adkins*, 82 N.C. App. 289, 293, 346 S.E.2d 220, 222 (1986).

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C. Whether The Order's Purpose May Be Served By Compliance

[4] The Plasmans argue that the purpose of the 26 May Order can no longer be served by requiring them to return to Decca USA the funds they diverted from Bolier after their terminations took effect. In making this argument, the Plasmans assert that the 26 May Order “erroneously and impermissibly awarded damages, not a fine permitted by contempt[.]” The Plasmans also contend that the payment of money was not necessary to avoid irreparable harm to Decca USA, i.e., “[t]here is no evidence that [Decca] USA needed [the] purported . . . ‘diverted money’ to preserve [its] majority control of Bolier.” These arguments are wholly lacking in merit.

Whether the issuance of the injunction was necessary to avoid irreparable harm to Decca USA was an issue ripe for Judge Voorhees’ consideration in federal court. *See Pashby v. Delia*, 709 F.3d 307, 320 (4th Cir. 2013) (recognizing that “parties seeking preliminary injunctions [must] demonstrate that (1) they are likely to succeed on the merits, (2) they are likely to suffer irreparable harm, (3) the balance of hardships tips in their favor, and (4) the injunction is in the public interest”). But the 26 May Order is not an injunction; it is an order entered to *enforce* an injunction. In the Contempt Order, Judge Bledsoe specifically found “that the purpose of the May 26 Order to enforce the Federal Court [Injunction] Order’s directive that the Plasmans return the diverted funds to Decca USA [] may still be served by compliance with the Order.” This finding was in harmony with this Court’s conclusion in *Bolier I* that Judge Bledsoe entered the 26 May Order “simply [to] enforc[e] the ruling in Judge Voorhees’ Order ordering [the Plasmans] to return to Decca USA all of the funds that the Plasmans had diverted from Bolier.” *Bolier I*, __ N.C. App. at __, 792 S.E.2d at 872. Our review of the record reveals that the Plasmans have yet to return the diverted funds. We need say little more than that the purpose of the 26 May Order—to enforce compliance with the injunction’s terms, including the requirement that funds diverted from Bolier’s bank accounts be returned to Decca USA—could still be served by compliance with the 26 May Order. To address the Plasmans’ arguments any further would permit them to mount an impermissible collateral attack on the underlying injunction. We refuse, as did the *Bolier I* Court, to “enable [the Plasmans] to achieve a ‘back door’ appeal of Judge Voorhees’ Order well over three years after its entry.” *Id.* at __, 792 S.E.2d at 872.

D. Willful Noncompliance

[5] The Plasmans next argue that Judge Bledsoe erroneously found that their noncompliance with the 26 May Order was willful. Curiously,

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the Plasmans assert that the time frame in which they could appeal the injunction was tolled by the subsequent motions for modification and clarification, a contention that the *Bolier I* Court squarely rejected. *See Bolier I*, __ N.C. App. at __, 792 S.E.2d at 872. Beyond that, the Plasmans argue that they acted in good faith and pursuant to “proper legal process,” and that the trial court lacked jurisdiction to enter any ruling—including the Contempt Order—once notice of appeal from the 26 May Order was given. According to the Plasmans, their “understanding that [the appeal] divested the trial court of jurisdiction to continue contempt proceedings necessarily prevented [them] from being found in willful, bad faith disobedience.” We disagree.

As an initial matter, we have already concluded above that the trial court *did* have jurisdiction to enter the Contempt Order. Furthermore, the record supports Judge Bledsoe’s finding that the Plasmans were in willfill noncompliance of the 26 May Order at the time the Contempt Order was entered.

“ ‘Willful’ has been defined as disobedience which imports knowledge and a stubborn resistance, and as something more than an intention to do a thing. It implies doing the act purposely and deliberately, indicating a purpose to do it, without authority—careless whether [the contemnor] has the right or not—in violation of law[.]” *Hancock v. Hancock*, 122 N.C. App. 518, 523, 471 S.E.2d 415, 418 (1996) (citation and other internal quotations marks omitted). The term willfulness “involves more than deliberation or conscious choice; it also imports a bad faith disregard for authority and the law.” *Forte v. Forte*, 65 N.C. App. 615, 616, 309 S.E.2d 729, 730 (1983) (citations omitted). Consequently, “[w]illfulness in a contempt action requires either a positive action (a ‘purposeful and deliberate act’) in violation of a court order or a stubborn refusal to obey a court order (acting ‘with knowledge and stubborn resistance’).” *Hancock*, 122 N.C. App. at 525, 471 S.E.2d at 419 (citation omitted).

In the present case, Judge Bledsoe made the following findings:

{17} . . . In the P.I. Order, the Federal Court first ordered the Plasmans to return to Decca USA’s Bank of America lockbox all of Bolier & Co.’s monies, including but not limited to customer payments, diverted to them. . . . This requirement arose out of the Plasmans’ purported removal of Bolier funds from Decca USA accounts between the date of their employment termination on October 19, 2012 and the date when they were finally locked out of Bolier’s premises on January 14, 2013. The Plasmans used these

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funds to pay their purported wages, expenses, and attorney's fees after their employment was terminated.

{18} The Plasmans did not return the funds as ordered by the Federal Court, and after the matter was remanded to this Court, the Court, in its May 26 Order, granted Decca USA's Motion to Enforce [the Federal Court's P.I.] Order

. . . .

{19} The Plasmans have not yet returned to Decca USA the diverted funds. The Plasmans never appealed the Federal Court P.I. Order and only filed a response to [the] Court Order seeking clarification as to the order to repay diverted funds. The Federal Court did not respond to the Plasmans' Response prior to remand. On June 25, 2015, the Plasmans filed a Notice of Appeal of this Court's May 26 Order, including the portions of the Order enforcing the Federal Court P.I. Order's requirement that the Plasmans return the diverted funds.

{20} This Court subsequently concluded that because the May 26 Order "simply ordered [the] Plasmans to comply with the never-appealed, legally valid and binding, 2013 P.I. Order," the appeal of the May 26 Order was interlocutory, did not affect a substantial right, and therefore did not stay the case. . . .

{21} After this Court concluded that the case was not stayed, the Plasmans continued not to comply with the May 26 Order and again filed a motion to clarify this Court's holding. The Court again affirmed its conclusion that the appeal of the May 26 Order did not stay the case or affect a substantial right. . . . The Plasmans have continued to refuse to comply with the May 26 Order's directive to return the diverted funds.

{22} After the Court issued the Show Cause Order, the Plasmans, rather than complying with the Show Cause Order's instruction to submit evidence for *in camera* review or making a good faith effort to seek clarification, submitted, only minutes before the filing deadline, a document entitled Objections to Show Cause Production, Notice of Conditional Intent to Comply with Show Cause, and Request for Clarification ("Request"). The Court found

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that filing to be “procedurally improper, substantively without merit, and completely baseless as a purported excuse [not] to comply with the clear terms of the Court’s Show Cause Order. . . .”

[23] While the May 26 Order found that the Plasman’s response to the Federal Court’s P.I. Order reflected “a genuine dispute (or at least the Plasman’s genuine confusion) concerning [their obligations],” . . . *the Court finds that the Plasman’s belabored and continuing refusal to return the diverted funds in the face of this Court’s repeated directives to do so reflects “knowledge and stubborn resistance” to the May 26 Order. The Court also finds that the Plasman have acted with a “bad faith disregard for authority and the law” by improperly seeking to reargue the merits of the May 26 Order in this Court and the Court’s conclusion that the matter is not stayed pending appeal. The Court therefore finds that the Plasman are in willful noncompliance of the May 26 Order.*

(Emphasis added and internal citations omitted).

As summarized above, the Plasman did not comply with the injunction’s terms. Although the 26 May Order enforced the injunction and identified the exact amount of funds to be returned—\$62,192.15 plus applicable interest—the Plasman repeatedly filed motions in the Business Court that sought clarification of what was already clear: they were required to return the diverted funds to Decca USA. The Plasman also stubbornly refused to accept Judge Bledsoe’s conclusions that the appeal from the 26 May Order did not divest the Business Court’s jurisdiction over the case, and that the trial level proceedings would not be stayed. The record is replete with instances in which the Plasman acted with “knowledge” of and “stubborn resistance” to the 26 May Order’s clear directives. *Hancock*, 122 N.C. App. at 525, 471 S.E.2d at 419. Accordingly, Judge Bledsoe’s finding that the Plasman were in willful noncompliance with that order is supported by competent evidence.

E. Decca USA’s Purported Noncompliance with the Injunction and 26 May Order

[6] The Plasman also argue that the injunction and the 26 May Order are no longer enforceable because Decca USA has refused to comply with both orders’ requirement that the Plasman be provided with certain information concerning Bolier’s operations. We disagree.

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In making this argument, the Plasmans simply complain about relief they have not obtained from Judge Bledsoe regarding disputes outside the scope of this appeal. According to the Plasmans, “Judge Bledsoe has repeatedly failed to find that [Decca USA] has not provided [Chris] Plasmán with the information or access to Bolier. To the contrary, Judge Bledsoe has repeatedly stayed discovery, refused to compel [Decca USA] to provide information.” The Plasmans also argue that the Business Court was required to “issue [an] adequate [Rule 65] security bond” before the injunction could be enforced.

The gravamen of these contentions is that the 26 May Order lacked essential findings and was erroneous. Even assuming that Judge Bledsoe should have made certain findings concerning Decca USA’s compliance with the injunction, those findings would be immaterial to a determination of whether the Plasmans had complied with *their own* obligations under the injunction. Furthermore, “[a]n erroneous order is one ‘rendered according to the course and practice of the court, but contrary to law, or upon a mistaken view of the law, or upon an erroneous application of legal principles.’” *Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 676, 360 S.E.2d 772, 777 (1987) (citation omitted). “An erroneous order may be remedied by appeal; it may not be attacked collaterally.” *Id.* (citation omitted). This Court has already dismissed the Plasmans appeal in *Bolier I*. Thus, regardless of whether the 26 May Order was properly issued or not, it could not simply be ignored by the Plasmans. Even if Decca USA has not complied with its responsibilities under the injunction (as enforced by the 26 May Order), the Plasmans’ obligation to return the diverted funds remains in place. Accordingly, this argument is without merit.

F. The Plasmans’ Ability To Comply With The 26 May Order

[7] Finally, the Plasmans argue that Judge Bledsoe improperly considered their jointly-held bank accounts and their individually-held investment retirement accounts (IRAs) in assessing the Plasmans’ present ability to comply with the 26 May Order. Once again, we disagree.

“In determining a contemnor’s present ability to pay, the appellate courts of this state have directed trial courts to ‘take an inventory of the property of the plaintiff; find what are his assets and liabilities and his ability to pay and work—an inventory of his financial condition.’” *Gordon v. Gordon*, 233 N.C. App. 477, 484, 757 S.E.2d 351, 356 (2014) (quoting *Bennett v. Bennett*, 21 N.C. App. 390, 393-94, 204 S.E.2d 554, 556 (1974)). “Considering how a contemnor pays his expenses is an important part of this analysis.” *Id.* “The majority of cases have held that

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to satisfy the ‘present ability’ test defendant must possess some amount of cash, or asset readily converted to cash.” *McMiller v. McMiller*, 77 N.C. App. 808, 809, 336 S.E.2d 134, 135 (1985). However, “[t]he standard is not having property free and clear of any liens, but rather that one has the present means to comply with the court order and hence to purge oneself of the contempt.” *Adkins*, 82 N.C. App. at 291, 346 S.E.2d at 222. “Reasonable measures may well include liquidating equity in encumbered assets.” *Id.* at 291-92, 346 S.E.2d at 222.

The Plasmans rely exclusively on *Spears v. Spears*, __ N.C. App. __, 784 S.E.2d 485 (2016) to argue that jointly-titled assets—here, joint checking and savings accounts—cannot be used to determine a party’s ability to comply with a contempt order. In *Spears*, this Court vacated a contempt order because, *inter alia*, the trial court faulted the defendant-husband “for failing to force his second wife to sell their beach house despite the fact that defendant testified that they owned the house as tenants by the entirety.” *Id.* at __, 784 S.E.2d at 496. However, the *Spears* Court simply recognized the statutory rule that a husband cannot not force his wife to sell, lease, transfer, or otherwise liquidate certain real property when that property is held as a tenancy by the entireties. *Id.* (citing N.C. Gen. Stat. § 39-13.6(a) (2013) (“Neither spouse may bargain, sell, lease, mortgage, transfer, convey or in any manner encumber any property so held without the written joinder of the other spouse.”)).

Spears has no application here, for the protections afforded real property held by spouses as tenants by the entirety do not apply in this instance. Therefore, the jointly-held bank accounts at issue were properly considered in Judge Bledsoe’s evaluation of the Plasmans’ ability to comply.

We reach the same conclusion concerning the individual IRAs held by the Plasmans. Indeed, this Court has previously held that a trial court properly considered funds in a defendant’s retirement account in determining that the defendant had the present ability to pay alimony arrears and purge himself of civil contempt. *Tucker v. Tucker*, 197 N.C. App. 592, 597, 679 S.E.2d 141, 144 (2009) (“Thus, the trial court properly considered the assets that defendant had available at the time of the hearing to satisfy the \$10,000.00 payment towards the alimony arrears and specifically based its conclusion regarding defendant’s ability to pay upon the fact that defendant had available, *inter alia*, \$6,200.00 from his 401K account and a \$2,000.00 cashier’s check, which together would comprise \$8,200.00 of the \$10,000.00.”). Accordingly, Judge Bledsoe’s inventory of the Plasmans’ financial condition properly took account of their jointly-held bank accounts and their individual IRAs, and it was not error to

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consider these assets when assessing the Plasmans' present ability to comply with the 26 May Order and return the diverted funds to Bolier.

V. Conclusion

For the reasons stated above, we conclude that the trial court had jurisdiction to hold the Plasmans in civil contempt, and that the Contempt Order should be affirmed in its entirety.

AFFIRMED.

Judges BRYANT and INMAN concur.

RADIATOR SPECIALTY COMPANY, PLAINTIFF

v.

ARROWOOD INDEMNITY COMPANY (AS SUCCESSOR TO GUARANTY NATIONAL INSURANCE COMPANY, ROYAL INDEMNITY COMPANY AND ROYAL INDEMNITY COMPANY OF AMERICA); COLUMBIA CASUALTY COMPANY; CONTINENTAL CASUALTY COMPANY; FIREMAN'S FUND INSURANCE COMPANY; INSURANCE COMPANY OF NORTH AMERICA; LANDMARK AMERICAN INSURANCE COMPANY; MUNICH REINSURANCE AMERICA, INC. (AS SUCCESSOR TO AMERICAN REINSURANCE COMPANY); MUTUAL FIRE, MARINE AND INLAND INSURANCE COMPANY; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA; PACIFIC EMPLOYERS INSURANCE COMPANY; ST. PAUL SURPLUS LINES INSURANCE COMPANY; SIRIUS AMERICA INSURANCE COMPANY (AS SUCCESSOR TO IMPERIAL CASUALTY AND INDEMNITY COMPANY); UNITED NATIONAL INSURANCE COMPANY; WESTCHESTER FIRE INSURANCE COMPANY; ZURICH AMERICAN INSURANCE COMPANY OF ILLINOIS, DEFENDANTS

No. COA16-638

Filed 16 May 2017

1. Appeal and Error—interlocutory orders—partial summary judgment—non-collateral issues remaining—not a final judgment

In a complex liability insurance case involving a company that manufactured products containing benzene and asbestos, partial summary judgment orders were interlocutory even though defendant-Fireman's Fund Insurance Company contended that the orders constituted a final judgment for appellate purposes. Certain coverage disputes were resolved, but non-collateral issues remained, including damages and the individual claims of plaintiff against defendant-National Union Fire Insurance Company.

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2. Appeal and Error—interlocutory orders—substantial right exception—duty to defend—unidentified pending claims—appeal dismissed

The Court of Appeals dismissed the appeals of the manufacturer of products containing benzene and asbestos (Radiator Specialty Company (RSC)) in a case that involved multiple liability insurance companies. While RSC contended that partial summary judgment and other orders affected its substantial right to duty-to-defend coverage, the duty-to-defend substantial right exception has never been applied to orders that resolve ancillary coverage disputes with respect to numerous unidentified claims. RSC made a bare citation to *Cinoman v. Univ. of N. Carolina*, 234 N.C. App. 481 (2014), without application or analysis and did not establish that *Cinoman* controlled here. Furthermore, RSC never explained the practical impact that applying any of these orders (including allocation and trigger orders for determining coverage and costs) would have on its right to insurance defense in any allegedly pending claim.

3. Appeal and Error—interlocutory order—multiple insurance companies—trigger order for coverage—substantial right not affected

In a case involving a manufacturer of products containing benzene and asbestos and multiple liability insurance companies, one of the insurance companies (Fireman's Fund) could not establish appellate jurisdiction over an interlocutory appeal based on the contention that a Trigger Order for liability coverage affected a substantial right. The Trigger Order had no practical effect on Fireman's Fund's substantial rights because the trial court entered an order that Fireman's Fund owed no duty to plaintiff absent its consent. Additionally, Fireman's Fund did not show how application of the trigger order would impact any particular claim.

4. Appeal and Error—appealability—pretrial orders multiple liability insurers—asbestos and benzene—no certification—petition for certiorari denied

In a case involving the manufacturer of products containing benzene and asbestos and multiple liability insurance companies, it was noted that neither plaintiff-Radiator Safety Company (RSC) nor Fireman's Fund Insurance Company had attempted to obtain N.C.G.S. § 1A-1, Rule 54(b) certification of interlocutory orders, and those orders thus remained subject to change until entry of a final judgment. Moreover, petitions for certiorari by RSC and Fireman's Fund were denied. Significant non-collateral issues such as damages

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remained disputed and it was unclear whether other claims had been resolved.

Appeal by plaintiff from orders entered 28 and 29 January 2016 by Judge W. David Lee in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 January 2017.

Perkins Coie LLP, by Jonathan G. Hardin, pro hac vice, and Catherine J. Del Prete, pro hac vice; and McGuireWoods LLP, by Joshua D. Davey and L.D. Simmons, II, for plaintiff-appellant, cross-appellee Radiator Specialty Company.

No brief filed for defendant-appellee Arrowood Indemnity Company.

Smith Moore Leatherwood LLP, by Matthew Nis Leerberg and Timothy P. Lendino; and Rivkin Radler LLP, by Michael A. Kotula, pro hac vice, and Robert A. Maloney, pro hac vice, for defendant-appellee, cross-appellant Fireman's Fund Insurance Company.

Hedrick Gardner Kincheloe & Garofalo, LLP, by M. Duane Jones and Paul C. Lawrence; and Musick, Peeler, & Garrett, LLP, by Stephen M. Green, pro hac vice, for defendant-appellee Landmark American Insurance Company.

Goldberg Segalla, LLP, by David L. Brown; and Jacson & Campbell, P.C., by Donald C. Brown, Jr. and Timothy R. Dingilian, for defendant-appellee National Union Fire Insurance Company of Pittsburgh, PA.

Nexsen Pruet, PLLC, by James W. Bryan; and Saul Ewing, LLP, by Thomas S. Schaufelberger, pro hac vice, and Aaron J. Kornblith, pro hac vice, for defendant-appellee United National Insurance Company.

Gallivan, White & Boyd, P.A., by Phillip E. Reeves, pro hac vice, Jennifer E. Johnsen, pro hac vice, and Gillian S. Crowl; and Ellis & Winters LLP, by Thomas H. Segars, for defendant-appellee, cross-appellant Zurich American Insurance Company of Illinois.

Hunton & Williams LLP, by Nash E. Long; and Pillsbury Winthrop Shaw Pittman LLP, by Mark J. Plumer, pro hac vice, and Vernon

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Thompson, Jr., pro hac vice, for Edison Electric Institute, amicus curiae.

Cranfill Sumner & Hartzog LLP, by Jaye E. Bingham-Hinch and Laura Foggan, pro hac vice, for Complex Insurance Claims Litigation Association, amicus curiae.

Robinson, Bradshaw & Hinson, P.A., by R. Steven DeGeorge; and Reed Smith LLP, by Ann V. Kramer, pro hac vice, and Julie L. Hammerman, pro hac vice, for United Policyholders, amicus curiae.

ELMORE, Judge.

The interlocutory appeals and cross-appeals in this complex insurance case arise from an action brought by a diversified products manufacturer and seller that, since 1971, secured from about two dozen insurers a sophisticated multi-policy commercial liability insurance package; for a few undisclosed years manufactured products containing benzene and asbestos and, consequently, has paid or incurred substantial litigation defense costs and liabilities to resolve hundreds of related products-liability claims; and then, years later, after settling coverage disputes with several of its insurers, brought the instant action against its remaining solvent insurers, seeking a judgment declaring the extent to which those insurers owe it a duty to pay its defense and indemnity costs under their respective policies for past and future benzene and asbestos claims brought against it.

Over the course of litigation, the parties moved and cross-moved for partial summary judgment on various coverage issues. After multiple hearings, the trial court entered fifteen orders resolving most disputes in the context of these progressive disease claims, including the proper theory to determine whether coverage has been triggered under a policy, method to allocate defense and indemnity costs for claims spanning multiple policy periods, and method to determine when underlying coverage exhausts and excess or umbrella coverage attaches. But before the court entered any final judgments in the action, the parties appealed or cross-appealed six of those orders.

This case presents various insurance liability coverage issues, including which trigger, allocation, and exhaustion theories or methods should apply to progressive disease claims spanning multiple policy periods of a decades-long, multi-carrier, multi-policy, multi-layered liability insurance coverage block. The dispositive issue, however, is

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whether this case should be dismissed at this stage in litigation. Several insurers request that we dismiss these appeals and cross-appeals so the trial court can enter a final judgment fully and finally resolving all claims. These insurers argue that the interlocutory orders on appeal would not irreparably affect substantial rights justifying immediate review. The insured and one insurer claim entitlement to immediate review on the basis that the orders affect their substantial rights.

Because these six interlocutory orders were not Rule-54(b)-certified by the trial court as appropriate for immediate appeal, nor has any party demonstrated sufficiently how any order affects its substantial rights and would work injury if not immediately reviewed, we dismiss these appeals and cross-appeals to allow the trial court to fully and finally resolve all matters before entertaining appellate review.

I. Background

Because thousands of documents in the appellate record and the parties' fifteen briefs were filed under seal, our discussion and analysis is limited.

Plaintiff Radiator Specialty Company (RSC) is an automotive, hardware, and plumbing products manufacturer and seller. Since 1971, RSC has insured itself against various risks from operating its business, securing from twenty-five insurers over one-hundred primary, excess, or umbrella commercial general and/or products liability insurance policies providing coverage for nearly annual periods in differing amounts, policies subject to differing limits, retentions, and deductibles. Five of those insurers, Fireman's Fund, Landmark, National Union, United National, and Zurich (defendants) issued RSC twenty-five primary, excess, or umbrella policies for nearly annual periods within a 1976–2014 coverage block.

For a few years within that coverage block, RSC manufactured products containing benzene and asbestos. As a result, RSC has been named as a defendant or co-defendant in hundreds of benzene- and asbestos-related products liability claims filed across the United States. Over several years, RSC has paid or incurred substantial litigation defense and liability costs to resolve hundreds of those claims and has entered into coverage settlements with many of its insurers.

In February 2013, RSC brought the instant action against its remaining fifteen solvent insurers, alleging they owed it a duty to indemnify RSC for its defense and liability costs and to reimburse RSC for its payment of those costs, and seeking a declaration of the rights, status, duties,

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and obligations of those insurers under their respective policies to pay RSC's defense and indemnity costs for the benzene and asbestos claims. In July 2015, RSC amended its complaint and named nine insurers, including defendants, seeking declarations of those insurers' defense and indemnity duties for the benzene claims and declarations of six insurers' duties for the asbestos claims. RSC's amended complaint also added two claims against National Union for its alleged bad faith refusal to pay defense costs or settle claims, seeking punitive damages, and its alleged unfair and deceptive trade practices, seeking treble damages. RSC demanded a jury trial on all six of its claims for relief.

Throughout the litigation, the parties advanced several theories of insurance coverage and moved and cross-moved for partial summary judgment on several issues. First, the parties disputed the proper theory of triggering coverage under a policy with respect to these progressive disease claims. RSC and one insurer moved for application of an "injury-in-fact" trigger, a theory in which coverage for "bodily injury occurs when there is medical evidence establishing when the injury occurred, regardless of when it becomes diagnosable." *Imperial Cas. & Indem. Co. v. Radiator Specialty Co.*, 862 F. Supp. 1437, 1441 (E.D.N.C. 1994) (citations omitted), *aff'd*, 67 F.3d 534 (4th Cir. 1995). Other insurers moved for application of an "exposure" trigger, meaning coverage would only be triggered during periods in which claimants were actually exposed to benzene or asbestos.

Second, the parties disputed the proper method for allocating defense and indemnity costs when a covered claim spans multiple policy periods. RSC moved for application of an "all-sums" allocation, a method by which "a triggered insurer is liable for all costs associated with a claim, subject to a right of contribution among any other triggered insurers." The insurers moved for application of a "pro-rata" allocation, in which "costs are spread among the triggered insurers, and to the insured for uninsured periods, in a time-on-the-risk manner."

Third, the parties disputed the proper underlying-policy exhaustion method to trigger excess or umbrella coverage. Two umbrella insurers moved for application of "horizontal" exhaustion, meaning that the insured must exhaust all available underlying coverage before turning to excess or umbrella coverage. The competing position was "vertical" exhaustion, meaning that once an underlying policy exhausts, the coverage obligation shifts upward to the excess or umbrella policy covering the same policy period.

After five days of motions hearings on these and other coverage disputes, the trial court allegedly entered fifteen orders on 28 or

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29 January 2016, although only eight are included in the appellate record. Relevant for this discussion are the six orders on appeal and their challenged rulings.

First, the court ruled that exposure trigger theory was the appropriate theory to determine when coverage under a policy was triggered (“Trigger Order”). Second, the court ruled that pro-rata allocation, based on a time-on-the-risk manner, was the proper method to allocate defense and indemnity costs for claims spanning multiple policy periods (“Allocation Order”). Third, the court ruled that horizontal exhaustion was the proper method to trigger excess or umbrella coverage, entering one order applicable to Zurich’s umbrella policy (“Zurich Horizontal Exhaustion Order”) and another applicable to Landmark’s umbrella policies (“Landmark Partial Summary Judgment Order”). Next, the court ruled that RSC may not apply settlement payments and indemnity incurred without Zurich’s consent to deduce the liability-retained limit of Zurich’s umbrella policy, as required to trigger its indemnification obligations (“Zurich Indemnity Obligations Order”). Finally, the court ruled that RSC’s coverage settlement with a primary insurer does not cease United National’s coverage obligations under its excess policy (“United National Coverage Cessation Order”).

On 26 February 2016, RSC appealed the Allocation Order, Trigger Order, Zurich Indemnity Obligations Order, Zurich Horizontal Exhaustion Order, and Landmark Partial Summary Judgment Order. That same day, Fireman’s Fund appealed the Trigger Order, Landmark Partial Summary Judgment Order, and Zurich Horizontal Exhaustion Order. On 29 February 2016, United National appealed the Allocation Order and United National Coverage Cessation Order. That same day, Zurich cross-appealed the Zurich Horizontal Exhaustion Order.

II. Analysis

On appeal or cross-appeal, the parties challenge several of the trial court’s rulings. In RSC’s appeals, it contends the court erred in applying an exposure trigger, rather than an injury-in-fact trigger; a pro-rata allocation, rather than an all-sums allocation; and a horizontal exhaustion method, rather than a vertical exhaustion method, with respect to Landmark’s umbrella coverage obligations. RCS also asserts the court erred by ruling it cannot apply settlement payments and indemnity incurred without Zurich’s consent to erode the retained-liability limit of Zurich’s umbrella policy. In Fireman’s Fund’s cross-appeal, it also challenges the trial court’s application of an exposure trigger, rather than an injury-in-fact trigger. In United National’s cross-appeal, it contends the

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court erred by ruling that RSC's settlement with an underlying insurer does not terminate its coverage obligation for that policy period. In Zurich's cross-appeal, it contends the court erred by including a footnote to its Zurich Horizontal Exhaustion Order that, Zurich alleges, implies that its umbrella coverage obligations may attach in a situation other than complete horizontal exhaustion.

However, we must first consider the appealability of these interlocutory orders. Landmark, National Union, United National, and Zurich contend these interlocutory appeals and cross-appeals are premature and should be dismissed so the trial court can fully and finally resolve all matters before appellate review. These insurers argue the orders are interlocutory, do not affect substantial rights, and would not work injury if not reviewed before final judgment.

RSC and Fireman's Fund disagree. These parties argue we should immediately review their appeals. Fireman's Fund asserts that the orders constitute a final judgment for appeal purposes and, alternatively, that the Trigger Order affects substantial rights because it dictates which insurers owe RSC defense in pending claims. RSC asserts the Trigger Order, Allocation Order, Zurich Horizontal Exhaustion Order, and Landmark Partial Summary Judgment Order would irreparably affect its substantial rights absent immediate review because the orders eliminate or severely restrict its ability to obtain insurance defense in pending claims.

A. Orders are Interlocutory

[1] As an initial matter, we reject Fireman's Fund's argument that these series of partial summary judgment orders constitute a final judgment under N.C. Gen. Stat. § 7A-27(b)(1) (2015) (providing statutory right to appeal from final judgments of the superior court).

A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court. An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.

Veazey v. City of Durham, 231 N.C. 357, 361–62, 57 S.E.2d 377, 381 (1950) (citations omitted).

Although RSC and its other insurers concede the orders are interlocutory, Fireman's Fund argues that, because the trial court "virtually

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decided all the issues of law in dispute” and “left only collateral issues for determination,” the orders, properly interpreted, constitute a final judgment for appeal purposes. Fireman’s Fund cites to *Duncan v. Duncan*, 366 N.C. 544, 742 S.E.2d 799 (2013), in which our Supreme Court held that “[a]n order that completely decides the merits of an action . . . constitutes a final judgment for purposes of appeal even when the trial court reserves for later determination collateral issues *such as attorney’s fees and costs.*” *Id.* at 546, 742 S.E.2d at 801 (emphasis added) (citation omitted).

Here, conversely, notwithstanding RSC’s pending attorney’s fees request, other non-collateral issues remain unresolved. Significantly, although the orders resolve certain coverage disputes, the issue of damages remains pending. *See Tridyn Indus., Inc. v. Am. Mut. Ins. Co.*, 296 N.C. 486, 492, 251 S.E.2d 443, 448 (1979) (dismissing as interlocutory “an order of partial summary judgment on the issue of liability, reserving for trial the issue of damages”); *see also Land v. Land*, 201 N.C. App. 672, 673, 687 S.E.2d 511, 513–14 (2010) (“Where defendants’ liability for . . . damages has been established by jury verdicts, and the only unresolved issue before the trial court is the amount of damages to be awarded, [the] appeal is interlocutory, does not affect a substantial right, and must be dismissed.”). Further, the record indicates RSC’s two individual claims against National Union remain pending. Accordingly, because claims remain unresolved and matters still need to be judicially determined in the trial court, these orders are interlocutory.

B. Appellate Jurisdiction

Landmark, National Union, United National, and Zurich contend we lack jurisdiction over these appeals and cross-appeals because no order would irreparably affect substantial rights absent immediate appellate review. RSC and Fireman’s Fund disagree and claim a right to immediate appeal on the basis that the orders affect substantial rights.

“[I]t is the duty of an appellate court to dismiss an appeal if there is no right to appeal.” *Pasour v. Pierce*, 46 N.C. App. 636, 639, 265 S.E.2d 652, 653 (1980) (citing *Waters v. Qualified Pers., Inc.*, 294 N.C. 200, 201–02, 240 S.E.2d 338, 340 (1978)). “Generally, there is no right of immediate appeal from interlocutory orders.” *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). The purpose for this rule “is to prevent fragmentary, premature and unnecessary appeals by permitting the trial divisions to have done with a case fully and finally before it is presented to the appellate division.” *Waters*, 294 N.C. at 207, 240 S.E.2d at 343.

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Yet immediate appeal from an interlocutory order may be allowed in two situations. First, an appeal may lie in multi-claim or multi-party litigation, if the trial court certifies under Rule 54(b) of the North Carolina Rules of Civil Procedure that its order represents a final judgment as to some claims or parties and that there is no just reason to delay the appeal. N.C. Gen. Stat. § 1A-1, Rule 54(b) (2015). Second, an appeal may lie if the order qualifies under N.C. Gen. Stat. §§ 1-277 and 7A-27(d)(1) (2015), typically because it affects a “ ‘substantial right which [the appellant] might lose if the order is not reviewed before final judgment.’ ” *Hanesbrands Inc. v. Fowler*, __ N.C. __, __, 794 S.E.2d 497, 499 (2016) (quoting *City of Raleigh v. Edwards*, 234 N.C. 528, 530, 67 S.E.2d 669, 671 (1951)).

Here, because no order is Rule 54(b)-certified as appropriate for immediate appeal, to establish appellate jurisdiction RSC and Fireman’s Fund bear the burden of demonstrating how each order it appeals “ ‘(1) affect[s] a substantial right and (2) [will] work injury if not corrected before final judgment.’ ” *Harris v. Mattheus*, 361 N.C. 265, 269, 643 S.E.2d 566, 569 (2007) (quoting *Goldston*, 326 N.C. at 728, 392 S.E.2d at 737); see also *Goldston*, 326 N.C. at 726, 392 S.E.2d at 736 (“[A]n appeal from an interlocutory order will be dismissed as fragmentary and premature unless the order affects some substantial right and will work injury to appellant if not corrected before appeal from final judgment.”). “It is the appellant’s burden to present appropriate grounds for . . . acceptance of an interlocutory appeal, . . . and not the duty of this Court to construct arguments for or find support for appellant’s right to appeal[.]” *Hanesbrands*, __ N.C. at __, 794 S.E.2d at 499 (quoting *Johnson v. Lucas*, 168 N.C. App. 515, 518, 608 S.E.2d 336, 338, *aff’d per curiam*, 360 N.C. 53, 619 S.E.2d 502 (2005)).

To satisfy this burden, RSC and Fireman’s Fund must allege in the “statement of the grounds for appellate review” section of their briefs “sufficient facts and argument [establishing] that [a] challenged order affects a substantial right,” N.C. R. App. P. 28(b)(4), and “must present more than a bare assertion that [an] order affects a substantial right; they must *demonstrate why* [an] order affects a substantial right,” *Hanesbrands*, __ N.C. at __, 794 S.E.2d at 499 (quoting *Hoke Cnty. Bd. of Educ. v. State*, 198 N.C. App. 274, 277–78, 679 S.E.2d 512, 516 (2009) (first emphasis added)). “ ‘Where the appellant fails to carry the burden of making such a showing to the court, the appeal will be dismissed.’ ” *Id.* at __, 794 S.E.2d at 499 (quoting *Johnson*, 168 N.C. App. at 518, 608 S.E.2d at 338).

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1. RSC's Substantial Right Showing

[2] RSC alleges the orders affect its substantial right to “duty-to-defend coverage for currently pending lawsuits” because the orders “eliminat[e] or severely limit[] its ability to obtain a defense from its [i]nsurers in currently pending products liability suits.” In the statement of the grounds for appellate review section of its principal brief, RSC makes a bare citation to our decision in *Cinoman v. Univ. of N. Carolina*, 234 N.C. App. 481, 764 S.E.2d 619, *disc. rev. denied*, __ N.C. __, 763 S.E.2d 383 (2014), and asserts: “Where, as here, there is a pending suit or claim, ‘an interlocutory order concerning the issue of whether an insurer has a duty to defend in the underlying action “affects a substantial right that might be lost absent immediate appeal.” ’ ” *Id.* at 483, 764 S.E.2d at 621–22 (quoting *Lambe Realty Inv., Inc. v. Allstate Ins. Co.*, 137 N.C. App. 1, 4, 527 S.E.2d 328, 331 (2000)). Yet RSC neither applies nor analogizes the facts or procedural posture of *Cinoman* to its case and, therefore, fails to establish adequately that our finding of a substantial right in *Cinoman* controls here.

In *Cinoman*, the plaintiffs, Dr. Cinoman and his malpractice insurer, appealed from an interlocutory injunction order staying their declaratory judgment action brought on the issue of whether the defendant, UNC, owed defense and indemnity in a pending medical malpractice action. *Id.* at 482–83, 764 S.E.2d at 621. UNC had denied coverage and the patient demanded damages exceeding applicable malpractice insurance policy limits. *Id.* at 483, 764 S.E.2d at 621. The interlocutory injunction order on appeal stayed the plaintiff’s declaratory judgment proceedings pending resolution the underlying malpractice action. *Id.* Accordingly, we concluded the order, which stayed an action brought on the issue of whether defense was owed in the underlying action, “concern[ed] the issue of whether an insurer has a duty to defend in the underlying action,” and found a substantial right justifying immediate review. *Id.* at 483, 764 S.E.2d at 621–22.

Here, conversely, no order RSC appeals stays a declaratory judgment action brought on the issue of whether an insurer owes it defense in a particular claim pending resolution of that underlying claim. Nor do RSC’s appeals arise from an action in which it alleges a particular insurer owes it defense in a particular claim. Rather, RSC’s appeals arise from an action in which it seeks a declaration of the extent to which multiple insurers owe it a duty “to pay for defense costs and indemnity incurred” in hundreds of unidentified past claims and future claims brought against it. Further, RSC pointed this Court to no facts underlying any allegedly pending claim, such as whether, as in *Cinoman*, coverage has

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been denied, or whether damages demanded would exceed reachable coverage limits. RSC's bare assertions that claims are pending against it and that these the orders concern the issue of whether an insurer owes defense in those claims, without further facts or argument, fails to demonstrate that our decision in *Cinoman* to find a substantial right controls its case.

In *Lambe*, we first acknowledged that an insured may be entitled to interlocutory review of an order “of partial summary judgment on the issue of whether [the insurer] has a duty to defend [the insured] in [an] underlying action,” 137 N.C. App. at 4, 527 S.E.2d at 331, because “the duty to defend involves a substantial right to . . . the insured,” *id.* (quoting *Gen. Accident Ins. Co. v. Ins. Co. of N. Am.*, 44 Ohio St. 3d 17, 21–22, 540 N.E.2d 266, 271 (1989)). In recognizing this right, we explained that when an insurer denies coverage in a pending claim, “the insured often must choose to settle the suit as quickly as possible in order to avoid costly litigation, bring a declaratory judgment action against the insurer seeking a declaration that there is a duty to defend, or defend the suit without help from the insurer.” *Id.* (quoting *Gen. Accident Ins. Co.*, 44 Ohio St. 3d at 21–22, 540 N.E.2d at 271).

Since *Lambe*, the duty-to-defend substantial right exception has been applied to permit an insured interlocutory review an order deciding the ultimate duty-to-defend issue when an identified claim is pending against it and the order arose from an action in which the insured alleged that it was owed defense in that claim. *See Enter. Leasing Co. v. Williams*, 177 N.C. App. 64, 67–68, 627 S.E.2d 495, 497–98 (2006) (finding the insured had substantial right where order declared, in part, its insurer owed “no duty to defend” in claim pending against it). This exception has also been applied to review an interlocutory order that stayed declaratory judgment proceedings brought on the ultimate duty-to-defend issue in a particular claim. *See Cinoman*, 234 N.C. App. at 483, 764 S.E.2d at 621–22. Heretofore, however, the duty-to-defend substantial right exception has never been applied to interlocutory orders that concern not the ultimate duty-to-defend issue with respect to a particular pending claim but resolve ancillary coverage disputes with respect to numerous unidentified claims, orders that merely may indirectly affect the duty-to-defend issue if applied to an allegedly pending claim. *See Paradigm Consultants, Ltd. v. Builders Mut. Ins. Co.*, 228 N.C. App. 314, 319, 745 S.E.2d 69, 73 (2013) (finding no substantial right, in part, because, although order dismissed the insurer’s affirmative defenses, it “did not address the ultimate issue of whether [the insurer] owed [the insured] a duty to defend and indemnify” in pending claim).

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In this case, the orders RSC appeals decide the proper trigger theory and cost allocation method, as well as policy exhaustion method by which Landmark's and Zurich's umbrella coverage obligations attach, with respect to numerous unidentified claims. But no order directly decides or stays a decision on the ultimate duty-to-defend issue with respect to any particular claim. Although we are cognizant that certain orders may implicate the duty-to-defend issue to differing degrees depending upon the facts of an allegedly pending claim, RSC advanced no legal argument for expanding the duty-to-defend substantial right exception to orders that do not directly decide this ultimate issue. Additionally, unlike the appeals in *Enterprise Leasing Co.* and *Cinoman*, which arose from an allegation that an insurer owed defense in a particular pending claim, RSC's appeals arise from its allegation that multiple insurers owe it a "duty to pay for defense costs and indemnity incurred" in numerous unidentified claims. RSC advanced no argument for expanding this exception to appeals arising not from an allegation that an insurer owes defense in a particular pending claim but in hundreds of resolved, and a few allegedly pending, unidentified claims. Further, neither RSC shows adequately nor does the record indicate how delaying RSC's appeals until final judgment would force it to settle suits quickly, bring another declaratory judgment action, or leave it unable to mount an adequate defense in any claim. See *Lambe*, 137 N.C. App. at 4, 527 S.E.2d at 331. "[W]e take a restrictive view of the substantial right exception to the general rule prohibiting immediate appeals from interlocutory orders." *Hamilton v. Mortg. Info. Servs., Inc.*, 212 N.C. App. 73, 78, 711 S.E.2d 185, 189 (2011) (citation, quotation marks, and brackets omitted).

Yet "[r]ecognizing that 'the "substantial right" test for appealability of interlocutory orders is more easily stated than applied,' . . . it is 'usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered.'" *Hanesbrands*, __ N.C. at __, 794 S.E.2d at 500 (quoting *Waters*, 294 N.C. at 208, 240 S.E.2d at 343). Generally, "each interlocutory order must be analyzed to determine whether a substantial right is jeopardized by delaying the appeal." *Stetser v. TAP Pharm. Prod., Inc.*, 165 N.C. App. 1, 11, 598 S.E.2d 570, 578 (2004).

Here, the Trigger Order and Allocation Order decide the proper theory of triggering coverage and method of allocating defense and indemnity costs in hundreds of past and future claims brought against RSC. In the Zurich Indemnity Obligations Order, the court ruled that Zurich owes no duty to indemnify RSC until RSC demonstrates that it has exhausted the

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liability-retained limit of Zurich's umbrella policy, which the court ruled RSC cannot erode by applying its indemnity costs paid or liabilities incurred without Zurich's consent. Zurich's policy provided \$5 million in umbrella liability coverage per occurrence and in annual aggregate, with a \$10,000.00 liability-retained limit per claim, for the 13 November 1982–13 November 1983 policy period. In the Landmark Partial Summary Judgment Order, the court ruled that the Landmark umbrella policies may afford RSC a duty to defend in a given benzene action where all applicable underlying policies have been exhausted by payments or settlements on RSC's behalf. These policies provided umbrella coverage in \$10 million or \$8 million per occurrence and annual aggregate amounts, with a \$10,000.00 retained limit, for nearly annual policy periods spanning from 8 October 2003 to 1 May 2014.

RSC asserts in a footnote to its brief that, as of 31 October 2016, thirty-nine benzene claims remain pending against it, and argues the orders would work injury to its substantial right to insurance defense in those claims if not immediately reviewed because the Allocation Order "restricted the [i]nsurers' duty to defend RSC to a small fraction of its litigation costs under the guise of pro rata allocation"; the Trigger Order "reduced the number of policies available to defend RSC by applying the more restrictive 'exposure' trigger of coverage"; the Landmark Partial Summary Judgment Order "eliminated RSC's right to a defense from Landmark due to application of 'horizontal exhaustion' "; and the Zurich Horizontal Exhaustion Order "delayed RSC's right to a defense under Zurich's umbrella policy by barring RSC from properly counting settlements which did not require Zurich's consent toward exhausting underlying limits." Yet RSC never explained the practical impact applying any of these orders would have on its right to insurance defense in any allegedly pending claim.

RSC pointed this Court to no factual predicate underlying an allegedly pending benzene claim, nor did it identify any pending asbestos claims. *See Paradigm*, 228 N.C. App. at 319, 745 S.E.2d at 73 (finding no substantial right when underlying litigation had resolved). Additionally, the record reveals that the trial court entered an order declaring that three insurers owed RSC defense in benzene claims. These insurers issued RSC seven reachable policies providing primary liability coverage for certain annual periods within the 1981–1992 coverage block in differing amounts, subject to differing policy limits, deductibles, and retentions. In light of this order and RSC's failure to point us to any relevant facts in any allegedly pending claim—such as, whether insurers have denied coverage, the period in which claimants alleged exposure

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to RSC's benzene-containing products or evidence indicates suffered an injury-in-fact, or the amount of damages demanded—this Court is unable to determine which policy periods may be implicated, which policies may be triggered, the extent to which RSC may be entitled to reachable primary coverage, or the extent to which excess or umbrella coverage might attach in any particular claim.

Because RSC failed to present sufficient facts and argument explaining the practical consequence of applying any order to any allegedly pending claim, especially in light of being entitled to some defense, this Court cannot meaningfully assess the extent to which any order may actually impact its right to defense in a pending claim or the extent to which any order may work injury if not immediately reviewed. Nor is it “the duty of this Court to construct arguments for or find support for an appellant’s right to appeal; the appellant must provide sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.” *Wells Fargo Bank, N.A. v. Corneal*, 238 N.C. App. 192, 194, 767 S.E.2d 374, 376 (2014) (citing *Hamilton*, 212 N.C. App. at 79, 711 S.E.2d at 190). Because RSC has failed to demonstrate the applicability of its alleged substantial right exception to its particular case, we dismiss its appeals. See *Hanesbrands*, __ N.C. at __, 794 S.E.2d at 499 (“Where the appellant fails to carry the burden of making such a showing to the court, the appeal will be dismissed.” (citation omitted)).

2. Fireman’s Fund’s Substantial Right Showing

[3] Fireman’s Fund contends the Trigger Order affects substantial rights. It argues application of exposure trigger absolves certain insurers of their defense duties in pending claims, duties that may be triggered if injury-in-fact trigger were applied. Yet other than this bare assertion, Fireman’s Fund advances no further showing of how applying exposure trigger would actually impact any particular claim. Although we recognize the Trigger Order may implicate different insurers’ defense duties, as we concluded above, insufficient facts and arguments have been advanced for this Court meaningfully to assess the Trigger Order’s practical effect on any allegedly pending claim.

National Union argues Fireman’s Fund cannot establish appellate jurisdiction on the basis that the Trigger Order affects its substantial rights because the trial court entered an order declaring that Fireman’s Fund owed RSC no duty to defend absent its consent. We agree.

In *Peterson v. Dillman*, __ N.C. App. __, 782 S.E.2d 362 (2016), we rejected a similar substantial right argument advanced by an automobile

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insurer which attempted to appeal an interlocutory order that declared its policy covered a pending claim because, in light of an applicable statute, the order's practical effect was to permit but not require the insurer to defend in that pending claim. *Id.* at __, 782 S.E.2d at 367 ("We cannot agree with [the insurer] that its *choice* to enter the action is tantamount to a *duty* to defend an insured"). Here, the trial court entered an order declaring that Fireman's Fund owed RSC no defense duty absent Fireman's Fund's consent. As in *Peterson*, we conclude Fireman's Fund's ability but not duty to defend RSC does not implicate its substantial rights. Further, Fireman's Fund makes no showing as to how the Trigger Order would work injury to it if not reviewed before final judgment. *See Harris*, 361 N.C. at 270, 643 S.E.2d at 569 ("It is not determinative that the trial court's order affects a substantial right. The order must also work injury if not corrected before final judgment.").

Because applying the Trigger Order has no practical effect on Fireman's Fund's substantial rights, it cannot establish appellate jurisdiction on this basis. *See Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999) ("[A]n interlocutory order affects a substantial right if the order 'deprive[s] the *appealing* party of a substantial right which will be lost if the order is not reviewed before a final judgment is entered.'" (emphasis added) (quoting *Cook v. Bankers Life & Cas. Co.*, 329 N.C. 488, 491, 406 S.E.2d 848, 850 (1991))).

3. United National's and Zurich's Substantial Right Showing

United National and Zurich make no substantial right showing. These parties concede no order affects their substantial rights and contend that RSC's and Fireman's Fund's appeals and cross-appeals, as well as their own, should be dismissed at this stage in litigation. Because we dismiss RSC's and Fireman's Fund's appeals, we also dismiss United National's and Zurich's cross-appeals.

4. Other Avenues of Establishing Jurisdiction

[4] As a secondary matter, we note that RSC and Fireman's Fund could have attempted to establish appellate jurisdiction by obtaining a Rule 54(b)-certification on any of these interlocutory orders. *See Duncan*, 366 N.C. at 545, 742 S.E.2d at 801 ("Certification under Rule 54(b) permits an interlocutory appeal from orders that are final as to a specific portion of the case, but which do not dispose of all claims as to all parties."). These parties either did not seek Rule 54(b)-certification or were unsuccessful in persuading the trial court to certify any of its orders as appropriate for immediate appellate review. Because these orders were not Rule 54(b)-certified, they are subject to change until entry of a final judgment.

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N.C. Gen. Stat. § 1A-1, Rule 54(b) (“[I]n the absence of entry of such a final judgment, any order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.”); *see also Greene v. Charlotte Chem. Labs., Inc.*, 254 N.C. 680, 693, 120 S.E.2d 82, 91 (1961) (“[A]n [interlocutory] order . . . is subject to change by the court during the pendency of the action to meet the exigencies of the case.”).

We also acknowledge that Fireman’s Fund has filed a petition for writ of certiorari, which RSC has joined, requesting appellate review of any interlocutory order deemed unappealable. In our discretion, we deny the petition.

The general prohibition against entertaining interlocutory appeals exists “to eliminate the unnecessary delay and expense of repeated fragmentary appeals,” *Edwards*, 234 N.C. at 529, 67 S.E.2d at 671, and to “permit[] the trial divisions to have done with a case fully and finally before it is presented to the appellate division,” *Waters*, 294 N.C. at 207, 240 S.E.2d at 343. We reiterate that “[t]here is no more effective way to procrastinate the administration of justice than that of bringing cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders.’” *Harris v. Matthews*, 361 N.C. 265, 269, 643 S.E.2d 566, 568–69 (2007) (quoting *Veazey*, 231 N.C. at 363, 57 S.E.2d at 382). At this stage in litigation, significant non-collateral issues such as damages remain disputed and pending and it is unclear from the record the extent to which other claims, including RSC’s two individual claims against National Union, have been resolved. We conclude that “[t]his case should be reviewed, if at all, in its entirety and not piecemeal.” *Tridyn Indus.*, 296 N.C. at 494, 251 S.E.2d at 449 (dismissing as untimely appeal from interlocutory order resolving issue of liability coverage but leaving unresolved issue of damages and denying the appellant’s writ of certiorari as a means to otherwise establish appellate jurisdiction).

III. Conclusion

The six orders on appeal or cross-appeal are interlocutory. None were Rule 54(b)-certified by the trial court which entered them as appropriate for immediate appellate review. Nor has any party sufficiently demonstrated how any order affects its substantial rights and would work injury absent immediate review.

RSC failed to establish how the orders would irreparably affect its substantial right to insurance defense in allegedly pending benzene claims, especially in light of the particular facts and posture of its case. No order decides the ultimate duty-to-defend issue with respect to

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any particular claim. RSC failed to advance a sufficient argument for expanding the duty-to-defend substantial right exception to any order that may have a secondary effect on this ultimate issue, which arose from an action brought not on any particular pending claim but on numerous unidentified claims. RSC failed to present sufficient facts underlying any allegedly pending benzene claim, is entitled to some defense for benzene claims, and failed to show how applying any order would practically impact its defense in any pending claim, especially in light of reachable primary coverage. Fireman's Fund cannot establish that the Trigger Order affects its substantial rights because it owes RSC no defense duty absent its consent. The remaining insurers argue these appeals and their own cross-appeals should be dismissed at this stage in litigation and we agree.

We dismiss these appeals and cross-appeals so that all issues may be fully and finally resolved before appellate review.

DISMISSED.

Judges DILLON and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
DEVRIE LERAN BURRIS, DEFENDANT

No. COA16-238

Filed 16 May 2017

1. Constitutional Law—federal—Miranda warnings—conversation not custodial—driver's license retained by officer

There was no error in an impaired driving prosecution where the trial court denied defendant's motions to suppress statements made without *Miranda* warnings. Although defendant argued that he was in custody after he handed the officer his driver's license, defendant was not under formal arrest and, under totality of the circumstances, an objectively reasonable person would not have believed that he restrained to that degree. The encounter occurred in a hotel parking lot, defendant was standing outside his vehicle while speaking with the officer, he was not handcuffed or told he was under arrest, and his movement was not limited beyond the officer retaining his driver's license.

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2. Motor Vehicles—impaired driving—warrantless—exigent circumstances

There were exigent circumstances supporting a warrantless blood draw in an impaired driving prosecution where the trial court found that the officer had a reasonable belief that a delay would result in the dissipation of the alcohol in defendant's blood. The reading on the portable roadside breath test was .10; the officer believed that the reading was close to .08 after defendant was taken to the police department, refused the breathalyzer test, and made a telephone call; and the officer, who was the only officer at the scene, believed that it would have taken another hour and a half for another officer to arrive and to obtain a warrant.

3. Motor Vehicles—impaired driving—operating a motor vehicle—on a street, highway, or public vehicular area—sufficiency of the evidence

In an impaired driving prosecution arising from an encounter with an officer in a hotel parking lot, there was sufficient evidence for the jury to decide whether defendant had been driving the vehicle and whether he had driven it on a public highway, street, or public vehicular area. The officer had been called to the hotel because of robberies in the area, the engine of the vehicle was not running when the officer approached it, the vehicle was not in a parking space, defendant was sitting in the driver's seat, and defendant admitted that he had been driving the vehicle and described the route he had taken to the hotel in detail.

Appeal by defendant from judgment entered on or about 7 October 2015 by Judge Martin B. McGee in Superior Court, Cabarrus County. Heard in the Court of Appeals 22 August 2016.

Attorney General Joshua H. Stein, by Assistant Attorney General Kathryn E. Hathcock, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katherine Whitney Dickinson-Schultz, for defendant-appellant.

STROUD, Judge.

Defendant Devrie Leran Burris (“defendant”) appeals from the trial court’s judgment finding him guilty of impaired driving. On appeal, defendant raises several issues, including that the trial court erred in denying his motion to suppress self-incriminating statements made

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after his driver's license was retained and without *Miranda* warnings. Because we find that defendant was not in custody at the time his license was retained, we affirm the trial court's denial of his motion to suppress the statements. We also hold that the trial court properly denied defendant's motion to suppress the results of the warrantless blood draw due to exigent circumstances and that the court did not err in denying his motion to dismiss at the close of all the evidence.

Facts

On 13 April 2012, Christopher Hill of the Kannapolis Police Department ("Detective Hill") responded to a suspicious person call at a Fairfield Inn in Cabarrus County. After pulling in to the hotel parking lot, Detective Hill observed a red Ford Explorer "parked in front of the hotel kind of in the unloading area under the overhang." A woman was standing outside of the Explorer and defendant was sitting in the driver's seat. Detective Hill spoke to the woman standing outside of the car and to defendant through the passenger side window, which was rolled down. The vehicle's engine was not running.

Detective Hill asked "what they were doing there" and "for their identifications." Defendant and the woman responded that they were trying to get a room, and defendant got out of the driver's seat to walk around the car to Detective Hill to hand him his identification. Detective Hill noticed a "strong odor of alcohol beverage" from defendant when he handed over his driver's license. He told defendant and the woman to "hang tight there in the parking lot area" while he went inside to talk to the hotel clerk. He learned that the clerk had called because of a concern that the actions of defendant and the woman were similar to "a robbery that happened in a neighboring hotel a night or two before."¹

Based on his conversation with the hotel clerk, Detective Hill went back outside to ask defendant if he was the one driving the vehicle, to which he responded "yes." He then began asking defendant questions about where he was traveling and the route he had taken to the hotel. At some point, Detective Hill checked the registration on the vehicle and determined that it was registered in defendant's name. Detective Hill asked defendant whether he had anything to drink that night, and defendant responded that he had "a couple drinks." Defendant told

1. Detective Hill did not say what the clerk told him, if anything, regarding the specifics of any "actions" of defendant or the woman which aroused his suspicions of a potential robbery. As relevant to the issues in this case, there is no evidence that the hotel clerk reported anything about when the Explorer arrived at the hotel or who had been driving it.

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Detective Hill that he had not had anything to drink since arriving at the hotel. Detective Hill did not observe any open or unopened containers in or around the red Ford Explorer.

Detective Hill asked defendant “to submit to field sobriety testing,” and performed those tests in the parking lot. Defendant “showed some signs of impairment on them.” Detective Hill then asked defendant to submit to a portable breath sample test, and he obliged, resulting in a reading of .10. At that point, Detective Hill placed defendant under arrest for driving while impaired and transported him to the Kannapolis Police Department.

After arriving at the police station, Detective Hill attempted to perform a breath test on defendant, but he refused. Since defendant refused a breath test, Detective Hill took defendant to the hospital to request a blood draw for analysis. Detective Hill did not seek a warrant for the blood draw. After arriving at the hospital, Detective Hill informed defendant of his implied consent rights. Defendant exercised his right to contact a witness, but 30 minutes later, the witness still had not arrived. After defendant refused to submit to a blood draw, Detective Hill directed a nurse to draw blood samples from defendant’s arm. After the blood draw, Detective Hill transported defendant to the magistrate’s office, where he was processed and placed in jail.

Defendant was charged with impaired driving. He was convicted and sentenced in district court on 15 April 2014. Defendant appealed to the superior court. Defendant filed a motion to dismiss on 23 July 2015, and in the motion asked for suppression of

any statements made by Defendant as the officer engaged in a custodial interrogation of the Defendant without advising the Defendant of his right to refrain from answering any questions or advising the Defendant of his constitutional right to counsel during questioning or any other federal, state or statutory rights of an accused in police custody regarding the effect of any statement on future proceedings.

On 17 August 2015, a hearing was held on defendant’s motion and the trial court orally denied the motion to suppress statements in open court.

Following the 17 August 2015 hearing, the trial court entered an order and a subsequent amended order denying defendant’s motion. In the amended order, the court concluded in relevant part:

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2. Miranda warnings and a waiver of those rights apply only before officers begin a custodial interrogation. Miranda v. Arizona, 384 U.S. 436. Without facts showing both “custody” and “interrogation,” the Miranda rule is inapplicable.
3. The U.S. Supreme Court has ruled that a person is in custody under the Miranda rule when officer [sic] have formally arrested the person or have restrained a person’s movement to a degree associated with a formal arrest. Berkemer v. McCarty, 468 U.S. 420.
4. The North Carolina Supreme Court has made clear that it follows the U.S. Supreme Court on the meaning of custody. State v. Buchanan, 353 [N.C.] 332.
5. In the present case, the Defendant falls short of the test for custody, therefore the statements made before arrest should not be suppressed.
6. Under the totality of the above-referenced circumstances, the Defendant’s Motion to Suppress should be denied.

An additional order denying defendant’s motion to suppress was entered regarding the warrantless blood draw, finding “exigent circumstances to support a warrantless blood draw.” A jury trial was held from 5 October to 7 October 2015, with the jury finding defendant guilty of driving while impaired. Defendant timely appealed to this Court.

Discussion

On appeal, defendant argues (1) that his motion to suppress self-incriminating statements should have been granted because he was seized and in custody at the time the statements were made yet he received no *Miranda* warnings; (2) that his motion to suppress the blood draw should have been granted because the warrantless blood draw was completed outside of any exigent circumstances; and (3) that the trial court erred in denying his motion to dismiss the charges because there was insufficient evidence to support a conviction.

I. Motion to Suppress Self-Incriminating Statements

[1] Defendant first argues on appeal that the trial court erred in denying his motion to suppress self-incriminating statements made without *Miranda* warnings. Specifically, defendant argues that he was seized and in custody when Detective Hill engaged in a “custodial interrogation”

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and that he was “entitled to *Miranda* warnings before [Detective] Hill’s ensuing questions.”

The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court’s findings of fact and whether the findings of fact support the conclusions of law. However, when . . . the trial court’s findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal. Conclusions of law are reviewed *de novo* and are subject to full review. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.

State v. Biber, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011) (citations and quotation marks omitted).

Defendant does not frame his argument as a challenge to any particular findings of fact but rather simply argues that he should have received *Miranda* warnings after his license was retained and before Detective Hill asked questions, because he was seized and under custodial interrogation at that time. Defendant’s argument does, however, direct us to a portion of the findings of fact as unsupported by the evidence, so we will briefly address those relevant findings.

The trial court found in part that:

4. Detective Hill asked the Defendant and the female for identification. The Defendant got out of the vehicle and gave identification to Detective Hill.
5. During this interaction, Detective Hill noticed that the Defendant had a strong odor of alcohol about his person *and the Defendant admitted to driving*.
6. Detective Hill directed both subjects to remain where they were while he went into the hotel to speak with the desk clerk. Detective Hill could not specifically recall, but believes he retained possession of the Defendant’s identification (driver’s license) when he left to enter the hotel.

(Emphasis added). Although the timing of events is not entirely clear from the wording of Finding No. 5, it could be understood to mean that defendant admitted to driving the vehicle *before* Detective Hill went

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inside the hotel to speak to the clerk. If that was the intended meaning -- and it may not have been -- it is not supported by the evidence. Detective Hill's testimony at the suppression hearing sets forth the correct order of events. At the hearing, Detective Hill testified on direct examination by the State:

Q And what did you observe once you arrived on the scene?

A When I pulled into the parking lot, I observed a red Ford Explorer. . . .

Q What did you do at that point?

A At that point I exited my patrol vehicle. I walked over to where the female was standing. I made contact with her, and the window was down in the passenger side so I was speaking to both her and the male and just asked what they were doing there and asked for their identifications.

Q What was the nature of the conversation with the defendant?

A At that point it was just when I asked what they were doing there, they said they were trying to get a room.

Q And what happened next?

A When I asked for the identifications . . . [defendant] got out of the driver seat of the vehicle and walked around to me and handed me his identification as well.

. . . .

Q Did you make any observations about him at that time?

A At that time when he walked around to me and while we were just engaging in some short conversation, I detected a strong odor of alcoholic beverage coming from him.

. . . .

Q What did you do at that point?

A At that point I just asked him to kind of hang tight there in the parking lot area while I went inside to speak with the hotel clerk. I went inside, spoke with her.

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Q And what did you do based on that conversation?

A Based on that conversation, *I went back outside to speak to [defendant] and I asked him if he was the one who was driving the vehicle, and he responded to me yes.*

(Emphasis added). Detective Hill testified that it was not until after he went inside to speak to the hotel clerk and came back out that he asked defendant whether he had been driving. There is no evidence of any other order of events. Accordingly, we find that to the extent that Finding No. 5 could be understood as finding that Detective Hill asked defendant about driving *before* he took his driver's license and told him to "hang tight," the trial court's order contains findings that are not supported by competent evidence.

Nevertheless, the crux of defendant's argument on appeal deals with the trial court's conclusion that defendant "falls short of the test for custody[.]" In *Miranda v. Arizona*, the United States Supreme Court held that statements stemming from a custodial interrogation of the defendant may not be used unless the prosecution "demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." 384 U.S. 436, 444, 16 L. Ed. 2d 694, 706, 86 S. Ct. 1602, 1612 (1966). Our Supreme Court has since clarified that "[t]he rule of *Miranda* requiring that suspects be informed of their constitutional rights before being questioned by police only applies to custodial interrogation." *State v. Brooks*, 337 N.C. 132, 143, 446 S.E.2d 579, 586 (1994). Additionally, "our Supreme Court has held the definitive inquiry in determining whether an individual is in custody for purposes of *Miranda* is, based on the totality of the circumstances, whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *State v. Portillo*, __ N.C. App. __, __, 787 S.E.2d 822, 828, *appeal dismissed*, __ N.C. __, 792 S.E.2d 785 (2016) (citation, quotation marks, and brackets omitted).

Defendant argues that when Detective Hill retained his driver's license, he "was seized under the Fourth Amendment" and "was not 'free to leave[.]'" As such, defendant claims that "since [defendant] was seized, [Detective] Hill's ensuing questions constituted a custodial interrogation." Defendant's argument, however, erroneously conflates the *Miranda* standard for custody with seizure. Our Supreme Court clarified in *State v. Buchanan*, 353 N.C. 332, 339, 543 S.E.2d 823, 828 (2001), that these two standards "are not synonymous[.]"

In *Buchanan*, the defendant argued "that the concept of 'restraint on freedom of movement of the degree associated with a formal arrest'

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merely clarifies what is meant by a determination of whether a suspect was ‘free to leave.’ ” *Id.* Our Supreme Court disagreed, explaining:

The two standards are not synonymous, however, as is evidenced by the fact that the “free to leave” test has long been used for determining, under the Fourth Amendment, whether a person has been seized. Conversely, the indicia of formal arrest test has been consistently applied to Fifth Amendment custodial inquiries and requires circumstances which go beyond those supporting a finding of temporary seizure and create an objectively reasonable belief that one is actually or ostensibly “in custody.” Circumstances supporting an objective showing that one is “in custody” might include a police officer standing guard at the door, locked doors or application of handcuffs.

The trial court in the instant case mistakenly applied the broader “free to leave” test in determining whether defendant was “in custody” for the purposes of *Miranda*. We therefore remand the case to the trial court for a redetermination of whether a reasonable person in defendant’s position, under the totality of the circumstances, would have believed that he was under arrest or was restrained in his movement to the degree associated with a formal arrest.

The State contends this Court has been inconsistent in its application of the “ultimate inquiry” test versus the “free to leave” test. To the extent that [the cases cited] or other opinions of this Court or the Court of Appeals have stated or implied that the determination of whether a defendant is “in custody” for *Miranda* purposes is based on a standard other than the “ultimate inquiry” of whether there is a “formal arrest or restraint on freedom of movement of the degree associated with formal arrest,” that language is disavowed.

Id. at 339-40, 543 S.E.2d at 828 (citations omitted). *See also Portillo*, __ N.C. App. at __, 787 S.E.2d at 828 (“This objective inquiry [for determining whether an individual is ‘in custody’ for *Miranda* purposes], labeled the ‘indicia of formal arrest test,’ is not synonymous with the ‘free to leave test,’ which courts use to determine whether a person has been seized for Fourth Amendment purposes. Instead, the indicia of formal arrest test has been consistently applied to Fifth Amendment custodial

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inquiries and requires circumstances which go beyond those supporting a finding of temporary seizure and create an objectively reasonable belief that one is actually or ostensibly ‘in custody.’” (Citations and quotation marks omitted)); *State v. Little*, 203 N.C. App. 684, 688, 692 S.E.2d 451, 456 (2010) (“[O]ur Supreme Court has rejected the ‘free to leave’ test for *Miranda* purposes and specifically overruled [prior cases] to the extent they appear to endorse that test. Instead, the ultimate inquiry on appellate review is whether there were indicia of formal arrest.” (Citations omitted)).

In *Berkemer v. McCarty*, 468 U.S. 420, 442, 82 L. Ed. 2d 317, 336, 104 S. Ct. 3138, 3151-52 (1984), the U.S. Supreme Court ruled that the defendant was not taken into custody for *Miranda* purposes until the police officer formally arrested him and transported him in his patrol car to the county jail, so *Miranda* warnings were not required until his arrest. The U.S. Supreme Court concluded:

[W]e find nothing in the record that indicates that respondent should have been given *Miranda* warnings at any point prior to the time Trooper Williams placed him under arrest. For the reasons indicated above, we reject the contention that the initial stop of respondent’s car, by itself, rendered him “in custody.” And respondent has failed to demonstrate that, at any time between the initial stop and the arrest, he was subjected to restraints comparable to those associated with formal arrest. Only a short period of time elapsed between the stop and the arrest. At no point during that interval was respondent informed that his detention would not be temporary. Although Trooper Williams apparently decided as soon as respondent stepped out of his car that respondent would be taken into custody and charged with a traffic offense, Williams never communicated his intention to respondent. A policeman’s unarticulated plan has no bearing on the question whether a suspect was “in custody” at a particular time; the only relevant inquiry is how a reasonable man in the subject’s position would have understood his situation. Nor do other aspects of the interaction of Williams and respondent support the contention that respondent was exposed to “custodial interrogation” at the scene of the stop. From aught that appears in the stipulation of facts, a single police officer asked respondent a modest number of questions and requested him to perform a simple balancing

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test at a location visible to passing motorists. Treatment of this sort cannot fairly be characterized as the functional equivalent of formal arrest.

Id. at 441-42, 82 L. Ed. 2d. at 335-36, 104 S. Ct. at 3151. *See also State v. Rooks*, 196 N.C. App. 147, 153, 674 S.E.2d 738, 742 (2009) (“The fact that defendant held his head down, was not talkative, and was acting like he was in trouble might suggest he did not feel free to leave. However, the defendant’s subjective belief has no bearing here. To hold otherwise would defeat the objective reasonable person standard. These facts and circumstances do not support a conclusion that defendant was subjected to custodial interrogation.” (Citations and quotation marks omitted)); *State v. Benjamin*, 124 N.C. App. 734, 738, 478 S.E.2d 651, 653 (1996) (“[T]he fact that a defendant is not free to leave does not necessarily constitute custody for purposes of *Miranda*.” (Citations and quotation marks omitted)).

As defendant was not under formal arrest at the time Detective Hill questioned him, we must determine whether, under the totality of the circumstances, defendant’s movement was restrained to the degree associated with formal arrest. *Portillo*, __ N.C. App. at __, 787 S.E.2d at 828. “For purposes of *Miranda*, custody analysis must be holistic and contextual in nature: it is based on the totality of the circumstances and is necessarily dependent upon the unique facts surrounding each incriminating statement. No one factor is determinative.” *Id.* at __, 787 S.E.2d at 828 (citations and quotation marks omitted). *See also State v. Crudup*, 157 N.C. App. 657, 660-61, 580 S.E.2d 21, 24-25 (2003) (“*Miranda* warnings are not required during normal investigative activities conducted prior to arrest, detention, or charge. In determining whether specific questions constitute custodial interrogation or general on-the-scene questioning, this Court has found the following factors to be relevant: (1) the nature of the interrogator; (2) the time and place of the interrogation; (3) the degree to which suspicion had been focused on the defendant, (4) the nature of the interrogation and (5) the extent to which defendant was restrained or free to leave. While none of the factors standing alone is determinative, each factor is relevant.” (Citations omitted)).

Decided on a case-by-case basis, prior decisions of this Court indicate that the “functional equivalent” standard is quite onerous and not easily met, though it very much depends on the facts of a particular situation. *See, e.g., State v. Barnes*, __ N.C. App. __, __, 789 S.E.2d 488, 491, *appeal dismissed*, __ N.C. __, 794 S.E.2d 525 (2016) (“Based on the totality of the circumstances, including the fact that Defendant was on

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probation during the search of Mr. Lewis' residence, we conclude that Defendant was not subjected to a formal arrest or a restraint on his freedom of movement of the degree associated with formal arrest [even though handcuffed during search of the residence]. Therefore, we agree with the trial court that Defendant was not 'in custody' for purposes of *Miranda*."); *Portillo*, __ N.C. App. at __, 787 S.E.2d at 830 ("Whatever degree of suspicion the detectives may have conveyed through their questioning [of defendant in hospital after surgery for gunshot wounds], a reasonable person in defendant's position would not have been justified in believing he was the subject of a formal arrest or was restrained in his movement by police action."). Cf. *State v. Johnston*, 154 N.C. App. 500, 503, 572 S.E.2d 438, 441 (2002) ("After a careful review of the record, we conclude, as a matter of law, that defendant was in 'custody.' The record reveals that defendant was ordered out of his vehicle at gun point, handcuffed, placed in the back of a patrol car, and questioned by detectives. Although the officers informed defendant that he was in 'secure custody' rather than under arrest, we conclude that defendant's freedom of movement was restrained to the degree associated with a formal arrest. A reasonable person under these circumstances would believe that he was under arrest.").

Under the totality of the circumstances in this case, we agree with the trial court's conclusion that defendant "falls short of the test for custody," as he was not formally arrested and an objectively reasonable person in his position would not have felt that his movement was restrained to the degree associated with a formal arrest. *Portillo*, __ N.C. App. at __, 787 S.E.2d at 828. While defendant may not have felt free to leave – and in fact may not have been free to leave – the test for custody in relation to *Miranda* is not subjective. See, e.g., *State v. Clark*, 211 N.C. App. 60, 68, 714 S.E.2d 754, 760 (2011) ("The extent to which Defendant was in custody for *Miranda* purposes depends on the objective circumstances surrounding his interactions with law enforcement officers, not on the subjective views harbored by Defendant." (Citation, quotation marks, ellipses, and brackets omitted)). Here, defendant was standing outside of his own vehicle while speaking with Detective Hill; he was not told he was under arrest or handcuffed, and other than his license being retained, his movement was not stopped or limited further while standing outside of the hotel by his vehicle. No mention of any possible suspicion of defendant's involvement in criminal activity – driving while intoxicated or otherwise – had yet been made, and an objectively reasonable person in these circumstances would not have believed he was under arrest or a functional equivalent at that time. Thus, although one of the trial court's findings was in error and not supported by the evidence, there

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were still sufficient findings to support the trial court's conclusion of law that defendant was not "in custody" and subject to *Miranda* warnings at the time of his admission. Accordingly, we find no error.

II. Motion to Suppress Blood Test Evidence

[2] Next, defendant argues that the trial court erred in denying his motion to suppress the blood test evidence because Detective Hill obtained a warrantless blood draw outside of exigent circumstances. As stated above, our review of a denial of a motion to suppress is based on "whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *Biber*, 365 N.C. at 167-68, 712 S.E.2d at 878.

Under N.C. Gen. Stat. § 20-139.1(d1) (2015):

If a person refuses to submit to any test or tests pursuant to this section, any law enforcement officer with probable cause may, without a court order, compel the person to provide blood or urine samples for analysis if the officer reasonably believes that the delay necessary to obtain a court order, under the circumstances, would result in the dissipation of the percentage of alcohol in the person's blood or urine.

"A reasonable belief generally must be based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant the officer in believing the point at issue." *State v. Fletcher*, 202 N.C. App. 107, 110, 688 S.E.2d 94, 96 (2010) (citation and quotation marks omitted).

In relation to the blood draw in this case, the trial court made the following relevant findings:

3. Detective Hill testified that when he arrived, the defendant was located in the driver's seat of his vehicle, the defendant had a strong odor of alcohol about his person, and the defendant admitted to driving.
4. Detective Hill testified that defendant "showed some signs of impairment" on the SFSTs and submitted a .10 reading on the roadside PBT.
5. Detective Hill testified that defendant admitted to having a couple of drinks, stated he had not drunk

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since arriving at the hotel, and stated that he had driven from Salisbury.

6. The defendant was arrested at 2:48 a.m.
7. Detective Hill arrived at the Kannapolis Police Department at 3:06 a.m. The defendant refused the intox within 2 to 3 minutes after arriving at the police department.
8. Detective Hill decided to get a blood test after the defendant refused the intox. CMC Kannapolis is approximately 4 miles away and is the closest place from Kannapolis Police Department for a blood draw.
9. At CMC Kannapolis, Detective Hill read the defendant his rights regarding the blood draw at 3:24 a.m. The defendant made a phone call. Detective Hill waited 30 minutes before starting the blood draw. The defendant refused the blood draw at 3:55 a.m. The defendant was compelled to submit shortly thereafter.
10. CMC Kannapolis is approximately 8 miles from the Magistrate's Office.
11. Detective Hill testified that based on the totality of the information he had at the time, he thought the defendant was close to a .08.
12. Detective Hill testified that it takes approximately 15 minutes to perform a blood draw.
13. Detective Hill testified that he believed it would have taken [an] additional hour to an hour and a half to get a search warrant, which would include driving to and from the Magistrate's Office, filling out the search warrant, presenting the information to the magistrate, and waiting for the warrant to be issued. Detective Hill further indicated that his best estimate of delay would have been an hour and 20 minutes, but it could be longer if there were other officers ahead of him.
14. Detective Hill testified there typically would be one magistrate at that time. There was no information offered if there would have been other officers available to assist in holding the defendant if Detective Hill went to get a search warrant.

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15. Based on the information before the court, Detective Hill was the only officer on the scene that night.
16. Detective Hill did not contact the Magistrate's Office to determine if there would have been a wait if he applied for a search warrant.
17. The Court finds Detective Hill's testimony credible.

The trial court concluded in relevant part:

8. There were exigent circumstances to support a warrantless blood draw.
9. In the present case, without getting a warrant, the process for getting the defendant's blood took approximately one hour and 22 minutes from the time the officer made contact with the defendant, 2:33 a.m., until the blood draw began, shortly after 3:55 a.m. There was no evidence before the court that the time this took was anything but routine and was within the officer's expectations.
10. The officer testified that it would take an additional hour to an hour and a half to obtain a search warrant under the circumstances of this case. His testimony was credible. When added to the reasonable and predictable time it took to draw the blood without a warrant, an hour and 22 minutes, the time it would have taken with a warrant increases to two hours and 22 minutes to two hours and 52 minutes.
11. The officer in this case had a .10 roadside reading and alcohol "decreases by approximately 0.015 percent to 0.02 percent per hour once the alcohol has been fully absorbed." McNeely. After considering these facts as well as the other factors outlined above, the court finds that the officer had exigent circumstances to have the blood drawn without a warrant. This is also consistent with the two to three hour window found in State v. Fletcher to dispense with the need for a warrant as this case falls in the two hour and 22 minutes to two hours and 52 minutes range with the facts listed above.

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12. Under the totality of the above referenced circumstances, the defendant's motion to suppress should be denied.

As defendant does not challenge any particular findings on appeal, the trial court's findings are considered binding on appeal. *Biber*, 365 N.C. at 168, 712 S.E.2d at 878 (“[W]hen, as here, the trial court's findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal.”). Rather, defendant argues that the trial court erred in denying his suppression motion because Detective Hill compelled that his blood be drawn without sufficient exigent circumstances to support the warrantless blood draw.

The United States Supreme Court held in *Schmerber v. California*, 384 U.S. 757, 768, 16 L. Ed. 2d 908, 918, 86 S. Ct. 1826, 1834 (1966) that the Fourth Amendment prohibits the warrantless seizure of a blood sample where such intrusion is “not justified in the circumstances” or is made in an “improper manner.” More recently, in *Missouri v. McNeely*, ___ U.S. ___, ___ 185 L. Ed. 2d 696, 715, 133 S. Ct. 1552, 1568 (2013), the Supreme Court held, in the context of a blood draw performed over a defendant's objection in impaired driving cases, that the dissipation of alcohol in a person's blood stream standing alone “does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant.”

This Court addressed *McNeely* in *State v. Dahlquist*, 231 N.C. App. 100, 103, 752 S.E.2d 665, 667 (2013), *appeal dismissed and disc. review denied*, 367 N.C. 331, 755 S.E.2d 614 (2014), noting that “after the Supreme Court's decision in *McNeely*, the question for this Court remains whether, considering the totality of the circumstances, the facts of this case gave rise to an exigency sufficient to justify a warrantless search.” In *Dahlquist*, the trial court found that: (1) the defendant pulled up to a checkpoint and an officer noticed an odor of alcohol; (2) the defendant admitted to drinking five beers; (3) field sobriety tests indicated that the defendant was impaired; and (4) the officer went to the hospital directly because he knew that it was 10 to 15 minutes away and typically not too busy on Saturday mornings, but that on a weekend night “it would take between four and five hours to obtain a blood sample if he first had to travel to the Intake Center at the jail to obtain a warrant.” *Id.* at 103, 752 S.E.2d at 665. This Court evaluated the totality of the circumstances and held that “the facts of this case gave rise to an exigency sufficient to justify a warrantless search.” *Id.* at 104, 752 S.E.2d at 668.

In *Fletcher*, decided prior to *McNeely* and *Dahlquist*, this Court held “that competent evidence supports the findings of fact that Officer

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Powers reasonably believed that a delay would result in the dissipation of the alcohol in defendant's blood and that exigent circumstances existed that allowed a warrantless blood draw." *Fletcher*, 202 N.C. App. at 113, 688 S.E.2d at 98. This Court explained in *Fletcher* that the defendant

[did] not question whether he had refused to submit to a test or whether probable cause existed in order to compel a blood test. Therefore, the only issue is whether Officer Powers's belief was reasonable under the circumstances. Defendant contends that Officer Powers's belief – that the delay caused by obtaining a court order would result in the dissipation of defendant's percentage of blood alcohol – was unreasonable and not grounded in fact or knowledge. However, competent evidence exists to suggest that her belief was reasonable. Officer Powers testified that the magistrate's office in Carthage was twelve miles away. She also testified that she had been to the magistrate's office on approximately twenty to thirty occasions late on Saturday night or early Sunday morning. She testified that the weekends are often very busy at the magistrate's office and that, of the twenty to thirty weekend nights she had traveled there, she had had to stand in line several of those times. Officer Powers further testified that she frequently had been to the emergency room at the hospital on weekend nights and that most of the time it was busy then. Based upon her four years' experience as a police officer, Officer Powers opined that the entire process of driving to the magistrate's office, standing in line, filling out the required forms, returning to the hospital, and having defendant's blood drawn would have taken anywhere from two to three hours. Although other evidence exists that could have supported a contrary finding, we hold that the trial court's finding of fact as to Officer Powers's reasonable belief is supported by competent evidence.

Id. at 110-11, 688 S.E.2d at 96 (quotation marks and brackets omitted). In addition, this Court held that "the trial court had before it competent evidence to support its finding that exigent circumstances existed" where the defendant "had failed multiple field sobriety tests and was unsuccessful at producing a valid breath sample[.]" and the officer "testified as to the distance between the police station and the magistrate's office, her belief that the magistrate's office would be busy late on a Saturday night, and her previous experience with both the

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magistrate's office and the hospital on weekend nights." *Id.* at 111, 688 S.E.2d at 97.

More recently, in *State v. Granger*, 235 N.C. App. 157, 165, 761 S.E.2d 923, 928 (2014), this Court affirmed the trial court's denial of a motion to suppress where "the totality of the circumstances showed that exigent circumstances justified the warrantless blood draw." (Emphasis omitted).

Specifically, the trial court found that Officer Lippert had concerns regarding the dissipation of alcohol from Defendant's blood, as it had been over an hour since the accident when Officer Lippert established sufficient probable cause to make his request for Defendant's blood. Those findings also state Officer Lippert's concerns due to delays from the warrant application process. Its findings show that Officer Lippert did not have the opportunity to investigate the matter adequately until he arrived at the hospital because of Defendant's injuries and need for medical care. Even if he had the opportunity to investigate the matter at the accident scene sufficiently to establish probable cause, unlike [the situation in *McNeely*], Officer Lippert was investigating the matter by himself and would have had to call and wait for another officer to arrive before he could travel to the magistrate to obtain a search warrant. Its findings show that Officer Lippert's knowledge of the approximate probable wait time and time needed to travel, as being over a 40 minute round trip to the magistrate at the county jail. Additionally, Officer Lippert had the added concern of the administration of pain medication to Defendant. Defendant had been in an accident severe enough that he was placed on a backboard for transportation to the hospital and complained of pain in several parts of his body. There was a reasonable chance if Officer Lippert left him unattended to get a search warrant or waited any longer for the blood draw, Defendant would have been administered pain medication by hospital staff as part of his treatment, contaminating his blood sample.

Id. (citations, quotation marks, brackets, and footnote omitted). *Cf. State v. Romano*, __ N.C. App. __, __, 785 S.E.2d 168, 174, *temp. stay allowed*, __ N.C. __, 789 S.E.2d 438, *disc. review allowed*, __ N.C. __, 794 S.E.2d 315, and __ N.C. __, 794 S.E.2d 317 (2016) ("Under the totality of the circumstances, considering the alleged exigencies of the

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situation [where the defendant was unconscious and unable to receive and consider his blood test rights and magistrate's office was a couple miles away from the hospital], the warrantless blood draw was not objectively reasonable.")².

The United States Supreme Court addressed warrantless breath tests and blood draws even more recently in *Birchfield v. North Dakota*, ___ U.S. ___, 195 L. Ed. 2d 560, 136 S. Ct. 2160 (2016). In *Birchfield*, the Supreme Court held that a warrantless breath test of an impaired-driving suspect is permissible under the Fourth Amendment as a search incident to arrest, but a warrantless blood draw is not permissible as a search incident to arrest due to its nature of being a greater intrusion of privacy. *Id.* at ___, 195 L. Ed. 2d. at 588, 136 S. Ct. at 2185 ("Because breath tests are significantly less intrusive than blood tests and in most cases amply serve law enforcement interests, we conclude that a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving.").

Here, however, defendant's only argument on appeal in relation to the blood draw is that it was "outside of exigent circumstances[.]" so *Birchfield* does not change the analysis. *See id.* at ___, 195 L. Ed. 2d. at 587, 136 S. Ct. at 2184 ("Nothing prevents the police from seeking a warrant for a blood test when there is sufficient time to do so in the particular circumstances or from relying on the exigent circumstances exception to the warrant requirement when there is not."). Furthermore, under the totality of the circumstances in this case, "the evidence supports the trial court's findings and conclusions regarding the existence of exigent circumstances[.]" *Dahlquist*, 231 N.C. App. at 104, 752 S.E.2d at 668.

Defendant submitted a .10 reading on a roadside PBT and was subsequently arrested at 2:48 a.m. before being transported to the Kannapolis Police Department, where he arrived 18 minutes later. Defendant "refused the intox within 2 to 3 minutes after arriving at the police department[.]" so Detective Hill made the decision to compel a blood test. The closest hospital was approximately four miles away from the police department and eight miles away from the Magistrate's Office. Detective Hill read defendant his rights as related to the blood draw at the hospital at 3:24 a.m. and waited for defendant to finish making a phone call before starting the blood draw at 3:55 a.m. The trial court

2. Our Supreme Court granted a temporary stay in this matter on 24 May 2016, *State v. Romano*, ___ N.C. ___, 789 S.E.2d 438 (2016), and recently heard arguments on 20 March 2017.

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also found that “Detective Hill testified that based on the totality of the information he had at the time, he thought the defendant was close to a .08.” Additionally, Detective Hill indicated that it was his belief that it would have taken an additional hour to an hour and a half to get a search warrant and he was the only officer on the scene, as in *Granger*, where the officer “was investigating the matter by himself and would have had to call and wait for another officer to arrive before he could travel to the magistrate to obtain a search warrant.” *Granger*, 235 N.C. App. at 165, 761 S.E.2d at 928.

As in *Fletcher*, “[a]lthough other evidence exists that could have supported a contrary finding,” 202 N.C. App. at 111, 688 S.E.2d at 96, we conclude that the trial court’s findings – as to Detective Hill’s reasonable belief that a delay would result in the dissipation of the alcohol in defendant’s blood – are supported by competent evidence. As the findings are supported by competent evidence, and the findings support the trial court’s ultimate conclusion that the blood draw was constitutional, we hold that the trial court did not err in denying defendant’s motion to suppress the blood draw.

III. Motion to Dismiss

[3] Finally, defendant argues that the trial court erred in denying his motion to dismiss the impaired driving charge at the close of the State’s evidence and at the close of all evidence because the State failed to present substantial independent circumstantial or direct evidence – other than defendant’s statement – to establish that defendant was operating a motor vehicle at any relevant time.

This Court reviews the trial court’s denial of a motion to dismiss *de novo*. 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. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. 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.

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State v. Marley, 227 N.C. App. 613, 614-15, 742 S.E.2d 634, 635-36 (2013) (citations and quotation marks omitted). *See also State v. Scott*, 356 N.C. 591, 597, 573 S.E.2d 866, 869 (2002) (“Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion.”); *State v. Franklin*, 327 N.C. 162, 171-72, 393 S.E.2d 781, 787 (1990) (“The trial court need only satisfy itself that the evidence is sufficient to take the case to the jury; it need not be concerned with the weight of that evidence. If there is any evidence tending to prove guilt or which reasonably leads to this conclusion as a fairly logical and legitimate deduction, it is for the jury to say whether it is convinced beyond a reasonable doubt of defendant’s guilt.” (Citations omitted)).

Under N.C. Gen. Stat. § 20-138.1 (2015), a person commits the crime of driving while impaired

if he drives any vehicle upon any highway, any street, or any public vehicular area within the State:

- (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. The results of a chemical analysis shall be deemed sufficient evidence to prove a person’s alcohol concentration; or
- (3) With any amount of a Schedule I controlled substance, as listed in G.S. 90-89, or its metabolites in his blood or urine.

N.C. Gen. Stat. Ann. § 20-138.1(a). Here, defendant argues that “the [S]tate has failed to present evidence of the substantial elements of ‘driving’ and ‘on a highway, street, or public vehicular area’ for the charged offense of driving while impaired.”

This Court has previously found that “one ‘drives’ within the meaning of [N.C. Gen. Stat. § 20-138.1] if he is in actual physical control of a vehicle which is in motion or which has the engine running.” *State v. Fields*, 77 N.C. App. 404, 406, 335 S.E.2d 69, 70 (1985). In this case, defendant admitted to Detective Hill that he had been driving the vehicle, and as discussed above, his statement was admissible evidence. He also described in detail the route he took to get to the hotel. Defendant told Detective Hill that he had driven from Salisbury on Interstate 85. Specifically, Detective Hill explained:

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Then I asked if he got off the exit on the Interstate at Highway 29. We were close to Exit 58 off 85. I asked if he got off at that Exit, and he said yes. And then he pointed to the IHOP, which is at the intersection of 29 and Cloverleaf Plaza. When I asked him where he turned, he pointed there. And then I pointed to Cloverleaf Parkway, which is the road/street running right in front of the hotel, asked if he drove down that portion of the road and he said yes.

Although Detective Hill testified that the vehicle's engine was not running at the time he approached the vehicle, it was parked under the overhang area by the front door of the hotel, where guests typically stop to check in to the hotel, not in a parking spot. He also observed defendant sitting in the driver's seat, and defendant got out of the driver's seat to give Detective Hill his driver's license. The vehicle was registered to defendant. The circumstantial evidence, along with defendant's admissions to driving the vehicle and the route he took, was sufficient evidence for the jury to decide whether defendant drove the vehicle and whether he drove it on a highway, street, or public vehicular area at a relevant time. Thus, "[u]nder the proper standard of review, substantial evidence existed for each essential element of DWI. Viewing the evidence in a light most favorable to the State, we conclude that a reasonable inference of defendant's guilt may be drawn from the direct and circumstantial evidence presented by the State. Such evidence was sufficient to support the jury's verdict of guilty." *Scott*, 356 N.C. at 598, 573 S.E.2d at 870.

Conclusion

Accordingly, we hold that the trial court did not err by denying defendant's motions to suppress his statement, by denying his motion to suppress the results of the warrantless blood test, or by denying his motion to dismiss for insufficient evidence.

NO ERROR.

Chief Judge McGEE and Judge INMAN concur.

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[253 N.C. App. 547 (2017)]

STATE OF NORTH CAROLINA

v.

MELVIN LEROY FOWLER, DEFENDANT

No. COA16-947

Filed 16 May 2017

**Constitutional Law—North Carolina—unanimous instructions—
disjunctive instructions—prejudicial error**

There was prejudicial error in an impaired driving prosecution where the trial court erred by instructing the jury on both driving under the influence and driving with an alcohol concentration of .08 or more, even though there was no evidence of a specific blood alcohol level. There was prejudicial error in that it was impossible to determine the charge on which offense the jury based its verdict. This is not a case where there was overwhelming evidence of impaired driving.

Judge BERGER concurring.

Appeal by Defendant from judgment entered 2 March 2016 by Judge A. Graham Shirley in Wake County Superior Court. Heard in the Court of Appeals 8 March 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Christopher W. Brooks, for the State.

Yoder Law PLLC, by Jason Christopher Yoder, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Melvin Leroy Fowler (“Defendant”) appeals a jury verdict convicting him of driving while impaired (“DWI”). On appeal, Defendant contends the trial court erred by: (1) instructing the jury on a theory of impaired driving unsupported by the evidence, thus violating Defendant’s constitutional right to a unanimous jury verdict; and (2) allowing Officer Monroe to testify as an expert witness regarding the horizontal gaze Nystagmus (“HGN”) test. For the following reasons, we grant Defendant a new trial.

I. Factual and Procedural Background

On 19 June 2014, Officer R. P. Monroe of the Raleigh Police Department (“RPD”) stopped Defendant and arrested him for DWI. On

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24 February 2015, Wake County District Court Judge James R. Fullwood found Defendant guilty of DWI. Defendant appealed to superior court for a jury trial, pursuant to N.C. Gen. Stat. § 15A-1431 (2016).

On 1 March 2016, the trial court called Defendant's case for trial. The evidence at trial tended to show the following.

The State first called Officer Monroe. On Thursday, 19 July 2014, Officer Monroe worked the night shift for the RPD. Aware the Wake County Sheriff's Office set up a checkpoint on Gorman Street, Officer Monroe visited the checkpoint to see if he could assist.

Officer Monroe rode down Avent Ferry Road on his motorcycle. When he was less than a half a mile from Gorman Street, he came to a point where Crest Road T-intersects with Avent Ferry Road. Officer Monroe saw Defendant's truck on Crest Road. Defendant pulled out in front of Officer Monroe's motorcycle. Officer Monroe "lock[ed] the bike up"¹, "ma[d]e an evasive maneuver", and "dip[ped]" into the right lane to avoid hitting Defendant's truck. Officer Monroe's motorcycle and Defendant's truck came within "maybe two or three feet" of each other. Officer Monroe activated his blue lights and stopped Defendant for unsafe movement. Defendant stopped his truck at a stop sign at the intersection of Avent Ferry Road and Champion Court.

Officer Monroe introduced himself and explained he stopped Defendant because Defendant almost ran into his motorcycle. Officer Monroe saw Defendant's red, glassy eyes. He smelled a "medium" odor of alcohol on Defendant's breath. Defendant spoke with slurred speech. Officer Monroe asked Defendant why he pulled out in front of his motorcycle. Defendant remarked Officer Monroe had enough room and he "was catching [Officer Monroe's] curiosity."

Officer Monroe asked Defendant if he drank any alcohol that night. Defendant responded "one to two" servings of Jägermeister, and he was only driving a short distance. Officer Monroe asked Defendant to get out of his truck to participate in a series of field sobriety tests. Defendant agreed.

Officer Monroe conducted three field sobriety tests: HGN, walk-and-turn, and one-leg stand. Officer Monroe first conducted the HGN test. Officer Monroe turned Defendant away from traffic, so passing

1. Officer Monroe explained to "lock the brakes up" means to employ the antilock brake on the motorcycle.

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headlights did not affect Defendant's eyes. He directed Defendant to stand facing him, with his feet together and hands to the side. Officer Monroe elevated Defendant's head slightly and held his finger in front of Defendant. He informed Defendant he was going to move his finger from left to right and instructed Defendant to follow his finger with Defendant's eyes. Defendant stated he understood the instructions, and Officer Monroe started the test. During the test, Defendant displayed a lack of "smooth pursuit" in both eyes, which Officer Monroe considered "two clues." Defendant ultimately displayed six out of six possible clues, three in each eye. Based on this test and the odor of alcohol, Officer Monroe concluded Defendant "had an impairing amount of alcohol in his system."

Officer Monroe also conducted two "divided attention" tests. The first test is the walk-and-turn. Officer Monroe instructed Defendant to place his left foot in front, with both hands to his sides, and move his right foot heel-to-toe. Officer Monroe told Defendant to stay in the heel-to-toe position while he gave Defendant further instructions. Officer Monroe next instructed Defendant to take nine heel-to-toe steps while keeping his hands at his sides, and counting out loud.

Defendant failed to follow instructions. Defendant swayed and stepped out of the starting stance. Officer Monroe instructed Defendant to return to the starting stance. Defendant then started the test too soon, stepped out of position, and lost his balance. Officer Monroe again instructed Defendant to stand in the starting position, but Defendant stepped out. The third time Officer Monroe instructed Defendant to get back in starting position, Defendant told Officer Monroe he could not do the test. Defendant then told Officer Monroe he was not going to do the test without his kneepads. Officer Monroe concluded the test.

Officer Monroe asked Defendant if he was willing to do the one-leg stand test. Defendant agreed. Officer Monroe instructed Defendant to keep his feet together, put his hands to his side, and stay in that position. Defendant was then to lift one foot with his toes pointed to the ground, and keep his foot parallel with the ground. While looking at his foot, Defendant would count to three. Next, Defendant should put his foot down and repeat the lift, as he continued counting from where he left off.

Defendant swayed when Officer Monroe started the test. Defendant also failed to follow the instructions. Defendant "barely got his foot off the ground" and failed to look down at his toes. When Officer Monroe instructed Defendant to lift his foot six inches off the ground, Defendant told Officer Monroe he did not know how much six inches was. Officer

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Monroe offered to demonstrate the test again. Defendant said he no longer wanted to do the test.

Officer Monroe told Defendant he would like to take a preliminary sample of Defendant's breath. He explained this test was not admissible in court, but rather just a test for positive or negative of alcohol. Defendant refused.

Officer Monroe arrested Defendant for DWI. After booking Defendant, Officer Monroe brought Defendant into the DWI testing room. He presented Defendant with a form for implied consent. Officer Monroe read Defendant his rights. Defendant signed the form, acknowledging he understood his rights. Defendant then placed a call. Officer Monroe did not know if Defendant called someone to observe the administration of tests.

Thirty minutes later, Officer Monroe administered the Intoxilyzer test. Officer Monroe instructed Defendant on how to correctly blow into the breathalyzer. However, Defendant stopped blowing air into the instrument before Officer Monroe told him to stop. The instrument "shut[] down" and displayed "insufficient sample." Officer Monroe again instructed Defendant on how to correctly blow into the instrument. Defendant said he had cancer, which prevented him from properly blowing into the instrument. Defendant then told Officer Monroe he was not going to blow into the instrument. Officer Monroe explained to Defendant his breathing was sufficient, but Defendant prematurely stopped blowing. Officer Monroe told Defendant if Defendant did not blow into the instrument, he was "going to refuse him." "Refusing" constitutes pressing the refusal button on the instrument, which indicates Defendant's "willful refusal not to provide a breath sample on the instrument for the purposes of a DWI investigation."

The State rested, and Defendant moved to dismiss the case. The trial court denied Defendant's motion to dismiss. Defendant did not present any evidence. Defendant renewed his motion to dismiss, and the trial court denied Defendant's motion.

When discussing jury instructions, the State requested "the .08 instruction." Defendant objected to the .08 instruction, because "there was no evidence to [any] sort of an actual number of any blood alcohol level" The trial court decided it would use the .08 instruction and reasoned:

Well, if you argue they haven't shown .08 I'm going to give that instruction or they haven't shown his blood alcohol content I will give that instruction because you can't have

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it both ways. You can't – you can't object to the instruction and argue that they haven't shown his [blood alcohol content] because there [is] more than one way to prove the offense.

The jury found Defendant guilty of driving while impaired. Defendant admitted to the existence of two driving while impaired convictions. Defendant admitted to the aggravating fact of driving while license revoked due to a DWI conviction. The trial court sentenced Defendant as an Aggravated Level One offender and sentenced him to 24 months imprisonment. Defendant gave timely oral notice of appeal.

II. Standard of Review

Challenges to the trial court's "decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009) (citations omitted). In a *de novo* review, this Court "considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008)(internal quotation marks and citation omitted).

"It is well settled that *de novo* review is ordinarily appropriate in cases where constitutional rights are implicated." *Piedmont Triad Reg'l Water Auth. v. Sumner Hills, Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001) (citations omitted). If an error is preserved for review, but does not arise under the Constitution of the United States, we review for prejudicial error. N.C. Gen. Stat. § 15A-1443(a) (2016).

Lastly, in regards to Officer Monroe's expert opinion testimony, the trial court's ruling on expert testimony under Rule 702 is typically reviewed for abuse of discretion. *State v. McGrady*, 368 N.C. 880, ___, 787 S.E.2d 1, 11 (2016) (citation omitted). "And 'a trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision.'" *Id.* at ___, 787 S.E.2d at 11 (quoting *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986)). However, "[w]here the [defendant] contends the trial court's decision is based on an incorrect reading and interpretation of the rule governing admissibility of expert testimony, the standard of review on appeal is *de novo*." *State v. Torrence*, ___ N.C. App. ___, ___, 786 S.E.2d 40, 41 (2016) (quotation marks and citations omitted).

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III. Analysis

We review Defendant's contentions in two parts: (A) jury instructions for impaired driving under N.C. Gen. Stat. § 20-138.1 (a)(2); and (B) Officer Monroe's expert testimony regarding the HGN test.

A. Jury Instructions for Impaired Driving

On appeal, Defendant contends the trial court erred by instructing the jury on driving while impaired under N.C. Gen. Stat. § 20-138.1 (a)(2), which violated Defendant's constitutional right to an unanimous jury verdict. We address Defendant's contentions regarding the jury instructions together and agree the trial court committed reversible error.

N.C. Gen. Stat. § 20-138.1(a) states;

A person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State:

- (1) While under the influence of an impairing substance;
or
- (2) After having consumed a sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more. The results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration; or
- (3) With any amount of a Schedule I controlled substance, as listed in G.S. 90-89, or its metabolites in his blood or urine.

N.C. Gen. Stat. § 138.1(a).

"Both the North Carolina Constitution and the North Carolina General Statutes protect the right of the accused to be convicted only by a unanimous jury in open court." *State v. Walters*, 368 N.C. 749, ___, 782 S.E.2d 505, 507 (2016) (citing N.C. Const. art. I, § 24; N.C. Gen. Stat. § 15A-1237(b)). "But it does not follow from these constitutional and statutory guarantees that every disjunctive jury instruction violates one or both of those guarantees." *Id.* at ___, 782 S.E.2d at 507.

As explained by our Supreme Court:

a disjunctive instruction, which allows the jury to find a defendant guilty if he commits either of two underlying acts, either which is in itself a separate offense, is fatally

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ambiguous because it is impossible to determine whether the jury unanimously found that the defendant committed one particular offense.

...

[I]f the trial court merely instructs the jury disjunctively as to various alternative acts which will establish an element of the offense, the requirement of unanimity is satisfied.

Id. at ___, 782 S.E.2d at 507-08 (internal quotation marks, citations, and emphases omitted).

This Court recently stated:

North Carolina's appellate courts have consistently held that "a trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973) (citations omitted). That is because the purpose of jury instructions is "the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence." *Id.* An instruction related to a theory not supported by the evidence confuses the issues, introduces an extraneous matter, and does not declare the law applicable to the evidence.

State v. Malachi, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___, COA16-752, 2017 WL 1381592, *2 (2017).

Typically, disjunctive jury instructions for impaired driving are permissible. *State v. Oliver*, 343 N.C. 202, 215, 470 S.E.2d 16, 24 (1996). When a disjunctive jury instruction is permitted, the State must still present evidence to support both theories. *State v. Johnson*, 183 N.C. App. 576, 582, 646 S.E.2d 123, 127 (2007). When a disjunctive jury instruction is improperly given, it violates the Defendant's right to a unanimous jury, because it is impossible to determine upon what theory of the case the jury decided. *State v. Funchess*, 141 N.C. App. 302, 308, 540 S.E.2d 435, 438-39 (2000) (citations omitted).

Here, the State specifically requested the .08 instruction "just so [counsel could] use it in [his] argument." Defendant objected because "there was no evidence to sort of an actual number of any blood alcohol level . . ." The trial court overruled Defendant's objection and instructed the jury as follows, *inter alia*:

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The defendant has been charged with impaired driving. For you to find the defendant guilty of this offense the state must prove three things beyond a reasonable doubt:

First, that the defendant was driving a vehicle.

Second, that the defendant was driving that vehicle upon a highway or street within the state.

And third, that the defendant was driving that vehicle, (1) that the defendant was under the influence of an impairing substance. Alcohol is an impairing substance. The defendant is under the influence of an impairing substance when the defendant has consumed a sufficient quantity of that impairing substance to cause the defendant to lose the normal control of the defendant's bodily or mental faculties or both to such an extent that there is an appreciable impairment of either or both of these faculties, or (2) that the defendant had consumed sufficient alcohol that at any relevant time after driving the defendant had an alcohol concentration of 0.08 or more grams of alcohol per 210 liters of breath. A relevant time is any time after driving that the driver still has in the driver's body alcohol consumed before or during driving. If the evidence tends to show that a chemical test known as an Intoxilyzer was offered to the defendant by a law enforcement officer and that the defendant refused to take the test or that the defendant refused to perform a field sobriety test at the request of an officer, you may consider this evidence together with all other evidence in determining whether the defendant was under the influence of an impairing substance at the time that the defendant drove a motor vehicle.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant drove a vehicle on a highway or street in the state and that when doing so the defendant was under the influence of an impairing substance or that the defendant had consumed sufficient alcohol that at any relevant time after driving the defendant had an alcohol concentration of 0.08 or more grams of alcohol per 210 liters of the breath, it would be your duty to return a verdict of guilty. If you

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do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

Defendant argues the trial court erred in instructing the jury under N.C. Gen. Stat. § 20-138.1 (a)(2), and such error is reversible error. The State concedes the trial court erred in its jury instructions. However, the State contends any error was harmless error, and Defendant is not entitled to a new trial.

We agree with both Defendant and State and hold the trial court erred in instructing the jury under both N.C. Gen. Stat. § 20-138.1(a)(1) and (a)(2). Although disjunctive jury instructions are generally permissible for impaired driving, in this case, the State presented *no* evidence supporting the section 20-138.1(a)(2) instruction. *Compare Oliver*, 343 N.C. at 215, 470 S.E.2d at 24, *with Johnson*, 183 N.C. App. at 582, 646 S.E.2d at 127. Defendant did not properly participate in the Intoxilyzer test, and the State introduced no evidence of blood alcohol tests. As such, the trial court improperly instructed the jury on alternate theories, one of which the evidence did not support.

It is impossible to conclude, based upon the record and general verdict form, upon which theory the jury based its verdict. Our case law mandates our Court to “assume the jury based its verdict on the theory for which it received an improper instruction.” *State v. Petersilie*, 334 N.C. 169, 193, 432 S.E.2d 832, 846 (1993) (citations omitted).

Furthermore, cannot agree with the State that the error was harmless or non-prejudicial. It is settled law this error entitles Defendant to a new trial. Under controlling case law:

[w]here the trial judge has submitted the case to the jury on alternative theories, one of which is determined to be erroneous and the other properly submitted, and we cannot discern from the record the theory upon which the jury relied, this Court will not assume that the jury based its verdict on the theory for which it received a proper instruction. Instead, we resolve the ambiguity in favor of the defendant.

State v. Pakulski, 319 N.C. 562, 574, 356 S.E.2d 319, 326 (1987) (citation omitted). *See State v. Lynch*, 327 N.C. 210, 219, 393 S.E.2d 811, 816 (1990) (holding such error entitled defendant to a new trial); *Malachi*, ___ N.C. App. at ___, ___ S.E.2d at ___; *State v. Jefferies*, ___ N.C. App. ___, ___, 776 S.E.2d 872, 880 (2015); *Johnson*, 183 N.C. App. at 585, 646

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S.E.2d at 128; *State v. Hughes*, 114 N.C. App. 742, 746, 443 S.E.2d 76, 79 (1994); *State v. O'Rourke*, 114 N.C. App. 435, 442, 442 S.E.2d 137, 140 (1994) (citation omitted); *State v. Dick*, No. COA15-1400, 2016 WL 5746395 (unpublished) (N.C. Ct. App. Oct. 4, 2016). *See also State v. Porter*, 340 N.C. 320, 331, 457 S.E.2d 716, 721 (1995) (citation omitted) (“Where jury instructions are given without supporting evidence, a new trial is required.”).

Moreover, this is not a case where there is overwhelming evidence of Defendant’s impaired driving. Before beginning the field sobriety tests, Defendant told Officer Monroe he suffers from knee pain. During the tests, Defendant told Officer Monroe he needed his knee pads to complete the tests. Officer Monroe testified Defendant lost his balance. However, Defendant neither fell during the tests, nor did he stumble or try to lean upon anything for balance.

Accordingly, we vacate Defendant’s conviction for impaired driving and grant him a new trial.

B. Expert Testimony

Defendant also contends the trial court erred by allowing Officer Monroe to testify as an expert in “the administration and interpretation” of the HGN test. Although the issue of expert testimony for the HGN test needs to be resolved, the record and arguments in this case are insufficient to address this issue. Because we grant Defendant a new trial based on the trial court’s error in jury instructions, we need not address this issue on appeal.

IV. Conclusion

For the foregoing reasons, we vacate Defendant’s conviction and grant him a new trial.

NEW TRIAL.

Judge CALABRIA concurs.

Judge BERGER concurring in a separate opinion.

BERGER, Judge, concurring.

I reluctantly concur in the result reached by this Court as I am compelled to follow the law as it currently exists. “Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent,

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unless it has been overturned by a higher court.” *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). However, it seems that, given the reasoning in recent opinions from our Supreme Court, harmless error analysis should be undertaken.

It is uncontroverted that, in the State’s case-in-chief for the driving while impaired charge, there was no evidence presented at trial regarding Defendant’s blood alcohol concentration, only evidence concerning an appreciable impairment theory. The trial court conducted a charge conference at the conclusion of all the evidence, and the record shows the court initially intended to instruct only on the appreciable impairment theory. However, the State argued, as shown below, that Defendant’s counsel intended to argue in closing that the State had failed to prove Defendant’s blood alcohol concentration:

THE COURT: I plan on giving . . . 270.20A, impaired driving. I will give the instructions on appreciable impairment as I assume that’s the theory that the state is proceeding under.

. . .

[THE STATE]: Your Honor, I would request the .08 instruction just so I can use it in my argument.

THE COURT: All right.

[ATTORNEY FOR DEFENDANT]: As there was no evidence to sort of an actual number of any blood alcohol level, I would object to that instruction.

THE COURT: Well, if you argue they haven’t shown .08 I’m going to give that instruction or they haven’t shown his blood alcohol content I will give that instruction because you can’t have it both ways. You can’t -- you can’t object to the instruction and argue that they haven’t shown his BAC because there are more than one way to prove the offense.

[ATTORNEY FOR DEFENDANT]: Well, my argument about the blood would be more along the

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line of not talking about any number at any point, just amount. If the blood came back and it was clear of all alcohol, there's no alcohol, there cannot possibly be an alcohol impairment. If there was only a minimal amount, .01 or .02, it couldn't be impairment.

THE COURT: Well, why agree with that because someone could have a .01 and .02 and still be impaired with that particular person. I mean, the only evidence is that there was consumption of alcohol. I mean, I will –

[THE STATE]: Your Honor, I'm almost confident [Attorney for Defendant]'s going to be arguing a portion of the blood test not being done and, you know, I mean, I think that that would allow us to at least have that instruction and then kind of explain why we don't have that in this case, so, I mean, I think it's appropriate to put it in there.

THE COURT: I'll go ahead and give B. Anything further? And I note your objection.

The trial court then instructed the jury consistent with the Pattern Jury Instruction for Driving While Impaired, as follows:

The defendant has been charged with impaired driving. For you to find the defendant guilty of this offense the state must prove three things beyond a reasonable doubt:

First, that the defendant was driving a vehicle.

Second, that the defendant was driving that vehicle upon a highway or street within the state.

And third, that the defendant was driving that vehicle, (1) that the defendant was under the influence of an impairing substance. Alcohol is an impairing substance. The defendant is under the influence of an impairing substance when the defendant has consumed a sufficient quantity of that impairing substance to cause the defendant to lose the normal control of the defendant's

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bodily or mental faculties or both to such an extent that there is an appreciable impairment of either or both of these faculties, or (2) that the defendant had consumed sufficient alcohol that at any relevant time after driving the defendant had an alcohol concentration of 0.08 or more grams of alcohol per 210 liters of breath. A relevant time is any time after driving that the driver still has in the driver's body alcohol consumed before or during driving.

If the evidence tends to show that a chemical test known as an Intoxilyzer was offered to the defendant by a law enforcement officer and that the defendant refused to take the test or that the defendant refused to perform a field sobriety test at the request of an officer, you may consider this evidence together with all other evidence in determining whether the defendant was under the influence of an impairing substance at the time that the defendant drove a motor vehicle.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant drove a vehicle on a highway or street in the state and that when doing so the defendant was under the influence of an impairing substance or that the defendant had consumed sufficient alcohol that at any relevant time after driving the defendant had an alcohol concentration of 0.08 or more grams of alcohol per 210 liters of the breath, it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

The trial court erred in giving the instructions regarding .08 blood alcohol concentration, where it should have only instructed the jury on appreciable impairment. A disjunctive instruction is erroneous if there is no "evidence to support all of the alternative acts that will satisfy the element." *State v. Johnson*, 183 N.C. App. 576, 582, 646 S.E.2d 123, 127 (2007). The North Carolina Supreme Court held in *State v. Pakulski* that:

Where the trial judge has submitted the case to the jury on alternative theories, one of which is determined to be erroneous and the other properly submitted, and we cannot discern from the record the theory upon which the jury relied, this Court will not assume that the jury based

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its verdict on the theory for which it received a proper instruction. Instead, we resolve the ambiguity in favor of the defendant.

State v. Pakulski, 319 N.C. 562, 574, 356 S.E.2d 319, 326 (1987). *See also State v. Petersilie*, 334 N.C. 169, 193, 432 S.E.2d 832, 846 (1993) (“[W]e must assume the jury based its verdict on the theory for which it received an improper instruction.” (citations omitted)); *State v. Lynch*, 327 N.C. 210, 393 S.E.2d 811 (1990); *State v. Johnson*, 183 N.C. App. 576, 646 S.E.2d 123 (2007); *State v. Hughes*, 114 N.C. App. 742, 746, 443 S.E.2d 76, 79 (1994) (“We are required, we believe, to order a new trial . . .”), *disc. review denied*, 337 N.C. 697, 448 S.E.2d 536 (1994); *State v. Dick*, ___ N.C. App. ___, 791 S.E.2d 873 (2016) (unpublished); *State v. Malachi*, ___ N.C. App. ___, ___ S.E.2d ___, COA16-752, 2017 WL 1381592 (2017). These cases set forth a *per se* plain error rule requiring a new trial when a disjunctive instruction is given and there is no evidence to support each of the theories submitted to the jury.

However, the North Carolina Supreme Court appears to be shifting away from this *per se* plain error rule for disjunctive jury instructions. In *State v. Lawrence*, 365 N.C. 506, 723 S.E.2d 326 (2012), that Court reaffirmed and clarified that “the plain error standard of review applies on appeal to unpreserved instructional” errors in the context of jury instructions. *Lawrence*, at 518, 723 S.E.2d at 334. The Supreme Court also noted that N.C. Gen. Stat. § 15A-1443 differentiated the harmless error standard of review, which applies only to preserved errors.

[H]armless error review functions the same way in both federal and state courts: Before 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. . . . [A]n error . . . [is] harmless if the jury verdict would have been the same absent the error. Under both the federal and state harmless error standards, the government bears the burden of showing that no prejudice resulted from the challenged federal constitutional error. But if the error relates to a right not arising under the United States Constitution, North Carolina harmless error review requires the defendant to bear the burden of showing prejudice. In such cases the defendant must show a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.

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Lawrence, at 513, 723 S.E.2d at 331 (internal citations, quotation marks, and brackets omitted).

In *State v. Boyd*, 366 N.C. 548, 742 S.E.2d 798 (2013), our Supreme Court, after directing this Court to follow the analysis in *Lawrence*, adopted a dissent from the Court of Appeals which applied plain error review to an unpreserved error concerning a jury instruction for which there was no evidence. See *State v. Boyd*, 222 N.C. App. 160, 730 S.E.2d 193 (2012) (Stroud, J., dissenting), *dissent adopted by* 366 N.C. 548, 742 S.E.2d 798 (2013).

More recently, the Supreme Court remanded to this Court the case of *State v. Martinez*, in which the trial court erred when it instructed the jury in a sexual offense case on a theory not supported by the evidence offered at trial. *State v. Martinez*, ___ N.C. App. ___, 795 S.E.2d 433 (2016) (unpublished), *writ dismissed*, ___ N.C. ___, 797 S.E.2d 5 (2017). Initially, this Court held that “there was an ambiguity as to which sexual act the jury found Defendant had committed, and therefore [we] ‘must resolve this ambiguity in favor of Defendant.’” *Id.* at ___ (quoting *State v. Pakulski*, 319 N.C. at 574, 356 S.E.2d at 326) (brackets omitted). Our Supreme Court remanded the case, directing us to determine whether or not the trial court’s instructions in that matter amounted to plain error as set forth in *Boyd*.

However, in the case *sub judice*, the error under review was preserved, as Defendant’s counsel objected to the instruction. For preserved error, harmless error analysis should be applied pursuant to the plain language of N.C. Gen. Stat. § 15A-1443 and as discussed in *Lawrence*. But, this is not the current state of the law. Even so, the majority engages in a harmless error analysis when it states, “this is not a case where there is overwhelming evidence of Defendant’s impaired driving” and then discusses the facts it believes supports that conclusion.

Were we to engage in a harmless error analysis, which under current case law we cannot do, I believe a different conclusion would be required. The evidence in the record tended to show that Defendant drove his truck into the path of Officer Monroe’s motorcycle. In order to avoid a collision with Defendant’s vehicle, Officer Monroe was forced to “lock the bike up and then immediately make an evasive maneuver” and abruptly shift lanes. Officer Monroe initiated a traffic stop, and observed that Defendant had red, glassy eyes, spoke with slurred speech, and had a medium odor of alcohol on his breath. When asked why he pulled out into the path of the officer’s motorcycle, Defendant said the officer had enough room and that he “was catching [the officer’s]

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curiosity.” Officer Monroe then asked Defendant if he had consumed any alcohol prior to driving that evening, and Defendant responded that “he had one to two drinks” of Jägermeister. Defendant was asked to exit the vehicle to perform field sobriety tests.

Defendant was visibly swaying and unable to keep his balance while the officer was providing instructions for the walk-and-turn test. Defendant also began the test before being instructed to do so on two occasions. At this point, Defendant told Officer Monroe “that he can’t do the test, he’s not going to do the test.”

Officer Monroe then attempted to have Defendant perform the one-legged stand test. Defendant again was visibly swaying and unable to perform the test as instructed. When Officer Monroe offered to demonstrate the test again, Defendant indicated he did not want to perform the test.

After he was arrested for driving while impaired, Defendant was taken to the Raleigh Police Department. There, Officer Monroe attempted to administer a blood alcohol test on the ECIR-2 (“Intoxilyzer”). Defendant took a breath and blew into the instrument to provide a sample. Defendant was performing this test as instructed, but then he stopped and indicated he was not going to continue with the test. Defendant’s failure to complete the Intoxilyzer test resulted in a refusal. No blood test was performed, and no numerical value was ever obtained for Defendant’s blood alcohol concentration for this incident.

It was this evidence upon which the jury deliberated and convicted Defendant. The jury heard no evidence regarding a numerical finding of Defendant’s blood alcohol concentration, yet we are required to assume the jury’s verdict was based upon a finding that Defendant’s blood alcohol concentration was .08 or higher. *See State v. Petersilie*, 334 N.C. 169, 193, 432 S.E.2d 832, 846 (1993) (citation omitted) (“[W]e must assume the jury based its verdict on the theory for which it received an improper instruction.” (citations omitted)).

Jurors are instructed prior to every trial that they should “use the same good judgment and common sense that you use[] in handling your own affairs” N.C.P.I.–Crim. 100.21 (2015). In reviewing the entire record in this case, one could reasonably conclude that, because there was no evidence of impaired driving under N.C. Gen. Stat. § 20-138.1(a)(2), the jurors did as they were instructed: they used their “good judgment and common sense,” and relied upon the appreciable impairment theory.

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Concluding the harmless error analysis, it cannot be said that a different result would have been reached in this case had the error in question not been committed. Defendant failed to establish that there was a reasonable possibility that the .08 instruction contributed to his conviction given the evidence of appreciable impairment. I would find the erroneous instruction harmless beyond a reasonable doubt.

While this may be the analysis the North Carolina Supreme Court would prefer us to utilize given the plain language of N.C. Gen. Stat. § 15A-1443 and a broader reading of *Lawrence*, *Boyd*, and *Martinez*, this Court must apply the law as it is. If the North Carolina Supreme Court is, in fact, changing the standard of review we are to apply to disjunctive instructions given in error, straightforward direction from that higher court would be beneficial.

STATE OF NORTH CAROLINA
v.
SUSAN MARIE MALONEY

No. COA16-851

Filed 16 May 2017

1. Appeal and Error—preservation of issues—plain error not argued—appeal dismissed

An issue concerning the instruction of the jury on two counts of manufacturing methamphetamine was not preserved for appeal where defendant did not object at trial and did not specifically and distinctly argue plain error on appeal. The issue was deemed waived.

2. Drugs—methamphetamine—possession of precursor chemicals—indictment not sufficient

The trial court lacked jurisdiction, and a conviction for possession of the precursor chemicals to methamphetamine was vacated where the indictment was fatally flawed in that it failed to allege an essential element of the crime (that defendant knew or had reason to know that the materials would be used to manufacture methamphetamine). The State's amendment of the indictment to add the missing element could not cure the defect.

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3. Drugs—continuing offense—manufacture of methamphetamine

The Court of Appeals concluded in an alternative argument that the trial court did not err by entering judgment on two separate counts of manufacturing methamphetamine. Debris from the manufacturing process was found in black garbage bags in two separate locations, a storage unit and the trunk of a car. Although defendant contended that the evidence suggested a continuous operation by the same participants, the garbage bags contained evidence that separate manufacturing offenses had been completed and defendant's own witness testified that the garbage bags contained trash from separate batches manufactured on separate dates.

Judge MURPHY concurring in part and concurring in the result in part.

Appeal by defendant from judgment entered 15 February 2016 by Judge Marvin K. Blount III in Beaufort County Superior Court. Heard in the Court of Appeals 21 March 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Daniel Snipes Johnson, for the State.

Michael E. Casterline for defendant-appellant.

BRYANT, Judge.

Where defendant failed to specifically and distinctly contend on appeal that the trial court's jury instruction amounted to plain error, we consider this argument waived. Where a fatally defective indictment could not be cured by the State's material amendment prior to trial, we arrest judgment on and vacate the conviction. Lastly, where the evidence at trial demonstrated termination, not continuation, of manufacturing of methamphetamine in more than one location, two counts of manufacturing of methamphetamine do not constitute a continuing offense, and the trial court committed no error in denying defendant's motions to dismiss.

In September 2013, officers at the Beaufort County Sheriff's Office received information that Randall Burmeister and an unknown female had been making numerous pseudoephedrine ("PSE") purchases at area pharmacies. PSE is a precursor chemical in the manufacture of methamphetamine and is also an ingredient in some over-the-counter cold and allergy drugs. Purchases of products containing PSE are tracked through the National Precursor Log Exchange ("NPLEX")

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database. In order to buy a product containing PSE, an individual must present identification at the pharmacy. The individual's ID is scanned and entered into the NPLEX database, along with the amount of PSE purchased. If the purchase exceeds a permissible threshold amount, the sale will be blocked.

By analyzing NPLEX records, investigators determined that Burmeister's companion was defendant Susan Marie Maloney. Defendant and Burmeister met in Illinois in 2008, shortly after Burmeister was released from prison after serving seven years for manufacturing methamphetamine.

At the request of investigators, a Walgreens pharmacist contacted police when Burmeister and Maloney purchased a PSE product on 7 October 2013. Under police surveillance, the couple left the store in a blue Taurus and drove to a residence on River Road, where officers confronted the couple in the driveway as they got out of their car.

Burmeister and defendant were not the owners of the residence, but were renting a room. Burmeister gave police permission to search their room, and the house's owner, Ricky Brass, permitted police to search the entire house and the blue Taurus, which he also owned. In the back seat of the car, Lieutenant Russell Davenport found a bag containing bags of salt, which is used in the last process of cooking methamphetamine. In the trunk of the car, Lieutenant Davenport found a black garbage bag. Upon opening it, he was overcome with fumes. The police immediately secured the scene and called the State Bureau of Investigation ("SBI"). Burmeister and defendant were taken into custody.

However, defendant, who had recently had heart surgery, was taken to the emergency room with chest pain. During the hours she was in the hospital, defendant told police officers that Burmeister had been arrested for making methamphetamine in Illinois. Defendant spent several hours in the hospital before being taken to the magistrate's office and served with an arrest warrant.

The next day, the SBI and local officers returned to the River Road residence. Among the items found inside the garbage bag in the trunk of the car were empty cans of solvent, a container of lye, an empty cold pack, tubing, a peeled lithium battery, a coffee filter, a funnel, a glass jar, and plastic bottles containing various residues and liquids. Inside the passenger compartment, officers also seized a container of table salt, needle-nosed pliers, a can of solvent, and a package of PSE decongestant tablets. Officers also searched defendant and Burmeister's rented

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storage unit. There, they found another black garbage bag containing, *inter alia*, a cold pack, an empty pack of starter fluid, coffee filters, peeled lithium batteries, empty blister packs of nasal decongestant containing pseudoephedrine hydrochloride, and various bottles containing off-white crystalline material. At trial, State's witnesses testified that many of the items found in both the trunk of the Taurus and the storage unit could be used in the manufacture of methamphetamine using the "one-pot" or "shake-and-bake" method. Ultimately, three plastic bottles—two from the garbage bag found in the trunk of the car and one recovered from the garbage bag in the storage unit—were found to contain concentrations of methamphetamine.

On 7 April 2014, defendant was indicted by a Beaufort County grand jury in case 13 CRS 52279 for one count of manufacturing methamphetamine and one count of possession of drug paraphernalia. Defendant was also indicted in case 13 CRS 52289 for one count of manufacturing methamphetamine, one count of possession of methamphetamine precursor materials (salt, sulfuric acid, lithium, ammonium nitrate and pseudoephedrine), and one count of possession of methamphetamine. All offenses were alleged to have occurred on or about 8 October 2013.

Defendant's cases were called for jury trial on 8 February 2016 before the Honorable Marvin K. Blount III in Beaufort County Superior Court. The district attorney made a motion to amend the second count in the indictment in case 13 CRS 52289, the charge of possession of precursors to methamphetamine, which motion the court granted.

At the close of the State's evidence, defendant made a motion to dismiss, which the court denied. Defendant presented evidence, testifying in her own defense and calling additional witnesses. Among the witnesses who testified on behalf of defendant was Burmeister, who had previously pled guilty shortly after his arrest for his involvement in the same incident underlying this appeal.

Burmeister told the court that upon moving from Illinois to North Carolina, he resumed making methamphetamine using the "one-pot" or "shake-and-bake" method. He testified that the garbage bags found in the car and the storage unit both held trash from separate batches of methamphetamine. He also testified that, after defendant's surgery, he would use her to help him obtain the PSE he needed to make methamphetamine. His practice was to give defendant a dose of her medication that made her "doped up." Then, he would take defendant to a pharmacy, put her driver's license in her hand, "grab the card [for the

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PSE] off the shelf, stick it in her hand, and walk her up to the window because she didn't know what was going on. She didn't know where we were." A pharmacy tech from the Walmart pharmacy also testified for defendant, who recalled seeing defendant several times in the fall of 2013. According to the tech, defendant was always accompanied by Burneister, who presented defendant's identification and requested the medication. The tech testified that defendant appeared "sickly," "a little disoriented," and seemed not to know what she needed, or what she was buying.

At the close of all the evidence, the court again denied defendant's motion to dismiss. Defendant was found guilty of each charge and the judge entered two consolidated judgments. In 13 CRS 52279, defendant received a sentence of fifty-eight to eighty-two months, and in 13 CRS 52289, defendant received another sentence of fifty-eight to eighty-two months, to be served at the expiration of the first sentence. Defendant appeals.

On appeal, defendant contends the trial court (I) erred in entering judgment on two counts of manufacturing methamphetamine where the trial court failed to instruct the jury on two distinct offenses; (II) lacked jurisdiction to enter judgment for possession of precursor materials; and (III) erred in entering judgment for two counts of manufacturing methamphetamine as the crime was a "continuing offense."

I

[1] Defendant first argues the trial court erred in entering judgment on two counts of manufacturing methamphetamine where the trial court failed to instruct the jury on two distinct offenses. In other words, defendant contends the trial court's failure to so instruct functioned to dismiss one of the manufacturing indictments as a matter of law and, therefore, one conviction arising from that indictment must be vacated.

Defendant has failed to properly preserve this issue for our review by not objecting at trial—either during the charge conference or before the jury retired—to the court's failure to instruct on what defendant now considers relevant instructions. Defendant will not now be heard on this issue. "A party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires" N.C. R. App. P. 10(a)(2) (2017). "Therefore, defendant is entitled only to review pursuant to the plain error rule." *State v. Call*, 349 N.C. 382, 424, 508 S.E.2d 496, 522 (1998) (citation omitted).

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In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is *specifically and distinctly* contended to amount to plain error.

N.C. R. App. P. 10(a)(4) (2017).

However, because defendant failed to “specifically and distinctly” argue plain error on appeal, she has waived appellate review. We deem this assignment of error waived. *See State v. Davis*, 202 N.C. App. 490, 497, 688 S.E.2d 829, 834 (2010) (“[B]ecause [the] [D]efendant did not ‘specifically and distinctly’ allege plain error as required by [our appellate rules], [the] [D]efendant is not entitled to plain error review of this issue.” (quoting *State v. Dennison*, 359 N.C. 312, 312–13, 608 S.E.2d 756, 757 (2005)).¹

II

[2] Next, defendant argues the trial court lacked jurisdiction to enter judgment for possession of precursor chemicals because the indictment for that offense was fatally defective and the State’s attempt to cure the defect involved a substantial alteration to the indictment. In other words, defendant contends that because the indictment could not be cured at trial by amendment, the trial court lacked jurisdiction as to this offense and defendant’s conviction for possession of methamphetamine precursor materials should be vacated. We agree.

“Although defendant did not object at trial to the facial inadequacy of the precursor indictment, ‘[a] challenge to the facial validity of an indictment may be brought at any time, and need not be raised at trial for preservation on appeal.’ ” *State v. Oxendine*, ___ N.C. App. ___, ___, 783 S.E.2d 286, 289 (2016) (alteration in original) (quoting *State v. LePage*, 204 N.C. App. 37, 49, 693 S.E.2d 157, 165 (2010)). “[W]e review the sufficiency of an indictment *de novo*.” *Id.* (quoting *State v. McKoy*, 196 N.C. App. 650, 652, 675 S.E.2d 406, 409 (2009)).

“To be valid ‘an indictment must allege every essential element of the criminal offense it purports to charge.’ ” *Id.* (quoting *State v. Billinger*, 213 N.C. App. 249, 255, 714 S.E.2d 201, 206 (2011)). “A conviction based on a flawed indictment must be arrested.” *State v. De La Sancha Cobos*,

1. Further, we reject defendant’s attempt to recast this issue on appeal as structural error requiring *de novo* review and dismissal as a matter of law.

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211 N.C. App. 536, 540, 711 S.E.2d 464, 468 (2011) (citing *State v. Outlaw*, 159 N.C. App. 423, 428, 583 S.E.2d 625, 629 (2003)).

In *State v. Oxendine*, the indictment charging the defendant with possessing an immediate precursor chemical with intent to manufacture methamphetamine or possessing precursor chemicals “knowing, or having reasonable cause to believe,” that the precursor chemicals will be used to manufacture methamphetamine

fail[ed] to allege that [the] defendant, when he possessed those materials, intended to use them, knew they would be used, or had reasonable cause to believe they would be used to manufacture methamphetamine. *The indictment contain[ed] nothing about [the] defendant’s intent or knowledge about how the materials would be used.*

___ N.C. App. at ___, 783 S.E.2d at 289 (emphasis added). Instead, the indictment in *Oxendine* alleged that the defendant “unlawfully, willfully and feloniously did possess [precursor chemicals] used in the manufacture of methamphetamine.” *Id.* Accordingly, this Court arrested judgment on the defendant’s conviction of possession of a precursor chemical because, “[w]ithout an allegation that [the] defendant possessed the required intent, knowledge, or cause to believe, the indictment fail[ed] to allege an essential element of the crime.” *Id.* at ___, 783 S.E.2d at 290.

We agree with defendant, and the State acknowledges, that *State v. Oxendine* is directly applicable to the instant case. Here, on 9 February 2016 during pretrial motions, the district attorney made a motion to amend the second count in the indictment in case 13 CRS 52289, the charge of possession of precursor materials used to produce methamphetamine:

[THE STATE:] . . . In this case, we’re requesting the language be substituted—knowing or having reasonable cause to believe that the immediate precursor chemical would be used to manufacture methamphetamine, a controlled substance.

THE COURT: Okay. All right. The State’s motion is allowed.

As a result, Count II of the indictment in case 13 CRS 52289, was amended (the district attorney’s handwritten addition is underlined), to read as follows:

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The jurors for the State upon their oath present that on or about the date shown above and in the county named above, the defendant named above unlawfully, willfully and did knowingly possess salt, sulfuric acid, lithium, amonium [sic] nitrate and pseudoephedrine, such items being precursors used to produce methamphetamine know or have reason to know and cause to believe that the immediate precursor chemical would be used to manufacture a controlled subs [sic].

Similar to the indictment in *Oxendine*, here, Count II of the indictment in case 13 CRS 52289 also fails to allege an essential element of the crime, namely, defendant's intent or knowledge "about how the materials would be used," i.e., "for manufacture of methamphetamine by h[er]self or someone else." *See id.* at ___, ___, 783 S.E.2d at 289, 290.

"The Criminal Procedure Act provides that '[a] bill of indictment may not be amended.'" *De La Sancha Cobos*, 211 N.C. App. at 541, 711 S.E.2d at 468 (alteration in original) (quoting N.C. Gen. Stat. § 15A-923(e) (2009)). An "amendment" is "any change in the indictment which would substantially alter the charge set forth in the indictment." *Id.* (quoting *State v. Snyder*, 343 N.C. 61, 65, 468 S.E.2d 221, 224 (1996)). Where an amendment to an indictment involves an element of the crime charged, it is a "material" one. *See id.* at 542, 711 S.E.2d at 468–69.

Here, the State attempted to materially amend Count II of the indictment in case 13 CRS 52289 before trial by adding that defendant knew or had reason to know that the immediate precursor materials would be used to manufacture methamphetamine, a controlled substance. This language, which functioned to establish an essential element of the crime of possession of precursor materials, materially amended the flawed indictment and constitutes reversible error. Because this fatally defective indictment could not be cured by the State's material amendment prior to trial, we arrest the trial court's judgment and vacate defendant's conviction on Count II of the indictment in case 13 CRS 52289.

III

[3] Lastly, and in the alternative to defendant's argument in Section I, *supra*, defendant contends the trial court erred in entering judgment for two separate counts of manufacturing methamphetamine because the crime was a single continuing offense and, therefore, one of defendant's convictions should be vacated. We disagree.

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“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) (citing *State v. McKinnon*, 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982)). “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)). “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).

“A continuing offense . . . is a breach of the criminal law not terminated by a single act or fact, but which subsists for a definite period and is intended to cover or apply to successive similar obligations or occurrences.” *State v. Johnson*, 212 N.C. 566, 570, 194 S.E.2d 319, 322 (1937). “North Carolina appellate courts have held that analogous activities are continuing offenses.” *State v. Grady*, 136 N.C. App. 394, 400, 524 S.E.2d 75, 79 (2000) (citations omitted); *see also State v. Calvino*, 179 N.C. App. 219, 223, 632 S.E.2d 839, 843 (2006) (vacating one of two convictions for keeping a vehicle for selling a controlled substance as double jeopardy prohibits a conviction for two counts under the applicable statute as “the offense is a continuing offense”). For example, illegal possession of stolen property is a continuing offense beginning at receipt and continuing until divestment, *see State v. Davis*, 302 N.C. 370, 372–75, 275 S.E.2d 491, 493–94 (1981), and kidnapping is a continuing offense that lasts from the time of initial confinement until the victim regains free will, *see State v. White*, 127 N.C. App. 565, 570, 492 S.E.2d 48, 51 (1997).

In *Grady*, the defendant was charged with two counts of maintaining a dwelling for the use of a controlled substance. In determining that maintaining a dwelling is a continuing offense, this Court noted that, if it were not, “the State would be free . . . to ‘divide a single act . . . into as many counts . . . as the prosecutor could devise.’ ” 136 N.C. App. at 400, 524 S.E.2d at 79 (alterations in original) (quoting *White*, 127 N.C. App. at 570, 492 S.E.2d at 51). This Court also described a situation which would not constitute a continuing offense: “There is no evidence indicating a termination and subsequent resumption of drug trafficking at this dwelling; to the contrary, the evidence shows that drugs were readily available there on request throughout the investigation.” *Id.* In other words, because the act of maintaining a dwelling in *Grady* involved drug

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transactions which took place over time at a single dwelling, the act of maintaining a dwelling could not be divided into discrete events (it was a continuing offense), and, therefore, the two convictions violated the constitutional prohibition against double jeopardy. *Id.*

The crime of manufacturing a controlled substance “means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance by any means . . .” N.C. Gen. Stat. § 90-87(15) (2015). In the instant case, two separate methamphetamine labs, or the evidence thereof, were discovered in the trunk of the Taurus and in the storage unit. In both locations, various materials related to the manufacture of methamphetamine were discovered in black garbage bags. Defendant argues that this “evidence suggests a single continuous operation where the same participants were making batches of the drug, with various stages of the preparation and processing occurring in locations which included the residence, the car, and the storage locker.”

We disagree with defendant’s characterization. In the present case, the evidence at trial demonstrated termination, not continuation, of separate processes of manufacturing methamphetamine in more than one location. In both locations—the trunk of the car and the storage unit—the chemical reaction process had reached the end stage where gas had been introduced into the liquid to precipitate a useable form of methamphetamine. In other words, the two separate garbage bags found in two distinct locations each contained evidence that separate manufacturing offenses had been completed. In fact, defendant’s own witness made the point that the garbage bags held trash from separate batches of methamphetamine manufactured on separate dates. While we do not think the statute necessarily requires a completed process—“manufacturing a controlled substance means the production, *preparation*, propagation, compounding, conversion, or processing of a controlled substance by any means,” *id.* § 90-87(15) (emphasis added)—based on the facts present in the instant case, it is clear that two separate and distinct locations contained two separate methamphetamine manufacturing processes. Accordingly, the trial court did not err by entering judgment for two separate counts of manufacturing methamphetamine. Defendant’s argument is overruled.

NO ERROR IN PART; JUDGMENT ARRESTED AND CONVICTION VACATED IN PART.

Judge INMAN concurs.

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Judge MURPHY concurs as to Parts I and II, and concurs in the result in Part III by separate opinion.

MURPHY, Judge, Concurring as to Parts I and II and the result of Part III.

I concur in the Court's opinion as to Parts I and II and the result of Part III, but I write separately to express my concerns regarding the application of N.C.G.S. § 90-87(15) to the manufacture of methamphetamine.

In the present case, there were three locations where drug manufacturing material was found: in Maloney and Burmeister's bedroom, in the storage unit Maloney had rented, and in the car the couple had borrowed from Brass. Indictments were filed regarding the materials found in the car and storage unit, but not the bedroom. Defendant argues that the manufacture of a controlled substance, lacking any specified duration or particular culmination, is a continuing offense. The majority emphasizes the separate locations of the materials found. However, I would hold that the locations of the items found are not controlling on the number of counts of manufacturing methamphetamine as the items found were only indicative of past "one-pot" manufacturing or the intention and ability to "cook" in the future.

As the majority points out, there were three empty bottles evidencing past cooks. I believe that each one-pot cook constituted an act of manufacturing methamphetamine under the statute as it is the bulk of the eventual completed process of turning chemicals into the controlled substance. While I arrive at the same result as the majority today, had all three bottles been in the same location I still would have found no error as they were merely trash and evidence of past illegal conduct.

As was discussed at length during arguments of counsel, there are many ways to analyze one continuing process as opposed to individual acts of manufacturing methamphetamine. It is a reasonable reading of the statute and our case law that multiple bottles cooked in the same room and producing hundreds of grams of methamphetamine without a significant break in production could result in only one conviction of manufacturing. Alternatively, it is just as reasonable a reading of the statute and case law that each time an additional amount of catalyst is introduced into the chemical solution the bottle starts a new chemical reaction and is an individual, though small, manufacture of

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methamphetamine which could reasonably result in the conviction of multiple counts from a single one-pot cook.

First-time offenders face a minimum presumptive sentence of 58 to 82 months for each offense of manufacturing methamphetamine, thus it is of great importance to the public that statutes such as N.C.G.S. § 90-87(15) are well-defined. The current statute and case law, even after today's decision, leave open to interpretation what constitutes one continuing offense of manufacture versus several separate instances.

I concur in today's result, but believe it is extremely important for this matter to be addressed for future decisions and to ensure the equal application of our statutes across the state. However, as an error-correcting court, we do not have the power to address policy concerns that may exist for various conflicting factual situations. This matter should be readdressed by the General Assembly or our Supreme Court.

STATE OF NORTH CAROLINA
v.
JESUS MARTINEZ, DEFENDANT

No. COA16-374-2

Filed 16 May 2017

1. Constitutional Law—federal—effective assistance of counsel—failure to object to doctor's testimony—testimony admissible

Defendant was not denied effective assistance of counsel where his trial counsel did not object to a doctor's testimony about a child sexual abuse victim. The doctor testified, "But in the fact that she did experience abuse," but the statement in context referred to a hypothetical victim and did not amount to a statement that this victim was in fact abused.

2. Constitutional Law—federal—right to impartial jury—juror's statement—no plain error

The trial court's failure to act upon a prospective juror's statement did not amount to plain error in a prosecution for the sexual abuse of a child. The prospective juror said that her uncle was a defense attorney and that he had said his job was to "get the bad guys off." Although defendant contended that this amounted to a comment on his guilt, it was a generic statement and did not

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imply that the prospective juror had any particular knowledge of defendant's case or the possibility that he might be guilty.

3. Criminal Law—jury instructions—disjunctive—one offense not supported by evidence

There was no plain error in a prosecution for several types of sexual abuse of a child where the trial court gave disjunctive instructions on the types of abuse but one type was not supported by the evidence. Defendant did not meet his burden of showing that the instruction had any probable impact on the verdict.

4. Appeal and Error—preservation of issues—offer of proof—not sufficient

Defendant did not preserve for appellate review issues concerning excluded evidence of bias against him in a prosecution for the sexual abuse of a child. Although defendant contended that his statements were an offer of proof, speculation about what the testimony would have been was not sufficient to show the actual content of the testimony.

5. Evidence—prior accusation of domestic violence—other evidence of guilt—exclusion—no prejudicial error

There was no prejudicial error in a prosecution for the sexual abuse of a child where the trial court erroneously excluded evidence that the mother had previously accused defendant of domestic violence, possibly indicating bias. Considering the other evidence of guilt, there was not a reasonable possibility of another result had the evidence been heard.

Judge BRYANT concurring in the result.

Appeal by Defendant from judgments entered 18 September 2015 by Judge Yvonne M. Evans in Mecklenburg County Superior Court.

Originally heard in the Court of Appeals 20 September 2016. By opinion filed 30 December 2016, this Court found no reversible error as to five of the eleven convictions, but vacated the other six convictions based on our conclusion that certain jury instructions constituted plain error.

By Order entered 16 March 2017, our Supreme Court remanded the matter to our Court for the limited purpose "of determining whether the trial court's instruction held to have been erroneous by the Court of Appeals constituted plain error as required by *State v. Boyd*, 222

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N.C. App. 160, 730 S.E.2d 193 (2012), *rev'd for the reasons stated in the dissenting opinion*, 366 N.C. 548, 742 S.E.2d 798 (2013).”

This opinion replaces the original Opinion filed on 30 December 2016.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Lauren M. Clemmons, for the State.

Hale Blau & Saad, P.C., by Daniel M. Blau, for the Defendant.

DILLON, Judge.

Jesus Martinez (“Defendant”) appeals from judgments entered upon jury verdicts finding him guilty of eleven felonies based on sexual conduct he engaged in with a minor.

I. Background

The evidence at trial tended to show as follows: Defendant was cohabiting with his girlfriend (“Mother”), *their* infant child, and Mother’s three children from a prior relationship.

Mother testified that one morning, she walked into the bedroom she shared with Defendant and saw the sheets “moving up and down.” She pulled back the sheets and saw her eight-year-old daughter, Chloe¹, curled into a “little ball” and “hiding.” Mother later asked Chloe what had been happening, and Chloe replied that Defendant had engaged in certain sexual conduct with her and had also done so in the past.

At trial, Chloe testified in detail regarding incidents where Defendant had engaged in sexual acts with her.

Defendant testified that when Mother walked into the bedroom, he and Chloe had simply been spending time together in bed, that both had been fully clothed, and that Mother had misinterpreted the situation.

Mother informed law enforcement of the incident, and Defendant was subsequently arrested and indicted for numerous offenses. Defendant was convicted of eleven felonies: four counts of sex offense in a parental role, two counts of sex offense with a child, and five other felonies. Defendant timely appealed.

1. A pseudonym.

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II. Analysis

Defendant makes four arguments on appeal: (1) that a medical expert witness impermissibly vouched for Chloe's credibility; (2) that a prospective juror made grossly prejudicial remarks during jury selection; (3) that the trial court's disjunctive instruction relating to the six "sexual offense" charges constituted plain error; and (4) that Defendant should have been allowed to introduce certain evidence to impeach the testimony of Chloe's mother. We address each argument in turn.

A. Expert Testimony

[1] Defendant's first set of arguments relate to a statement made by Dr. Patricia Morgan which Defendant contends constituted improper vouching by an expert. During direct examination, Dr. Morgan made the following statement:

PROSECUTOR: . . . [W]ould you be able to confirm [from a medical exam] whether or not [Chloe] could have experienced vaginal bleeding a month or so prior?

DR. MORGAN: It might be difficult to say because, again, that finding in and of itself I could see it in a girl who may not have experienced abuse. But *in the fact that she did experience abuse*, as well as have those findings of bleeding that she –

[Defense Counsel interrupted Dr. Morgan's testimony with an objection, but then withdrew the objection immediately.]

DR. MORGAN: Could you give me the question again, please? I want to make sure I'm answering it properly.

PROSECUTOR: Yes, ma'am. I was just asking if in looking at the hymen, if you knew one way or the other if she previously experienced bleeding. Can you tell by looking at it?

DR. MORGAN: If by looking at it I wouldn't be able to necessarily say if she had any bleeding because, again, the nature of the hymen is that it heals. And so I really couldn't say unless there was some residual or something that was evidence that shows that there was trauma.

(emphasis added).

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On appeal, Defendant contends Dr. Morgan's statement emphasized above – that “in the fact that she did experience abuse” – constituted inadmissible expert opinion regarding Chloe's *credibility*. Defendant also contends that his counsel's failure to object constituted ineffective assistance of counsel.

Our Supreme Court has held that in the absence of physical evidence to support a diagnosis of sexual abuse, expert testimony that sexual abuse has in fact occurred is not admissible because it is an impermissible opinion regarding the victim's credibility. *State v. Stancil*, 355 N.C. 266, 266-67, 559 S.E.2d 788, 789 (2002).

However, we conclude that Dr. Morgan's statement, considered in the context of her testimony as a whole, does not amount to an assertion that Chloe was in fact abused. Rather, a proper understanding of the transcript is that Dr. Morgan was speaking of a hypothetical victim when she made the statement. Indeed, Dr. Morgan testified that Chloe's medical exam was normal and that she could not determine from the exam whether or not Chloe had been sexually abused.

Other cases from our Court in which plain error *was* found to be present involved much more conclusory statements made by the expert. For instance, in a case cited by Defendant, our Court found prejudicial error where an expert witness stated in response to a question: “My opinion was that she was sexually abused.” *State v. Dixon*, 150 N.C. App. 46, 51, 563 S.E.2d 594, 598 (2002); *see also State v. Towe*, 366 N.C. 56, 60, 732 S.E.2d 564, 566 (2012) (finding plain error where expert stated that she would place the victim in the category of children who “have been sexually abused [and] have no abnormal findings”); *State v. Bush*, 164 N.C. App. 254, 259, 595 S.E.2d 715, 718 (2004) (finding plain error where expert stated: “My diagnosis was [that the child] was sexually abused by defendant”); *State v. Couser*, 163 N.C. App. 727, 732, 594 S.E.2d 420, 423-24 (2004) (finding plain error where expert testified that her diagnosis was “probable sexual abuse”).

Here, we do not believe that Dr. Morgan made an impermissible statement that she believed that Chloe was in fact abused. Accordingly, defense counsel's failure to object was not error, and therefore did not constitute ineffective assistance of counsel.

B. Juror Remarks

[2] Defendant argues that a statement by one of the prospective jurors violated Defendant's constitutional right to an impartial jury and amounted to plain error. Specifically, Defendant contends that a

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prospective juror's statement that her uncle was a local defense attorney who had told her his job was to "get the bad guys off" amounted to a comment on *Defendant's* guilt from a reliable source. We disagree.

The sole case cited by Defendant in support of this argument is *State v. Gregory*, in which a prospective juror stated that she helped prepare the defense for the defendant and had learned confidential information that would be favorable to the State if learned by the State. *State v. Gregory*, 342 N.C. 580, 587, 467 S.E.2d 28, 33 (1996). Our Supreme Court concluded that these statements "[were] likely to cause the [other] jurors to form an opinion before they heard any evidence at trial, and [] a juror who has formed an opinion cannot be impartial." *Id.* at 587, 467 S.E.2d at 33. Thus, the Court held that this statement denied the defendant a fair trial.

In contrast, here, the statement by the prospective juror was generic and did not imply that she had any particular knowledge of *Defendant's* case or the possibility that *Defendant* might be guilty. We do not believe that the trial court's failure to take specific action addressing the juror's comment amounted to plain error. *See State v. Black*, 328 N.C. 191, 196, 400 S.E.2d 398, 401 (1991) (stating that the trial court "has broad discretion to see that a competent, fair and impartial jury is impaneled") (internal marks omitted)).

C. Jury Instructions

[3] Defendant's third set of arguments relates to jury instructions given by the trial court regarding his six "sexual offense" convictions. It is this set of arguments that is the basis for the limited remand by our Supreme Court. In our first opinion, we agreed with Defendant that the trial court committed plain error when it gave a jury instruction where one of the theories upon which the jury could convict was not supported by any evidence offered at trial.

Defendant was convicted of four felonies under N.C. Gen. Stat. § 14-27.4(a)(1) (first degree sexual offense with a child) and two felonies under N.C. Gen. Stat. § 14-27.7(a) (sex offense in a parental role). Both statutes require that a jury find that a defendant engaged in a "sexual act" with the victim. N.C. Gen. Stat. § 14-27.4 (2013); N.C. Gen. Stat. § 14-27.7 (2013). "Sexual act" is defined by the General Assembly as "cunnilingus, fellatio, analingus, or anal intercourse." N.C. Gen. Stat. § 14-27.1(4) (2013).

At trial, the State's evidence tended to show that Defendant engaged in fellatio and anal intercourse with Chloe. The State did not present any

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evidence that Defendant engaged in analingus with Chloe. However, the trial court instructed the jury that it could find Defendant guilty of the six felonies if it found that he committed fellatio, anal intercourse, *or analingus* with Chloe.

In our first opinion, we held, based on a line of cases from our Supreme Court, that the trial court's inclusion of "analingus," where there was no evidence of analingus offered at trial, essentially constituted plain error *per se*. In this line of cases, our Supreme Court consistently held that "[w]here the trial court erroneously submits the case to the jury on alternative theories, one of which is not supported by the evidence and the other which is, and [] it cannot be discerned from the record upon which theory or theories the jury relied in arriving at its verdict, the error entitles defendant to a new trial." *State v. Lynch*, 327 N.C. 210, 219, 393 S.E.2d 811, 816 (1990); *see also State v. Pakulski*, 319 N.C. 562, 574, 356 S.E.2d 319, 326 (1987); *State v. Belton*, 318 N.C. 141, 162-63, 347 S.E.2d 755, 768-69 (1986), *partially overruled on other grounds by State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396 (1997).² Our Supreme Court has explained that a new trial is required in this case because "we *must assume* the jury based its verdict on the theory for which it received an improper instruction." *State v. Petersilie*, 334 N.C. 169, 193, 432 S.E.2d 832, 846 (1993) (emphasis added). And our Supreme Court has stated that such error rises to the level of plain error: "it would be difficult to say that permitting a jury to convict a defendant on a theory not legally available to the State because it is not charged in the indictment or not supported by the evidence is not plain error even under the stringent test required to invoke that doctrine." *State v. Tucker*, 317 N.C. 532, 540, 346 S.E.2d 417, 422 (1986); *see also State v. Brown*, 312 N.C. 237, 249, 321 S.E.2d 856, 861 (1984).

In the present case, it cannot be discerned from the verdict sheets which theory the jury relied upon to find that Defendant had engaged in sexual acts with Chloe. It could certainly be argued that the trial court's disjunctive instruction allowing the jury to convict based on a finding that Defendant engaged in analingus should not be considered plain error *per se* where there is clear evidence supporting the other theories contained in the instruction. The line of Supreme Court cases

2. Similar to the present case, this line of cases involves a disjunctive instruction where one of the theories presented to the jury is not supported by the evidence. This line of cases is distinct from another line of Supreme Court cases which addresses a situation where the jury is instructed on different theories but where each theory *is* supported by the evidence. This separate line of cases deals with the issue of jury unanimity. *See State v. Walters*, 368 N.C. 749, 753-54, 782 S.E.2d 505, 507-08 (2016).

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cited above, though, compels a plain error determination since we “must assume” that the jury based its verdict on the theory not supported by the evidence. And “[i]t is plain error to allow a jury to convict a defendant upon a theory not supported by the evidence.” *State v. Jordan*, 186 N.C. App. 576, 584, 651 S.E.2d 917, 922 (2007). *See also State v. Crabtree*, ___ N.C. App. ___, ___, 790 S.E.2d 709, 717 (2016).

In our first opinion, we essentially concluded that the trial court’s disjunctive instruction constituted plain error *per se*, based on the line of Supreme Court cases which includes *Petersilie*, *Lynch*, *Pakulski*, and *Belton*. In our prior opinion, we assumed that the jury based its verdicts on its finding that Defendant committed analingus with Chloe. Thus, based on this presumption, we concluded that plain error occurred when Defendant was convicted based on a finding by the jury not supported by the evidence.

Our Supreme Court, however, has remanded, instructing us to revisit our holding in light of its 2013 holding in *State v. Boyd*, 366 N.C. 548, 742 S.E.2d 798 (2013), a case not cited by the State in its brief nor considered by our Court in our first opinion. In *Boyd*, our Supreme Court issued a two-line *per curiam* opinion adopting Judge Stroud’s dissenting opinion from our Court. We now turn to analyze the trial court’s disjunctive instruction in the present case in light of the *Boyd* decision.

In *Boyd*, the trial court instructed the jury that it could convict the defendant of kidnapping on three alternative theories – that the defendant either confined, restrained, or removed the victim. *State v. Boyd*, 222 N.C. App. 160, 163, 730 S.E.2d 193, 196 (2013). On appeal to our Court, two members of the panel held that the instruction constituted plain error, as there was no evidence that the defendant “removed” the victim. *Id.* In her dissent, Judge Stroud agreed with the majority that the trial court erred when it instructed on the theory of “removal,” but that she disagreed that the error rose to the level of *plain* error. *Id.* at 167, 730 S.E.2d at 198 (“I believe that the instructional error as to ‘removal’ does not rise to the level of plain error.”). In reaching her conclusion, Judge Stroud did not assume that the jury relied on the theory of removal to support the kidnapping conviction. Rather, Judge Stroud cited the overwhelming evidence supporting the *other* kidnapping theories – confinement and restraint – to conclude that the defendant failed to show “that, absent the error [instructing on removal], the jury would have returned a different verdict.” *Id.* at 173, 730 S.E.2d at 201. Judge Stroud cited extensively to *State v. Lawrence*, 365 N.C. 506, 723 S.E.2d

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326 (2012), in which our Supreme Court clarified the application of the plain error test by reviewing courts.³

The 2013 *Boyd* decision represents a shift away from the *per se* rule that had been applied for a number of decades by our Supreme Court in cases involving disjunctive instructions where one of the theories was not supported by the evidence. Citing *Lawrence*, Judge Stroud did not follow the direction from our Supreme Court in past cases that a reviewing court “must assume” that the jury relied on the improper theory. See *Petersilie*, 334 N.C. at 193, 432 S.E.2d at 846. Rather, under *Boyd*, a reviewing court is to determine whether a disjunctive jury instruction constituted reversible error, without being required in every case to assume that the jury relied on the inappropriate theory.⁴

We have reviewed the record and conclude that Defendant has failed to meet his burden of showing that the trial court’s inclusion of “analingus” in the jury instruction had any *probable* impact on the jury’s verdict. Chloe was clear in her testimony regarding the occasions where fellatio and anal intercourse had occurred. The case essentially came down to whether the jury believed Chloe’s account or Defendant’s account. The trial court’s inclusion of the word “analingus” (for which there was no evidence) probably had no impact in the jury’s deliberations. Therefore, we find no plain error in Defendant’s convictions for sex offense with a child and sex offense in a parental role.⁵

3. In *Lawrence*, our Supreme Court reaffirmed its holding in *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983), regarding the application of the plain error test, stating that the defendant must show that the error had a “probable impact” on the jury’s verdict. *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. Our Supreme Court, however, has relied on *Odom* in the past to conclude that a disjunctive jury instruction which included a theory not supported by the evidence had a “probable impact” on the jury’s verdict. *Tucker*, 317 N.C. at 539, 346 S.E.2d at 421.

4. Our Court though, even after the *Boyd* decision in 2013, has continued to find reversible error *per se*. Some recent cases from our Court include *State v. Dick*, 791 S.E.2d 873, *11-12 (2016) (unpublished) (applying harmless error standard); *State v. Jefferies*, ___ N.C. App. ___, ___, 776 S.E.2d 872, 880 (2015); and *State v. Collington*, ___ N.C. App. ___, 775 S.E.2d 926 (2015) (unpublished) (stating that “trial court commits plain error [under Supreme Court precedent] when it instructs a jury on disjunctive theories of a crime, where one of the theories is improper”).

5. Defendant also contends that the trial court committed plain error in its jury instructions for sex offense in a parental role, based on the trial court’s instruction for both “vaginal intercourse” and “sexual act,” where the indictments only alleged that Defendant engaged in a “sexual act” with the victim. We acknowledge that this was error, however, it does not rise to the level of plain error. The cases cited by Defendant in support of this argument are distinguishable. Here, the verdict sheets only allowed the jury to find Defendant guilty if it believed he “engag[ed] in a *sexual act* with a minor”, thus rendering any error in the trial court’s earlier instructions harmless. See *State v. Fincher*, 309 N.C. 1, 22, 305 S.E.2d 685, 698 (1983).

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D. Impeachment Evidence

[4] Finally, Defendant argues that the trial court committed reversible error when it excluded relevant evidence which tended to show Mother's bias against him. On cross-examination, the trial court sustained the State's objections to defense counsel's attempt to elicit testimony from Mother on four different subjects; namely, that Mother (1) had recently discovered Defendant had another girlfriend, (2) was attempting to obtain a "U-visa"⁶ to allow her to remain in the United States legally after the trial, (3) was upset that Defendant refused to lend her money, and (4) had previously accused Defendant of domestic violence. On appeal, Defendant contends that the trial court's exclusion of this impeachment evidence constitutes prejudicial error. We conclude that Defendant failed to preserve his challenge as to the first three forms of impeachment evidence; further, we conclude that the exclusion of the fourth form did not constitute prejudicial error.

In order to preserve this issue for appellate review, "the significance of the excluded evidence must be made to appear in the record[.] [A] specific offer of proof is required unless the significance of the evidence is obvious from the record." *State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985). "[T]he essential content or substance of the witness's testimony must be shown before [the reviewing court] can ascertain whether prejudicial error occurred." *Id.*; see also *State v. Willis*, 285 N.C. 195, 200, 204 S.E.2d 33, 36 (1974) ("The words of the witness . . . should go in the record.").

In this case, the trial court did not hear Mother's responses to Defendant's first three lines of questioning. Defendant contends that statements he made during his testimony and at his sentencing hearing were an "offer of proof;" however, Defendant's speculation as to what the content of Mother's testimony would have been is not sufficient to show the *actual* "content or substance of [Mother's] testimony[.]" *Simpson*, 314 N.C. at 370, 334 S.E.2d at 60. Without her testimony in the record, it is impossible for this Court to determine whether Defendant's arguments have merit. As in *Simpson*, "[w]e fail to discern any reason why defense counsel could not have made an offer of proof by having the [witness] called to the stand in the absence of the jury and questioned about [her responses] . . ." *Simpson*, 314 N.C. at 371, 334 S.E.2d at 61. Accordingly, Defendant has failed to preserve these issues for our review.

6. A "U-visa" is a type of visa available to victims of serious crimes who are undocumented immigrants and cooperate with law enforcement in the investigation or prosecution of crimes. 8 U.S.C. § 1101(a)(15)(U).

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[5] On the fourth line of questioning, however, the State concedes that Defendant did make an offer of proof that Mother had previously accused Defendant of domestic violence. “Although we review a trial court’s ruling on the relevance of evidence *de novo*, we give a trial court’s relevancy rulings great deference on appeal.” *State v. Capers*, 208 N.C. App. 605, 615, 704 S.E.2d 39, 45 (2010) (internal marks omitted).

The record shows that during a bench conference, Defendant’s counsel indicated that Mother had accused Defendant of domestic violence, that the police declined to prosecute him, that she subsequently took out a private warrant against Defendant, and that she failed to appear in court to prosecute that warrant. We agree with Defendant that exclusion of this evidence was error. Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” N.C. Gen. Stat. § 8C-1, Rule 401 (2013). Evidence that Mother had accused Defendant of domestic violence could have indicated Mother’s bias against Defendant and may have influenced the jury’s assessment of her credibility as a witness.

However, considering the entire record of Defendant’s trial, we do not believe that there is a reasonable possibility that, had the jury heard evidence regarding Mother’s accusation of past domestic violence by Defendant, a different result would have been reached at trial. N.C. Gen. Stat. § 15A-1443(a); *see State v. Turner*, 268 N.C. 225, 232, 150 S.E.2d 406, 411 (1966). Mother offered eyewitness testimony concerning one of the acts of sexual conduct, and Defendant did not contradict her testimony that she saw *something*. Specifically, she stated that, on a single occasion, she discovered Defendant in bed with Chloe and that the covers were “moving up and down.” Defendant did not contradict Mother’s testimony, but instead offered an innocent explanation of the incident. The remainder of Mother’s testimony involved what Chloe had told her about other acts of sexual conduct by Defendant. However, Chloe herself testified at trial regarding the acts of Defendant. And the jury was allowed to view a recording of a prior interview with Chloe and compare it with her testimony at trial. Further, Chloe’s brother testified that on several occasions while the children were home alone with Defendant, Defendant would take the infant child and Chloe into the bedroom and lock the door.

In light of the other evidence presented at trial which tended to establish Defendant’s guilt, we are unable to conclude that Defendant was prejudiced by the exclusion of the evidence regarding Mother’s prior accusation of domestic violence.

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III. Conclusion

We find no reversible error in Defendant's convictions.⁷

NO REVERSIBLE ERROR.

Judge BERGER concurs.

Judge BRYANT concurs in the result only, by separate opinion.

BRYANT, Judge, concurring in the result only by separate opinion.

Because I believe the majority overstates the holding of *State v. Petersilie*, 334 N.C. 169, 432 S.E.2d 832 (1993), and because I disagree with the majority's characterization of the dissent adopted by the N.C. Supreme Court in *State v. Boyd*, 222 N.C. App. 160, 730 S.E.2d 193 (2012), *rev'd for the reasons stated in the dissenting opinion*, 336 N.C. 548, 742 S.E.2d 790 (2013) (per curiam), as "a shift away from the *per se* rule . . . in cases involving disjunctive [jury] instructions," I write separately and concur in the result only.

The majority opinion states that a "line of Supreme Court cases[1] compels a plain error determination since we 'must assume' that the jury based its verdict on the theory not supported by the evidence." The majority then proceeds to rationalize the disconnect between what it considers a directive in *Petersilie*, see 334 N.C. at 193, 432 S.E.2d at 846, and our Supreme Court's per curiam opinion in *Boyd*, by deciding that "Judge Stroud did not follow the instruction from our Supreme Court in past cases that a reviewing court 'must assume' that the jury relied on the improper theory." It is the majority's conclusion that there was a directive from the Supreme Court in *Petersilie* and the majority's overreliance on the words "we must assume" that compels me to write separately.

In *Petersilie*, the "[d]efendant was convicted of eleven counts of publishing unsigned materials about a candidate for public office—all misdemeanors in violation of N.C.G.S. § 163-274(7)." 334 N.C. at 172, 432 S.E.2d at 834. On appeal, the defendant argued, *inter alia*, that "the trial

7. Defendant also submitted a petition for writ of *certiorari* to this Court for review of the trial court's order requiring him to register as a sex offender and enroll in satellite-based monitoring ("SBM"). We exercise our discretion pursuant to N.C. R. App. P. 21(a)(1) to consider Defendant's argument on this point. However, because we have left Defendant's convictions undisturbed, we affirm the trial court's order in this regard.

1. *State v. Petersilie*, 334 N.C. 169, 432 S.E.2d 846 (1993); *State v. Tucker*, 317 N.C. 532, 346 S.E.2d 417 (1986); *State v. Brown*, 312 N.C. 237, 321 S.E.2d 856 (1984).

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court committed reversible error by incorrectly defining the essential elements of the statute [N.C.G.S. § 163-274(7)] in its instructions to the jury.” *Id.* at 191, 432 S.E.2d at 845. Specifically, the defendant argued “the trial court erroneously included a scienter requirement while no such requirement is present in the statute.” *Id.*

Our Supreme Court agreed, holding “that the trial court committed reversible error by *incorrectly stating the law* in its jury instructions[,]” *id.* at 172, 432 S.E.2d at 834 (emphasis added), and granting the defendant a new trial because the erroneous instruction was “*to defendant’s prejudice . . .*,” *id.* at 192, 432 S.E.2d at 845 (emphasis added). In other words, the trial court incorrectly stated the law by adding to its jury instruction an intent requirement not present in the statute, and which the jury was required to find beyond a reasonable doubt for each of the eleven counts charged. *Id.* at 191, 432 S.E.2d at 845 (“Section 163-274(7) requires that the jury find beyond a reasonable doubt that [the] defendant published ‘a charge derogatory to a candidate or calculated to affect the candidate’s chances of nomination or election.’ For all eleven counts against [the] defendant the trial court instructed the jury that it must find beyond a reasonable doubt that [the] defendant published: a charge *he intended* to be derogatory to a candidate for election . . . or which he calculated would affect such candidate’s chances of election . . .”).

In finding that the trial court incorrectly stated the law to the defendant’s prejudice, the Supreme Court in *Petersilie* reasoned as follows:

“When [the trial court] undertakes to define the law, [it] must state it correctly.” *State v. Earnhardt*, 307 N.C. 62, 70, 296 S.E.2d 649, 654 (1982). Failure to do so may be prejudicial error sufficient to warrant a new trial. *Id.* . . .

. . . [W]e believe the incorrect instruction was “too prejudicial to be hidden by the familiar rule that the charge *must be considered contextually as a whole.*” *Id.* . . .

. . . .

Because the trial court incorrectly instructed the jury regarding one of two possible theories upon which [the] defendant could be convicted and it is unclear upon which theory or theories the jury relied in arriving at its verdict, we must assume the jury based its verdict on the theory for which it received an improper instruction.

Id. at 192–93, 432 S.E.2d at 845–46 (emphasis added) (citations omitted).

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Notably, the defendant in *Petersilie* objected at trial to the jury instruction as given, and thus, the standard of review on appeal was not the plain error standard, which is applicable in the instant case as it also was in *Boyd*. See 220 N.C. App. at 168, 730 S.E.2d at 198 (Stroud, J., dissenting) (“Because defendant did not object at trial, we review for plain error.” (citation omitted)). Although not explicitly enunciated in *Petersilie*, the standard of review for jury instructions where the defendant objected at trial is a question of law reviewed *de novo*, *State v. Barron*, 202 N.C. App. 686, 694, 690 S.E.2d 22, 29 (2010) (citation omitted), with the caveat that “an error in jury instruction is *prejudicial* and requires a new trial only if ‘there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial’” *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009) (emphasis added) (citation omitted) (quoting N.C. Gen. Stat. § 15A-1443(a)); see *Petersilie*, 334 N.C. at ___, 432 S.E.2d at 845 (“Failure to [instruct correctly on the law] *may be* prejudicial error sufficient to warrant a new trial.” (emphasis added) (citation omitted)). Therefore, there is not—nor has there ever been—a *per se* rule involving disjunctive jury instructions. Recently, our Supreme Court in *State v. Walters*, 368 N.C. 749, 782 S.E.2d 505 (2016), noted that “our case law has long embraced a distinction between unconstitutionally vague instructions that render unclear the offense for which the defendant is being convicted and instructions which instead permissibly state that more than one specific act can establish an element of a criminal offense.” *Id.* at 753, 782 S.E.2d at 507 (citing *State v. Bell*, 359 N.C. 1, 29–30, 603 S.E.2d 93, 112–13 (2004)); see also *infra* note 2.

While the discussion in *Walters* ultimately addressed unanimity of jury verdicts, contrary to the majority’s assertion in footnote 2, such discussion is helpful to the instant case. See Maj. Op. at 8 n.2 (citing *Walters*, 368 N.C. at 753–54, 782 S.E.2d at 507–08) (stating that cases that deal with the issue of jury unanimity are “distinct from” and constitute a “separate line of Supreme Court cases” than those that address the issue of disjunctive jury instructions). However, the two lines of cases set forth and described in *Walters*—and which “cases have developed regarding the use of disjunctive jury instructions”—actually inform our analysis here. See 368 N.C. at 753, 782 S.E.2d at 507 (quoting *Bell*, 359 N.C. at 29, 603 S.E.2d at 112).

The first line of cases concerns jury instructions, like those in *Petersilie*, where the Court found the trial court’s incorrect statement on the law in its jury instruction to be so prejudicial as to entitle the defendant to a new trial. See 334 N.C. at 193, 196, 432 S.E.2d at 846, 848. The

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second line of cases concern jury instructions like we have in the instant case—where the trial court’s instructions on “one or more specific acts, any of which could establish an essential element of the offense” were listed, but were not supported by the evidence. *See State v. Hartness*, 326 N.C. 561, 567, 391 S.E.2d 177, 180–81 (1990) (noting that “the crime of indecent liberties is a single offense which may be proved by evidence of the commission of any one of a number of acts” and holding that “[t]he jury found [the] defendant guilty of committing indecent liberties upon his stepson after the trial judge correctly instructed it that it could find the immoral, improper, or indecent liberty upon a finding that [the] defendant either improperly touched the boy or induced the boy to touch him”).² “In this type of case, the focus is on the intent or purpose of the defendant instead of his conduct.” *Walters*, 368 N.C. at 753, 782 S.E.2d at 508 (quoting *Bell*, 359 N.C. at 29–30, 603 S.E.2d at 112–13).

Under the plain error standard, under which this Court has been explicitly directed to review this issue by the Supreme Court, *see Boyd*, 366 N.C. 548, 742 S.E.2d 789, “[t]o establish plain error, defendant must show that the erroneous jury instruction was a fundamental error—that the error had a *probable impact* on the jury verdict.” *Boyd*, 222 N.C. App. at 167, 730 S.E.2d at 198–99 (Stroud, J., dissenting) (emphasis added).

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.

Id. at 168, 730 S.E.2d at 198 (emphasis added) (citations omitted) (quoting *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012)).

In *Boyd*, which involved a jury instruction on kidnapping, the trial court erroneously included in its instruction a reference to “removal” as a (disjunctive) theory of the kidnapping charge. *Id.* at 169, 730 S.E.2d at

2. Further, it seems to me that if unanimity is satisfied from disjunctive instructions as to alternative acts—even one or more not supported by the evidence—from a constitutional perspective, a disjunctive instruction that is challenged simply because an alternative theory is not supported by the evidence cannot be prejudicial and therefore cannot constitute plain error.

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199. Because there was “overwhelming” evidence against the defendant, much of which “was uncontroverted,” *see id.* at 170, 730 S.E.2d at 199, the dissent, with whom the Supreme Court agreed, reasoned as follows: “The omission of approximately ten words relating to ‘removal’ from the above jury instructions would, under the facts of this particular case, make no difference in the result. Therefore, I would find no plain error as to the trial court’s instructions as to second-degree kidnapping.” *Id.* at 173, 730 S.E.2d at 201.

In the instant case, the jury instructions the trial court gave relating to the six charges of “sexual offense with a child” read “contextually as a whole,” *see Petersilie*, 334 N.C. at 192, 432 S.E.2d at 846 (citation omitted), as follows:

The defendant has been charged with two counts of sexual offense with a child. For you to find the defendant guilty of both of these counts on this offense, the State must prove three things beyond a reasonable doubt.

First, that the defendant engaged in a sexual act with the alleged victim. A sexual act means fellatio, which is any touching by the lips or tongue of one person and the male sex organ of another; or anilingus, which is any touching by the lips or tongue of one person and the anus of another; or anal intercourse, which is any penetration, however slight, of the anus of any person by the male sexual organ of another.³

The trial court erroneously included in its instruction the description of anilingus where the State presented no evidence of anilingus at trial. However, there was overwhelming evidence in the instant case that other sex offenses—fellatio and anal intercourse—had occurred.⁴ Furthermore, as the standard of review in the instant case is plain error, *Petersilie* does not, in fact, require that “we must assume the jury based its verdict on the theory for which it received an improper instruction,”

3. The trial court’s instruction quoted above in reference to two counts of sexual offense with a child was (for our purposes) identical to the instruction given for the four counts of “feloniously engaging in a sexual act with a minor over whom defendant had assumed a position of a parent residing in the home.”

4. It is also worth noting that the nature of the erroneous instruction in *Petersilie* is fundamentally different from the nature of the error in the instant case. In *Petersilie*, the trial court, in misstating the law, essentially created an alternate theory under which the jury could find the defendant guilty, a theory not enumerated in or contemplated by the statute. *See* 334 N.C. at 192–93, 432 S.E.2d at 845–46. In the instant case, the trial court did

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see id. at 193, 432 S.E.2d at 846 (citations omitted), especially where, as here, defendant cannot show that the error was prejudicial after considering the jury charge “contextually as a whole.” *See id.* at 192, 432 S.E.2d at 846 (citation omitted).

For the forgoing reasons, I concur in the result only.

STATE OF NORTH CAROLINA
v.
DANNY WAYNE POWELL, JR.

No. COA16-1022

Filed 16 May 2017

1. Appeal and Error—preservation of issues—express plain error argument in brief

An issue concerning firearms seized during a search of defendant’s home was properly preserved for appeal where defendant expressly made a plain error argument in his appellate brief.

2. Search and Seizure—search of parolee’s home—parole officer present—not for purposes of parole

On the specific facts of this case, there was plain error where the trial court denied a parolee’s motion to suppress firearms seized from his house by a violent crime task force of U.S. Marshals accompanied by two parole officers (but not defendant’s parole officer). N.C.G.S. § 15A-1343(b)(13) has been amended to require that warrantless searches by a probation officer be for purposes directly related to probation supervision. The evidence presented by the State was simply insufficient to satisfy the requirements of the statute.

not erroneously instruct the jury by creating an element or listing an act which the jury could consider a sex offense which was not listed in the statute; analingus is specifically enumerated as a “sexual act.” *See* N.C. Gen. Stat. § 14-27.1(4) (2013) (“ ‘Sexual act’ means cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse.”), *recodified as* N.C. Gen. Stat. § 14-27.20(4) (2015), by N.C. Sess. Laws 2015-181, § 2, eff. Dec. 1, 2015.

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3. Search and Seizure—denial of motion to suppress—plain error

Where the trial court erroneously denied defendant’s motion to suppress firearms seized in a search of his house, the error had a probable effect on the jury’s decision to convict defendant of possession of a firearm by a felon and amounted to plain error. Without this evidence, there would have been no evidence of criminal conduct.

Appeal by defendant from judgment entered 14 December 2015 by Judge Richard D. Boner in Catawba County Superior Court. Heard in the Court of Appeals 4 April 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General James D. Concepcion and Assistant Attorney General Sherri Horner Lawrence, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jillian C. Katz, for defendant-appellant.

DAVIS, Judge.

This case requires us to determine whether a warrantless search of a probationer’s home was “directly related” to the supervision of his probation as required by N.C. Gen. Stat. § 15A-1343(b)(13). Danny Wayne Powell, Jr. (“Defendant”) appeals from his conviction for possession of a firearm by a felon and argues that the trial court erred in denying his motion to suppress evidence found during a search of his residence. Because the State failed to meet its burden of demonstrating that the warrantless search was authorized by N.C. Gen. Stat. § 15A-1343(b)(13), we reverse the trial court’s order denying Defendant’s motion to suppress and vacate his conviction.

Factual and Procedural Background

On 23 September 2013, Defendant was convicted of felony breaking or entering and sentenced to 6 to 17 months imprisonment. This sentence was suspended, and he was placed on supervised probation for 30 months. At all times relevant to this appeal, he was living in Catawba County.

In March of 2015, Officers Sarah Lackey and Travis Osborne were Probation and Parole officers in Catawba County employed by the North Carolina Department of Public Safety. On 4 March 2015, Officers Lackey and Osborne “were conducting an operation with the U.S. Marshal’s task

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force service.” They were working with Investigator Gary Blackwood of the Street Crime Interdiction and Gang Unit of the Hickory Police Department, Officer Jamie Carey of the North Carolina Department of Public Safety, and “two or three . . . U.S. Marshals.” These officers were “part of [an] operation” conducting searches of “seven or eight” residences of individuals who were on probation, parole, or post-release supervision in a particular geographic area of Catawba County. The members of the task force utilized a list of probationers provided by the supervisor of Officers Lackey and Osborne. Although Officer Lackey testified at trial that “[t]he list . . . was targeting violent offenses involving firearms [and] drugs[,]” she acknowledged during the suppression hearing that “not all offenders that were selected had that criteria.” Defendant’s name, address, and status as a probationer was contained on the list provided to the task force. Neither Officer Lackey nor Officer Osborne was the probation officer assigned to Defendant.

At approximately 9:30 p.m. that night, the officers arrived at Defendant’s residence. Officer Osborne knocked on the front door while Investigator Blackwood and another officer went to the back corner of the house to ensure that no one exited the residence. When Defendant answered the door, Officer Osborne asked him if he was Danny Powell, and Defendant responded affirmatively. Officer Osborne then placed Defendant in handcuffs and directed him to sit down at the kitchen table. Defendant’s wife — who was eight months pregnant at the time — also remained in the kitchen along with Defendant’s father.

Officer Osborne asked if there were any firearms in the house, and Defendant’s wife responded that there was a firearm in the bedroom closet. Officer Osborne remained with Defendant in the kitchen while the other officers went to retrieve the firearm.

While searching the bedroom closet upstairs, Investigator Blackwood found a Mossberg twelve-gauge shotgun and a Mossberg .22 caliber rifle contained in “gun cases or gun sleeves” and determined that the guns were not loaded. He testified that it “was a walk-in type closet . . . [and] the guns were on the right-hand side against the wall. There was [sic] some clothing items kind of up against them.” He stated that the clothes in front of the guns were “[m]en’s clothing” but there were also “female clothing, shoes, . . . [and] male shoes” in the closet.

Investigator Blackwood seized the weapons, and Defendant was placed under arrest. On 18 May 2015, he was indicted by a grand jury for possession of a firearm by a felon.

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A jury trial was held on 23 September 2015 before the Honorable Patrice Hinnant in Catawba County Superior Court. On the morning of trial, Defendant filed a motion to suppress evidence of the firearms seized from his residence, arguing that the officers' search of his home violated his rights under the Fourth Amendment to the United States Constitution as well as N.C. Gen. Stat. § 15A-1343(b)(13). At the hearing on the motion to suppress, Officer Lackey, Officer Osborne, and Investigator Blackwood testified about their search of Defendant's home. The trial court orally denied Defendant's motion.

At trial, the State presented testimony from Officer Lackey, Officer Osborne, and Investigator Blackwood. Defendant and his wife testified for the defense. The jury found Defendant guilty of possession of a firearm by a felon.

On 14 December 2015, the trial court sentenced Defendant to 12 to 24 months imprisonment. The court also revoked Defendant's probation and activated his sentence from his prior conviction of felony breaking or entering. Defendant gave oral notice of appeal.

Analysis

Defendant's primary argument on appeal is that the trial court erred by denying his motion to suppress. Specifically, he contends the State failed to demonstrate that the evidence offered against him at trial was obtained by means of a lawful warrantless search.

[1] As an initial matter, we must determine whether this issue was properly preserved for appeal. Defendant acknowledges that although he filed a motion to suppress evidence of the firearms seized from his home, he failed to renew his objection when the State sought to admit the evidence at trial. Our Supreme Court has explained that

[t]o preserve an issue for appeal, the defendant must make an objection at the point during the trial when the State attempts to introduce the evidence. A defendant cannot rely on his pretrial motion to suppress to preserve an issue for appeal. His objection must be renewed at trial. [Defendant's] failure to object at trial waived his right to have this issue reviewed on appeal.

State v. Golphin, 352 N.C. 364, 463, 533 S.E.2d 168, 232 (2000) (internal citations omitted), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001). Accordingly, Defendant failed to properly preserve this issue for appellate review.

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However, our Supreme Court has held that “to the extent [a] defendant fail[s] to preserve issues relating to [his] motion to suppress, we review for plain error” if the defendant “specifically and distinctly assign[s] plain error” on appeal. *State v. Waring*, 364 N.C. 443, 468, 508, 701 S.E.2d 615, 632, 656 (2010), *cert. denied*, 565 U.S. 832, 181 L. Ed. 2d. 53 (2011). Because Defendant has expressly made a plain error argument in his appellate brief, we review his argument under this standard.

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).

[2] In conducting our review for plain error, we must first determine whether the trial court did, in fact, err in denying Defendant’s motion to suppress. *See State v. Oxendine*, __ N.C. App. __, __, 783 S.E.2d 286, 292 (“The first step under plain error review is . . . to determine whether any error occurred at all.”), *disc. review denied*, __ N.C. __, 787 S.E.2d 24 (2016).

The State contends that the warrantless search of Defendant’s home was authorized by N.C. Gen. Stat. § 15A-1343(b)(13), which states as follows:

(b) Regular Conditions. – As regular conditions of probation, a defendant must:

....

(13) Submit at reasonable times to warrantless searches by a probation officer of the probationer’s person and of the probationer’s vehicle and premises while the probationer is present, *for purposes directly related to the probation supervision*, but the probationer may not be required to submit to any other search that would otherwise be unlawful.

N.C. Gen. Stat. § 15A-1343(b) (2015) (emphasis added).

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Normally, “[t]he standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court’s findings of fact and whether the findings of fact support the conclusions of law.” *State v. Jackson*, 368 N.C. 75, 78, 772 S.E.2d 847, 849 (2015) (citation and quotation marks omitted). Here, however, the trial court summarily denied Defendant’s motion to suppress without making any findings of fact or conclusions of law.

N.C. Gen. Stat. § 15A-977 states that when ruling on a motion to suppress, “[t]he judge must set forth in the record his findings of facts and conclusions of law.” N.C. Gen. Stat. § 15A-977 (2015). However, despite this statutory directive, our Supreme Court has held that “only a material conflict in the evidence—one that potentially affects the outcome of the suppression motion—must be resolved by explicit factual findings that show the basis for the trial court’s ruling. When there is no conflict in the evidence, the trial court’s findings can be inferred from its decision.” *State v. Bartlett*, 368 N.C. 309, 312, 776 S.E.2d 672, 674 (2015) (internal citations omitted).¹

At a suppression hearing, “the burden is upon the state to demonstrate the admissibility of the challenged evidence[.]” *State v. Cheek*, 307 N.C. 552, 556-57, 299 S.E.2d 633, 636 (1983) (citation omitted). Here, as noted above, the testimony relied upon by the State at the suppression hearing came from three of the officers who participated in the search of Defendant’s home. Therefore, the State’s contention that the search was lawful under N.C. Gen. Stat. § 15A-1343(b)(13) hinges on the adequacy of the officers’ testimony regarding the purpose of the 4 March 2015 search. For this reason, it is necessary to carefully review their testimony on this issue.

Officer Lackey testified, in pertinent part, as follows:

[PROSECUTOR:] And for what purpose on March 4th did you go to the defendant’s residence?

[OFFICER LACKEY:] We were conducting a warrantless search of his residence with the U.S. Marshal’s task force.

1. We take this opportunity to reiterate, however, that even in cases where there is no material conflict in the evidence presented, “findings of fact are preferred.” *State v. Norman*, 100 N.C. App. 660, 663, 397 S.E.2d 647, 649 (1990) (citation omitted), *disc. review denied*, 328 N.C. 273, 400 S.E.2d 459 (1991).

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[PROSECUTOR:] And other than Officer Osborne and Officer Blackwood who else was with you?

[OFFICER LACKEY:] Task force officer Jamie Carey, who is also employed with the North Carolina Department of Public Safety, as well as to my knowledge, two or three other U.S. Marshals.

. . . .

[DEFENSE COUNSEL:] Officer Lackey, are you or were you [Defendant]’s supervising officer?

[OFFICER LACKEY:] I am not.

[DEFENSE COUNSEL:] Was Mr. Osborne the supervising officer?

[OFFICER LACKEY:] No.

[DEFENSE COUNSEL:] How was the determination made to search [Defendant]’s residence that evening?

[OFFICER LACKEY:] Part of the operation we were conducting with the U.S. Marshal’s task force, Officer Osborne and I were assigned to a specific area of the county. And he was one of the offenders in the area of the county that we were asked to search.

[DEFENSE COUNSEL:] Who asked you to search?

[OFFICER LACKEY:] Our supervisor.

[DEFENSE COUNSEL:] Does your supervisor also work for the U.S. Marshal’s Service?

[OFFICER LACKEY:] No, she does not.

[DEFENSE COUNSEL:] Did anybody in your office tell you that he was being searched for any particular reasons?

[OFFICER LACKEY:] Not any particular reason.

[DEFENSE COUNSEL:] Did you or any of the other people that entered the home that evening tell [Defendant] and [Defendant’s wife] that you were conducting a random search?

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[OFFICER LACKEY:] Yes.

....

[DEFENSE COUNSEL:] How many people entered the home?

[OFFICER LACKEY:] Let's see, it was myself, Officer Osborne, Officer Terry, Investigator Blackwood, and approximately two, three, maybe four U.S. Marshal officers.

....

[DEFENSE COUNSEL:] Are you aware of any complaints about [Defendant], and any illegal activity, contraband he might have had, any reason to have gone to his house other than just a random search?

[OFFICER LACKEY:] No, sir.

....

COURT: So, this was basically a list of persons that were on a special task force list to search if they were on probation, or was probation included as a reason for a condition of the search?

[OFFICER LACKEY:] It was offenders directly on probation or post release. There were some that were selected because they were gang members, but not all offenders that were selected had that criteria. It was also a random selection of offenders as well.

COURT: And this was a list created by federal law enforcement?

[OFFICER LACKEY:] No, it was created by the supervisors in our district to provide to the task force as a guide to go by for searches.

....

[DEFENSE COUNSEL:] Has there ever been any indication whatsoever that [Defendant] and [Defendant's wife], or anybody there was such [sic] member of a gang, or had any gang activity?

[OFFICER LACKEY:] No, sir.

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[DEFENSE COUNSEL:] Did you ever speak with [Defendant]'s probation officer to find out whether or not she had any suspicions of any kind of illegal activity, or anything contrary to his probation?

[OFFICER LACKEY:] No, sir.

Officer Osborne's testimony consisted of the following with regard to this issue:

[PROSECUTOR:] And Officer Osborne, for what purpose were you at the defendant's residence that evening?

[OFFICER OSBORNE:] To conduct a warrantless search.

[PROSECUTOR:] And . . . back in March of this year [Defendant] was on probation for a felony conviction arising out of Burke County, isn't that correct?

[OFFICER OSBORNE:] That's correct.

[PROSECUTOR:] And part of his probationary requirements was that he would be subject to warrantless searches and seizures, isn't that correct?

[OFFICER OSBORNE:] Yes, sir.

[PROSECUTOR:] And part of his probation was that while on probation as a convicted felon he would not be able to own firearms or be in the care, custody, and control of firearms, or be around firearms, is that not correct, Officer?

[OFFICER OSBORNE:] That's correct.

[PROSECUTOR:] Okay. Now, you and Officer Lackey were present during this search, is that correct?

[OFFICER OSBORNE:] That's correct.

[PROSECUTOR:] And Officer Blackwood was present during this search, correct?

[OFFICER OSBORNE:] Yes, sir.

. . . .

[DEFENSE COUNSEL:] You're not [Defendant]'s supervising officer are you?

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[OFFICER OSBORNE:] I am not.

[DEFENSE COUNSEL:] And you weren't at the time, were you?

[OFFICER OSBORNE:] Was not.

Finally, Investigator Blackwood testified, in pertinent part, as follows:

[PROSECUTOR:] And for what purpose were you accompanying the probation officers?

[INVESTIGATOR BLACKWOOD:] To assist in a search of the residence for any illegal contraband and weapons.

....

[DEFENSE COUNSEL:] Has there ever been any indication whatsoever that [Defendant] and [his wife], or anybody there was such [sic] member of a gang, or had any gang activity?

[INVESTIGATOR BLACKWOOD:] No, sir.

[DEFENSE COUNSEL:] Did you ever speak with [Defendant]'s probation officer to find out whether or not she had any suspicions of any kind of illegal activity, or anything contrary to his probation?

[INVESTIGATOR BLACKWOOD:] No, sir.

The North Carolina General Assembly amended N.C. Gen. Stat. § 15A-1343(b)(13) on 30 July 2009. Prior to the amendment, subsection (b)(13) stated, in pertinent part, that a warrantless search of a probationer by a probation officer must be “*reasonably related* to his or her probation supervision[.]” 2009 N.C. Sess. Laws 667, 672, 673, ch. 372, §§ 9.(a), 9.(b) (emphasis added) (codified at N.C. Gen. Stat. § 15A-1343(b)(13) (2015)). However, by virtue of the 2009 amendment, this portion of subsection (b)(13) was changed to require that warrantless searches by a probation officer be “for purposes *directly related* to the probation supervision[.]” *See id.* (emphasis added).

The General Assembly did not define the phrase “directly related” in its 2009 amendment to N.C. Gen. Stat. § 15A-1343(b)(13). It is well established that where words contained in a statute are not defined therein, it is appropriate to examine the plain meaning of the words in question absent any indication that the legislature intended for a technical definition to be applied. *See State v. Arnold*, 147 N.C. App. 670,

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674, 557 S.E.2d 119, 122 (2001) (“Words undefined in the statute should be given their plain and ordinary meaning.” (citation omitted)), *aff’d per curiam*, 356 N.C. 291, 569 S.E.2d 648 (2002); *Sharpe v. Worland*, 137 N.C. App. 82, 88, 527 S.E.2d 75, 79 (2000) (“Where the General Statutes fail to provide a definition of a term, it is appropriate to turn for guidance to dictionaries.” (citations omitted)), *disc. review denied*, 352 N.C. 150, 544 S.E.2d 228 (2000).

The word “directly” has been defined as “in unmistakable terms.” Webster’s Third New International Dictionary 641 (1966). “Reasonable” is defined, in pertinent part, as “being or remaining within the bounds of reason.” *Id.* at 1892. “When the General Assembly amends a statute, the presumption is that the legislature intended to change the law.” *State v. White*, 162 N.C. App. 183, 189, 590 S.E.2d 448, 452 (2004) (citation and quotation marks omitted). Thus, we infer that by amending subsection (b)(13) in this fashion, the General Assembly intended to impose a *higher* burden on the State in attempting to justify a warrantless search of a probationer’s home than that existing under the former language of this statutory provision.

Although all of our prior caselaw evaluating warrantless searches conducted pursuant to N.C. Gen. Stat. § 15A-1343(b)(13) applies the version of this statutory provision in effect prior to the 2009 statutory amendment, it is nevertheless helpful to review these decisions. In *State v. McCoy*, 45 N.C. App. 686, 263 S.E.2d 801, *appeal dismissed and disc. review denied*, 300 N.C. 377, 267 S.E.2d 681 (1980), this Court stated that “the United States Constitution is not violated by the requirement that a probationer submit to warrantless searches as a condition of probation. The courts of North Carolina and of other states, have approved of this condition.” *Id.* at 690, 263 S.E.2d at 804 (citations omitted). We reasoned that “[a]s a condition to probation, defendant had waived his right to be free from warrantless searches conducted in a lawful manner by his probation officer.” *Id.* at 691, 263 S.E.2d at 804-05. We further explained that

[p]ersons conditionally released to society . . . may have a reduced expectation of privacy, thereby rendering certain intrusions by governmental authorities “reasonable” which otherwise would be invalid under traditional constitutional concepts, at least to the extent that such intrusions are necessitated by legitimate governmental demands. Thus, a probationer who has been granted the privilege of probation on condition that he submit at any

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time to a warrantless search may have no reasonable expectation of traditional Fourth Amendment protection.

....

The official commentary to G.S. 15A-1343 states: This section specifies a number of conditions of probation, primarily ones that will be used fairly frequently, that may be imposed. The list is meant neither to be exclusive nor to suggest that these conditions should be imposed in all cases. Condition (15),² dealing with searches, recognizes that the ability to search a probationer in some instances is an essential element of successful probation. It includes two important limits: (1) only a probation officer, and not a law-enforcement officer, may search the probationer under this condition, and (2) the search may be only for purposes reasonably related to the probation supervision.

Id. at 691-92, 263 S.E.2d at 805 (internal citation, quotation marks, brackets, and formatting omitted and footnote added).

We have since applied this statutory provision on several occasions in the context of evaluating warrantless searches of a probationer's residence. In *State v. Howell*, 51 N.C. App. 507, 277 S.E.2d 112 (1981), the defendant's probation officer received a tip from an informant that the defendant was using drugs. She enlisted the assistance of law enforcement officers to help her conduct a search of the defendant's home, which uncovered the presence of illegal drugs. In moving to suppress the evidence, the defendant argued that the presence of law enforcement officers during the search rendered it unlawful under N.C. Gen. Stat. § 15A-1343(b). *Id.* at 508, 277 S.E.2d at 113.

We disagreed, holding that “[a] probation officer’s search as authorized by G.S. 15A-1343(b)(15) is not necessarily invalid due to the presence, or even participation of, police officers in the search.” *Id.* at 509, 277 S.E.2d at 114. We noted that “it would have been difficult for [the probation officer] to conduct a useful search of the house described in the record, and keep watch of two individuals at the same time.” *Id.* We concluded that “we are not persuaded by defendant’s argument that the warrantless search was initiated and accomplished by the police and was therefore unreasonable. Through the testimony of [his probation

2. The statutory language currently found in subsection (b)(13) that addresses warrantless searches of a probationer's home was formerly contained in subsection (b)(15).

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officer] the evidence is sufficient to support the trial court's finding that 'under the circumstances disclosed by this evidence' the search was reasonable." *Id.*

In *State v. Church*, 110 N.C. App. 569, 430 S.E.2d 462 (1993), law enforcement officers contacted the defendant's probation officer after learning that he was in possession of marijuana plants. The probation officer then arrived at the defendant's home and conducted a warrantless search along with law enforcement officers during which the plants were discovered. *Id.* at 573, 430 S.E.2d at 464.

This Court upheld the validity of the search despite the defendant's contention that it was "initiated and conducted by police officers, rather than his probation officer." *Id.* at 576, 430 S.E.2d at 466. We reiterated that "the presence and participation of police officers in a search conducted by a probation officer, pursuant to a condition of probation, does not, standing alone, render the search invalid." *Id.* We explained that the "[e]vidence presented at defendant's hearing tended to establish that the probation officer conducted the search of defendant's premises with the assistance of the officers" and that the purpose of the search was not unlawful. *Id.* (emphasis omitted).

In *State v. Robinson*, 148 N.C. App. 422, 560 S.E.2d 154 (2002), law enforcement officers received an anonymous tip that the defendant was in possession of marijuana at his home. The officers subsequently contacted the defendant's probation officer, and a plan was formed to search the defendant's residence. *Id.* at 424, 560 S.E.2d at 156. When the officers arrived, the probation officer obtained consent from the defendant to search the home at which point the other officers conducted a warrantless search of the premises, leading them to discover and seize marijuana. The defendant was then charged with multiple drug offenses. *Id.* at 425, 560 S.E.2d at 157.

On appeal from the denial of his motion to suppress, the defendant argued that the law enforcement officers had used his probation officer's "authority to search [him] in lieu of obtaining a search warrant, thereby resulting in an attempt by [his probation officer] to gain consent to search Defendant's house which was not in furtherance of the supervisory goals of probation, and was therefore unreasonable under the Fourth Amendment." *Id.* at 428, 560 S.E.2d at 159. We rejected this argument, ruling that because the defendant's probation officer was provided with information that "indicated . . . Defendant was in violation of his probation . . . [i]t clearly furthered the supervisory goals of probation for [the law enforcement officers] to forward this information to [him],

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and for [the probation officer] to attempt to investigate this information further by seeking Defendant's consent to a search of the house." *Id.* at 428-29, 560 S.E.2d at 159. Thus, we concluded, "[t]he fact that . . . other officers were in the general area of Defendant's home when [his probation officer] approached him about consenting to a search [did] not affect the legality of [the probation officer's] conduct." *Id.*

We also find instructive the Fourth Circuit's decision in *United States v. Midgette*, 478 F.3d 616, 622 (4th Cir.), *cert. denied*, 551 U.S. 1157, 168 L. Ed. 2d 749 (2007). In that case, the defendant's probation officer was informed by a police officer that the defendant "might be in possession of a firearm." *Id.* at 619. After meeting with the defendant at the probation office, the probation officer determined that "it probably would be a good idea to search [the defendant's] house." *Id.* (quotation marks omitted). The probation officer asked New Bern police officers to assist her in searching the defendant's residence. The officers found firearms, ammunition, and marijuana in the home, and he was indicted for possession of a firearm by a felon. *Id.* at 620. The defendant moved to suppress the evidence seized during the search. The trial court applied N.C. Gen. Stat. § 15A-1343(b) and found that the search of the defendant's home was lawful pursuant to a special condition of his probation requiring him to submit to searches by a probation officer for purposes that were "reasonably related to probation supervision." *Id.* at 618-19.

On appeal, the defendant argued that this special condition of his probation violated the Fourth Amendment because it did not require "any degree of certainty that the probationer actually possesses contraband or that he has violated his probation or the law[.]" *Id.* at 622 (citation and quotation marks omitted). The Fourth Circuit explained the purpose of N.C. Gen. Stat. § 15A-1343 as follows:

North Carolina has the . . . need to supervise probationers' compliance with the conditions of their probation in order to promote their rehabilitation and protect the public's safety. To satisfy this need, North Carolina authorizes warrantless searches of probationers by probation officers. But North Carolina has narrowly tailored the authorization to fit the State's needs, placing numerous restrictions on warrantless searches. The sentencing judge must specially impose the warrantless search condition, and not all probationers are subject to it; the search must be conducted during a reasonable time; the probationer must be present during the search; the search must be

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conducted for purposes specified by the court in the conditions of probation; and it must be reasonably related to the probationer's supervision. These criteria impose meaningful restrictions, guaranteeing that the searches are justified by the State's "special needs," *not merely its interest in law enforcement*.

Id. at 624 (internal citation omitted and emphasis added).

Here, it is clear from the officers' testimony that the search of Defendant's home occurred as a part of an ongoing operation of a U.S. Marshal's Service task force. At trial, Officer Lackey testified as follows:

[PROSECUTOR:] And for what purpose were you out and on duty that evening, Officer Lackey?

[OFFICER LACKEY:] We were conducting an operation with the U.S. Marshal's task force service. . . .

Moreover, with regard to the goal of the operation, Officer Osborne testified to the following:

[DEFENSE COUNSEL:] The search of [Defendant] was not a targeted search, was it? You didn't specifically pick him for a reason?

[OFFICER OSBORNE:] The list that was made to search was *targeting violent offenses* involving firearms, drugs, that was the target of the search.³

(Footnote and emphasis added.)

While our prior caselaw interpreting N.C. Gen. Stat. § 15A-1343(b) makes clear that the presence and participation of law enforcement officers does not, by itself, render a warrantless search under the statute unlawful, the State must meet its burden of satisfying the "purpose" element of subsection (b)(13) — a burden that has been rendered more stringent by the 2009 statutory amendment. We are unable to conclude that the State has met that burden here. *See, e.g., United States v. Irons*, No. 7:16-CR-00055-F-1, 2016 U.S. Dist. LEXIS 168844, 2016 WL 7174648 *4 (E.D.N.C. Dec. 7, 2016) (although post-release supervisee was required to submit to warrantless searches for purposes reasonably related to his post-release supervision, the warrantless search of his home was

3. We note that there is no suggestion in the record that Defendant's own probation officer was even notified — much less consulted — regarding the search of Defendant's home.

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unlawful where “[i]nstead of the search being supervisory in nature, it was conducted as part of a joint law enforcement initiative referred to as Operation Zero Hour”).

Were we to determine that the present search was permissible under N.C. Gen. Stat. § 15A-1343(b)(13), we would essentially be reading the phrase “for purposes directly related to the probation supervision” out of the statute. This we cannot do. *See N.C. Bd. of Exam’rs for Speech Path. v. N.C. State Bd. of Educ.*, 122 N.C. App. 15, 21, 468 S.E.2d 826, 830 (1996) (“Since a legislative body is presumed not to have used superfluous words, our courts must accord meaning, if possible, to every word in a statute.”), *aff’d per curiam in part and disc. review improvidently allowed in part*, 345 N.C. 493, 480 S.E.2d 50 (1997). Thus, even assuming the trial court found the testimony of all the testifying officers at the suppression hearing to be credible, the evidence presented by the State was simply insufficient to satisfy the requirements of N.C. Gen. Stat. § 15A-1343(b)(13).

We wish to emphasize that our opinion today should not be construed as diminishing any of the authority conferred upon probation officers by N.C. Gen. Stat. § 15A-1343(b)(13) to conduct warrantless searches of probationers’ homes or to utilize the assistance of law enforcement officers in conducting such searches. Rather, we simply hold that on the specific facts of this case the State has failed to meet its burden of demonstrating that the search of Defendant’s residence was authorized under this statutory provision.

[3] *Having determined that the motion to suppress was erroneously denied*, we turn to the second step in our plain error review — whether this error had a probable impact on the jury’s determination that Defendant was guilty. Here, this prong is easily met. Had Defendant’s motion to suppress been granted, no evidence showing criminal conduct on his part would have been obtained, and thus no basis would have existed to prosecute him for the offense for which he was convicted. Therefore, it is clear that the trial court’s erroneous denial of Defendant’s motion to suppress had a probable impact on the jury’s guilty verdict. *See Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. Accordingly, because Defendant has shown the trial court’s denial of his motion to suppress amounted to plain error, we reverse the order denying his motion and vacate his conviction.⁴

4. Based on our ruling that the denial of Defendant’s motion to suppress constituted plain error, we need not address his remaining arguments on appeal.

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Conclusion

For the reasons stated above, we reverse the trial court's order denying Defendant's motion to suppress and vacate his conviction for possession of a firearm by a felon.

REVERSED AND VACATED.

Judges BRYANT and STROUD concur.

STATE OF NORTH CAROLINA
v.
DARYL WILLIAMS, DEFENDANT

No. COA16-684

Filed 16 May 2017

1. Appeal and Error—preservation of issues—exception noted

An issue concerning evidence of a prior incident and instructions was preserved for appeal where defendant first objected to the evidence prior to jury selection but the trial court deferred its ruling and defendant noted an exception after a voir dire at trial, but did not object and defense counsel did not object at trial before the jury, but renewed the objection during the charge conference.

2. Evidence—prior firearms incident—offered as evidence of knowledge—not admissible

Evidence of a prior incident in which a firearm was found in a vehicle occupied by defendant was not admissible in a prosecution for possession of a firearm by a felon. Here, firearms were found in a vehicle by which defendant was standing with the car keys in his pocket and the State offered the prior incident as evidence that defendant knew of the firearms. The State's assertion depended on an improper character inference.

3. Evidence—prior incident—admitted to show opportunity—abuse of discretion

The trial court abused its discretion in a prosecution for possession of a firearm by a felon by admitting evidence of a prior incident in which a firearm was found in a vehicle occupied by defendant. The State offered the evidence to show opportunity,

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but offered only conclusory statements of the connection between the prior incident, opportunity, and possession of a firearm. Any probative value was minimal and was substantially outweighed by the danger of unfair prejudice.

4. Evidence—prior incident—admitted for no proper purpose—prejudicial

There was prejudicial error warranting a new trial in a prosecution for possession of a firearm by a felon where evidence of a prior incident involving a firearm was admitted for no proper purpose. The Court of Appeals was not convinced that the trial court's limiting instruction had a meaningful impact so as to cure the prejudice.

Judge DILLON dissenting.

Appeal by defendant from judgment entered 12 August 2015 by Judge Paul L. Jones in Wayne County Superior Court. Heard in the Court of Appeals 25 January 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Scott A. Conklin, for the State.

Gilda C. Rodriguez for defendant-appellant.

ELMORE, Judge.

Daryl Williams (defendant) was charged with possession of a firearm by a felon after officers found an AK-47 rifle in the back seat of a vehicle and a Highpoint .380 pistol next to the rear tire on the passenger's side. At trial, the State offered evidence of a prior incident in which officers found a Glock 22 pistol in a different vehicle occupied by defendant. The trial court admitted the evidence to show defendant's knowledge and opportunity to commit the crime charged. At the conclusion of trial, the jury found defendant guilty of possession of a firearm by a felon and he pleaded guilty to attaining habitual felon status.

After his conviction, defendant filed a petition for writ of certiorari, which we allowed. Defendant argues that evidence of the prior incident was not admissible under Rules 404(b) and 403, and that the trial court erred each time it instructed the jury on the limited purpose for which it could consider the evidence. Reviewing for prejudicial error, we hold that the trial court erred in admitting the evidence as circumstantial

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proof of defendant's knowledge, and the trial court abused its discretion in admitting the evidence as circumstantial proof of defendant's opportunity to commit the crime charged. We need not address defendant's second argument regarding the court's jury instructions. Defendant is entitled to a new trial.

I. Background

On 30 November 2014 at 1:45 a.m., Officer Kenneth Prevost responded to a "shots fired" call at the Alpha Arms Apartments in Goldsboro. Upon his arrival, he saw defendant and two unidentified men in the parking lot standing near a Crown Victoria. The front passenger's door was open and he saw defendant put something into the vehicle before shutting the door. The two men walked away as Officer Prevost approached but defendant remained standing on the passenger's side of the vehicle.

When Officer Prevost asked defendant if he had heard any gunshots, defendant replied that he had not. Defendant also denied having any weapons on him. Officer Prevost frisked defendant and, after confirming he was unarmed, told defendant he was free to go. As defendant walked away, Officer Prevost shined a flashlight inside the Crown Victoria and observed an AK-47 rifle in the back seat. When he saw the rifle, he ordered defendant to stop and placed him under arrest.

Officer Prevost searched defendant incident to his arrest, finding the keys to the Crown Victoria in his pants pocket. Once backup arrived, the officers proceeded to search the vehicle. Officer Prevost noticed a strong odor of marijuana when he opened the passenger's side door but did not find any marijuana inside the vehicle. The officers did find defendant's debit card, his social security card, and a medication bottle with defendant's name on it. Although the vehicle was not registered to defendant, Officer Prevost testified that he had seen defendant driving it on other occasions.

Along with the rifle in the back seat, the officers found a Highpoint .380 pistol underneath the vehicle, next to the rear tire on the passenger's side. Officer Prevost seized the firearms and secured them in the trunk of his patrol car. No fingerprint analysis was conducted on the rifle or pistol, and no tests were performed to determine if they had been fired that night.

Defendant offered evidence at trial tending to show that he had no knowledge of the rifle and pistol recovered at the scene. Tyrik Joyner testified that he was at the apartment complex on 30 November 2014 with his cousin, Ty'rek Mathis. Joyner was visiting with his "homegirl,"

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Shaniqua Johnson, who lived in one of the apartments. Joyner received a call from his uncle who had recently purchased the AK-47 and asked Joyner to hold onto the rifle while he went to the club. His uncle dropped off the rifle and Joyner, having nowhere else to keep it, placed it in the back seat of the unlocked Crown Victoria. He claimed that the vehicle belonged to Johnson, though she let other people drive it. Joyner testified that no one fired the rifle and the shots he and Mathis heard came from a different direction. Although Joyner had seen defendant walking around the apartment complex earlier that evening, defendant was not at Johnson's apartment and was not present when Joyner placed the rifle in the back seat.

Mathis also testified that he was with Joyner at the apartment complex that night. Mathis was reluctantly carrying a pistol that belonged to another cousin, who had asked Mathis to hold it for him. Mathis and Joyner planned on going to Johnson's apartment that night to drink and play cards but Mathis knew that Johnson would not allow guns in her apartment. He also testified: "I'm not no guy that, you know, walk around with no gun." When he saw Joyner place the rifle in the back seat of the Crown Victoria, Mathis decided he too would leave the pistol underneath the vehicle before heading inside. As far as he knew, the vehicle belonged to Johnson and was driven by Johnson. Mathis testified that he did not see defendant or the police that night. It was only when he left Johnson's apartment later that he realized the pistol was gone.

The issues raised in defendant's petition for writ of certiorari are based upon the admission of Rule 404(b) evidence at trial. Officer Prevost and Sergeant Leanne Rabun testified that they had a previous encounter with defendant on 12 July 2013 (the "prior incident"). They responded to a call to investigate a suspected drug transaction between two men in the parking lot of a strip mall. One had since left the parking lot but the other was seen entering a white SUV. Officer Prevost arrived to conduct a K-9 sniff of the vehicle and saw defendant, the sole occupant, sitting in the driver's seat. The sniff led to a subsequent search of the vehicle in which the officers found a Glock 22 pistol with an extended magazine underneath the driver's seat.

At trial, the State argued that it was not offering the evidence to prove conduct in conformity therewith but as independently relevant circumstantial evidence of motive, knowledge, and identity. Sergeant Rabun testified during *voir dire* that defendant told her he was carrying the Glock 22 because his house had been robbed which, according to the State, was evidence of his motive to carry a firearm for protection.

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As to knowledge, the State argued that the prior incident tended to show that defendant knew the rifle and pistol were in and around the Crown Victoria. Finally, the State asserted that the prior incident was relevant to identify defendant as the perpetrator because it shows “that these are his firearms. That’s a habit of his *modus operandi* to have firearms.”

After *voir dire*, the trial court announced its ruling on the evidence:

THE COURT: Okay. Court’s going to allow that evidence in for limited purpose of basically the fact that the officers were familiar with him; and on a prior occasion, that being July 12, 2013, there was a prior incident which defendant was stopped for suspicion of some crime; and they found him in possession of a firearm, and that’s going to be the extent of it.

Although the purpose for which the evidence was initially admitted is not clear, the court subsequently denied the State’s request to ask Sergeant Rabun about the reason for which defendant had the Glock 22, indicating that the prior incident was not admitted to show motive.

After Officer Prevost and Sergeant Rabun testified, the trial court instructed the jury that it could only consider the evidence as proof of defendant’s knowledge:

THE COURT: . . . Ladies and Gentlemen, the Court is going to give you a limited instruction regarding prior testimony in this case. Evidence of other crimes is inadmissible if it’s only referenced to show the character of the accused.

There are two exceptions, one where a specific mental attitude, state, is an essential element of the crime charged. Evidence may be offered of certain action, declaration of the accused as it tends to establish the requisite mental intent or state even though the evidence disclosed the commission of another offense by the accused. And two, where a guilt[y] knowledge is an essential element of the crime charged. Evidence to be offered of such action and declaration of an accused tend[s] to establish the requisite guilt[y] knowledge even though the evidence reveals commission of another offense by the accused.

Ladies and Gentlemen, the defendant cannot be convicted in this trial for something he has done in the past unless it is an essential element of the charge here.

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Later, during the charge conference, the trial court announced for the first time that the evidence could also be considered as proof of defendant's opportunity to commit the crime charged. The court instructed the jury thereafter:

Evidence that has been received tend[s] to show that that previous encounter, defendant and Officer Prevost, were involved in an incident which involved a firearm, which was detailed as a Glock pistol. This evidence was received solely for showing defendant had *knowledge, which is a necessary element of the crime charged in the case*, and that defendant had *opportunity to commit the crime*.

If you believe this evidence, you may consider it, which you will consider it only for the limited purpose which it was received. You may not consider it for any other purpose. Evidence of other crimes is inadmissible if its only relevance is to show the character of the accused. There are exceptions to the rule. They are when specific mental attitude or state is a sentencing element of the crime charged.

Evidence may be offered of such action [] or declaration of the accused as they tend to establish mental state even though the evidence discloses the commission of another offense by the accused or where guilt[y] knowledge is an essential element of the crime charged.

Evidence may be offered of such action or declarations of the accused that tends to establish required guilt[y] knowledge; that even though the evidence reveals a commissioned offense by the accused, defendant cannot be convicted in this trial for something he has done in the past, unless it is an element of the charges here.

(Emphasis added.)

II. Discussion

Defendant raises two issues for appellate review. First, defendant argues that testimony of the prior incident was improper character evidence under Rule 404(b) and should have otherwise been excluded under Rule 403. Second, defendant argues that the trial court erred each time it instructed the jury on the limited purpose for which it could consider the evidence.

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A. Preservation

[1] Defendant maintains that his trial counsel's objections to the prior incident were sufficient to preserve the first issue for appellate review, citing to this Court's decision in *State v. Randolph*, 224 N.C. App. 521, 527–28, 735 S.E.2d 845, 850–51 (2012) (holding that the defendant preserved issue for appeal where he filed a pre-trial motion to suppress, the trial court deferred ruling until the issue arose at trial, the defendant objected on the same grounds during *voir dire*, but he did not object to the challenged testimony when it was elicited before the jury), *appeal dismissed*, 366 N.C. 562, 738 S.E.2d 392 (2013). Alternatively, defendant contends that the admission of the evidence amounts to plain error. The State argues in response that our review is limited to plain error because defendant failed to raise a timely objection at trial.

Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure provides in pertinent part: "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1) (2017). "To be timely, an objection to the admission of evidence must be made 'at the time it is actually introduced at trial.' It is insufficient to object only to the presenting party's forecast of the evidence." *State v. Ray*, 364 N.C. 272, 277, 697 S.E.2d 319, 322 (2010) (quoting *State v. Thibodeaux*, 352 N.C. 570, 581, 532 S.E.2d 797, 806 (2000)); see also *State v. Snead*, 368 N.C. 811, 816, 783 S.E.2d 733, 737–38 (2016) (holding that objection outside the presence of the jury was insufficient to preserve the alleged error for appellate review). An unpreserved issue in a criminal case may still be "presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(a)(4) (2017).

Defense counsel first objected to evidence of the prior incident before jury selection but the court deferred its ruling until the State offered the evidence at trial. After Officer Prevost testified on direct to the circumstances of his investigation at the Alpha Arms Apartments, the court ordered a recess in anticipation of *voir dire*. Defense counsel briefly reminded the trial court of the basis for his objection and, when the session resumed, the court convened a *voir dire* of Officer Prevost and Sergeant Rabun.

After hearing their testimony concerning the prior incident and the arguments by counsel, the trial court ruled the evidence admissible. At that point, defense counsel requested: "Judge, I would just

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note an exception for the record.” The trial court responded: “Okay. Exception for the record.” Defense counsel failed to object thereafter when Officer Prevost and Sergeant Rabun testified to the prior incident in the presence of the jury but renewed his objection once more during the charge conference.

Based on the exchange between defense counsel and the trial court following *voir dire*, it is understandable that counsel would not feel compelled to renew his objection in the presence of the jury. To the extent that defense counsel relied on the trial court’s statement as assurance that a subsequent objection was unnecessary to preserve the issue, it would be fundamentally unfair to fault defendant on appeal—especially since the purpose for which the evidence was admitted was not settled until the charge conference. In light of the circumstances of this case, we review for prejudicial error. *See State v. Kostick*, 233 N.C. App. 62, 67–68, 755 S.E.2d 411, 415–16 (reviewing appeal on the merits where the trial court noted the defendant’s “exception” to a pre-trial ruling denying his motion to suppress; the defendant’s failure to include the jury trial transcript in record on appeal made it impossible to determine whether he renewed his objection at trial; and the State agreed that the “pretrial hearing transcript would be sufficient for purposes of defendant’s appeal”), *disc. review denied*, 367 N.C. 508, 758 S.E.2d 872 (2014).

B. Rule 404(b) Evidence

“The admissibility of evidence is governed by a threshold inquiry into its relevance.” *State v. Griffin*, 136 N.C. App. 531, 550, 525 S.E.2d 793, 806 (2000) (citation omitted). Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” N.C. Gen. Stat. § 8C-1, Rule 401 (2015). Relevant evidence may nevertheless “be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” N.C. Gen. Stat. § 8C-1, Rule 403 (2015).

Pursuant to Rule 404(b), “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith.” N.C. Gen. Stat. § 8C-1, Rule 404(b) (2015). Such evidence “may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.” *Id.* Rule 404(b) has thus been described as a

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general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.

State v. Coffey, 326 N.C. 268, 278–79, 389 S.E.2d 48, 54 (1990); *see also State v. White*, 340 N.C. 264, 284, 457 S.E.2d 841, 852–53 (1995) (“The list of permissible purposes for admission of ‘other crimes’ evidence is not exclusive, and such evidence is admissible as long as it is relevant to any fact or issue other than the defendant’s propensity to commit the crime.” (citing *State v. Bagley*, 321 N.C. 201, 362 S.E.2d 244 (1987), *cert. denied*, 485 U.S. 1036 (1988))). “Rule 404(b) evidence, however, should be carefully scrutinized in order to adequately safeguard against the improper introduction of character evidence against the accused.” *State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 122 (2002). In furtherance of “these important evidentiary safeguards, the rule of inclusion described in *Coffey* is constrained by the requirements of similarity and temporal proximity.” *Id.* at 154, 567 S.E.2d at 123 (citations omitted).

Whether evidence is “within the coverage of Rule 404(b)” is a legal conclusion reviewed *de novo* on appeal. *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). “‘Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment’ for that of the lower tribunal.” *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quoting *In re Appeal of The Greens of Pine Glen Ltd. P’ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

Whether relevant evidence passes muster under Rule 403 is a discretionary ruling reviewed for abuse of discretion on appeal. *Beckelheimer*, 366 N.C. at 130, 726 S.E.2d at 159. An abuse of discretion occurs “where the court’s ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). “In our review, we consider not whether we might disagree with the trial court, but whether the trial court’s actions are fairly supported by the record.” *State v. Lasiter*, 361 N.C. 299, 302, 643 S.E.2d 909, 911 (2007) (citing *Wainwright v. Witt*, 469 U.S. 412, 434 (1985)).

1. Knowledge

[2] We first address whether evidence of the prior incident was properly admitted as circumstantial proof of defendant’s knowledge. Although knowledge is not an essential element of possession of a firearm by a

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felon, *see* N.C. Gen. Stat. § 14-415.1(a) (2015); *State v. Mitchell*, 224 N.C. App. 171, 176–78, 735 S.E.2d 438, 442–44 (2012), defendant’s position at trial—that he was not aware of the rifle and pistol—made his guilty knowledge a material fact in issue. The State prosecuted defendant on the theory of constructive possession, which requires that a defendant have “both the power and intent to control [the item’s] disposition or use.” *State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972). “The requirements of power and intent necessarily imply that a defendant must be aware of the [item’s] presence . . . if he is to be convicted of possessing it.” *State v. Davis*, 20 N.C. App. 191, 192, 201 S.E.2d 61, 62 (1973). Circumstantial evidence that defendant knew of the firearms, therefore, would tend to prove his constructive possession thereof.

The problem with the testimony is that its tendency, if any, to prove knowledge is based almost entirely upon defendant’s propensity to commit the crime charged. The State contends that “the discovery of firearms in vehicles controlled by the Defendant increases the likelihood that the Defendant was aware of the firearms in and beside the [Crown] Victoria.” That is to say, a person who possessed a pistol in the past is more likely to have known about the firearms found on a more recent occasion. Knowledge, in the State’s assertion, does not follow logically from the mere fact of prior possession. It flows instead from an intermediate inference, i.e., because defendant possessed a firearm in the past, *he probably did so again*, and therefore knew of the rifle and pistol. *See* David P. Leonard, *The New Wigmore: Evidence of Other Misconduct and Similar Events* § 6.4.1, at 403–15 (2009).¹

Absent an intermediate character inference, the fact that defendant, one year prior, was found to be in possession of a different firearm, in a different car, at a different location, during a different type of investigation, does not tend to establish that he was aware of the rifle and pistol in this case. *See id.* § 6.4.2, at 420 (“Of course, a person’s mere possession of a firearm on an uncharged occasion, without more, has no meaningful tendency to prove defendant knew of the presence of the firearm on the charged occasion.”); *see also id.* (“Only when facts are present linking the two events in time, by circumstances, or in other respects, is it appropriate to admit the evidence to rebut a defense of lack of knowledge.”); *cf. State v. Weldon*, 314 N.C. 401, 403–07, 333 S.E.2d 701, 702–05 (1985) (holding that evidence of two similar occasions in

1. *The New Wigmore: Evidence of Other Misconduct and Similar Events* refers to Federal Rule of Evidence 404(b), which is nearly identical to the pertinent provisions of North Carolina Rule of Evidence 404(b) at issue in this case.

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which heroin and large sums of cash were found in the defendant's home was admissible to prove guilty knowledge, where the defendant "denied knowing to whom the heroin belonged or how it got into her house" and claimed "she would never knowingly allow anyone to possess drugs on her premises"). Because its relevance was based upon an improper character inference, the trial court erred in admitting the evidence as proof of defendant's knowledge.

2. Opportunity

[3] Next, we address whether evidence of the prior incident was properly admitted to establish defendant's opportunity to commit the crime. Apart from conclusory statements, the State offered no explanation—either at trial or on appeal—of the connection between the prior incident, opportunity, and possession. We can only assume that the evidence was offered to first establish that defendant had access to firearms, leading to the next logical inference that defendant had an opportunity to possess them. The final inference, flowing from defendant's opportunity, might be that defendant possessed the rifle and pistol recovered in this case. See 1 Kenneth S. Broun et al., *McCormick on Evidence* § 190, at 761–62 (6th ed. 2006) (describing "opportunity, in the sense of access to or presence at the scene of the crime or in the sense of possessing distinctive or unusual skills or abilities employed in the commission of the crime charged" (footnotes omitted)).² Possession was, of course, a material fact in genuine dispute.

The probative value of the prior incident to show opportunity and, ultimately, possession is limited by three principal concerns. First, the jury had to make the connection between possession in the prior incident and access to firearms before establishing the intermediate fact of opportunity. The officers' testimony of the prior incident, however, falls short of explaining how defendant acquired the Glock 22, or of revealing a reliable source of firearms. The shortcoming is understandable, as the State did not initially offer the evidence to show opportunity. Although the connection between prior possession and access is not a challenging one to make, adding another link to the chain of inferences naturally diminishes the probative value of the evidence.

Second, the mere fact that defendant had access to firearms does not place him within a smaller category of potential perpetrators in this case. It was never defendant's contention that, as a convicted felon, he could

2. *McCormick on Evidence* also refers to Federal Rule of Evidence 404(b).

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not lawfully purchase firearms and, therefore, had a lesser opportunity to possess them. Proof of defendant's opportunity to possess firearms only establishes his equal footing with a majority of citizens who can purchase and possess firearms freely, and the prior incident does not reveal some special opportunity to possess the particular rifle and pistol recovered in this case. *See* Leonard, *supra*, § 11.2, at 664–65 (“[I]f everyone has access to the means to commit a crime, the evidence either is not relevant or is of negligible probative value to identify Defendant as the perpetrator.” (citing 1 Edward J. Imwinkelried, *Uncharged Misconduct Evidence* § 3:03, at 6 (1998))).

Finally, any tendency the evidence had to show opportunity was superfluous in light of the other—and less prejudicial—evidence at trial. *See State v. Wilkerson*, 148 N.C. App. 310, 327, 559 S.E.2d 5, 16 (Wynn, J. dissenting) (“[T]he existence of other evidence of defendant's intent and knowledge in the instant case greatly reduced the probative value of defendant's prior convictions, while simultaneously increasing their prejudicial effect.” (citation omitted)), *rev'd per curiam for the reasons stated in the dissent*, 356 N.C. 418, 571 S.E.2d 583 (2002). Officer Prevost's testimony already established that defendant had an opportunity to possess the rifle and pistol. Defendant was seen standing next to the vehicle before Officer Prevost saw the rifle in the back seat, the keys to the vehicle were found in defendant's pants pocket, and some of his belongings were found inside the vehicle. In fact, the testimony of his own two witnesses would show that defendant had an opportunity to commit the crime charged in that he associated with people who had firearms.

The danger of unfair prejudice, on the other hand, is obvious. Evidence that defendant possessed a pistol on a prior occasion naturally invites the presumption that he did so again. The jury was far more likely to take the intuitive route, inferring possession in this case based on defendant's possession in the prior incident, than it was to follow the strained logic connecting the prior incident to opportunity and, ultimately, possession. *See* Leonard, *supra*, § 6.4.1, at 405–06. The more obvious character inference is, of course, what Rule 404(b) prohibits and what Rule 403 attempts to guard against. *See State v. Carpenter*, 361 N.C. 382, 387–88, 646 S.E.2d 105, 109 (2007) (recognizing a “natural and inevitable tendency . . . to give excessive weight to” evidence of a prior offense “and either to allow it to bear too strongly on the present charge or to take the proof of it as justifying a condemnation, irrespective of the accused's guilt of the present charge.” (citations omitted) (internal quotation marks omitted)); *State v. Johnson*, 317 N.C. 417, 430, 347 S.E.2d

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7, 15 (1986) (noting “[t]he dangerous tendency of [Rule 404(b)] evidence to mislead and raise a legally spurious presumption of guilt”); *State v. McClain*, 240 N.C. 171, 176, 81 S.E.2d 364, 368 (1954) (“[E]vidence of other crimes is likely to have a prejudicial effect on the fundamental right of the accused to a fair trial . . .”).

Based on the minimal probative value, if any, that the prior incident had in establishing opportunity and possession in this case, it was certainly and substantially outweighed by the danger of unfair prejudice. While we are mindful that a trial court is not required to make an explicit demonstration of the Rule 403 balancing test, *State v. Mabrey*, 184 N.C. App. 259, 266, 646 S.E.2d 559, 564 (2007), there is some concern whether the court gave Rule 403 the attention it deserved. The court initially ruled the evidence admissible to show that the officers were familiar with defendant and that, on a prior occasion, “they found him in possession of a firearm.” It was not until the charge conference that the court announced, without explanation, that the evidence could be considered by the jury to show opportunity. Based on the foregoing, we conclude that the trial court abused its discretion in admitting evidence of the prior incident as proof of defendant’s opportunity to commit the crime charged.

3. Prejudice

[4] We further conclude that the trial court’s error in admitting the evidence for no proper purpose was prejudicial to the defense and warrants a new trial. *See* N.C. Gen. Stat. § 15A-1443(a) (2015). The circumstances in this case “reveal a distinct risk that the jury may have been led to convict based on evidence of an offense not then before it.” *State v. Hembree*, 368 N.C. 2, 14, 770 S.E.2d 77, 86 (2015). The State’s evidence of possession may have been sufficient to submit the charge to the jury, *see State v. Hudson*, 206 N.C. App. 482, 489–90, 696 S.E.2d 577, 582–83 (2010), but it was not overwhelming. Apart from the prior incident, the evidence of defendant’s guilt was based circumstantially on his proximity to the vehicle and his control thereof. Defendant’s evidence, on the other hand, tended to show that, despite any control defendant had over the vehicle, he was not aware of the firearms. *See State v. Hairston*, 156 N.C. App. 202, 205, 576 S.E.2d 121, 123 (2003) (holding that evidence of the “defendant’s guilt was conflicting and was not so overwhelming as to make the trial court’s error in admitting prior convictions evidence non-prejudicial”).

We are also not convinced that the trial court’s limiting instructions had a meaningful impact on the jury so as to cure the prejudice. The court

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emphasized the use of the evidence to show knowledge, which rested upon an impermissible character inference. In the same context, the court twice instructed the jury that “defendant cannot be convicted for something he has done in the past, unless it is an element of the charges here,” referring to the prior incident and defendant’s knowledge in this case. In light of the conflicting evidence, the trial court’s instructions, and the inherent prejudice associated with improper character evidence, there is a reasonable possibility that, had evidence of the prior incident not been admitted, the jury would have reached a different result.

C. Jury Instructions

As a separate issue on appeal, defendant contends that the trial court erred each time it instructed the jury on the limited purpose for which it could consider evidence of the prior incident. We discussed the court’s limiting instructions, *supra*, only to explain the negligible impact that the instructions had in curing the prejudice at trial. Based on our disposition and the unlikelihood that the same instruction will be offered without the evidence, we do not specifically address defendant’s argument or the preservation thereof. *See Hairston*, 156 N.C. App. at 205, 576 S.E.2d at 123.

III. Conclusion

The trial court erred in admitting evidence of the prior incident to show defendant’s knowledge and opportunity to commit the crime charged. There is a reasonable possibility that, had the evidence not been admitted, the jury would have reached a different result. Defendant is entitled to a new trial.

NEW TRIAL.

Judge ZACHARY concurs.

Judge DILLON dissents by separate opinion.

DILLON, Judge, dissenting.

On appeal, Defendant argues that the trial court erred in admitting certain testimony from a State witness. The jurisprudence from our Supreme Court compels us to conclude that Defendant did not properly preserve his objection to this testimony. Accordingly, I disagree with the majority and believe that we should review the alleged error for plain error. Further, I do not believe that the admission of the challenged testimony amounted to plain error.

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In the present case, the trial court conducted a *voir dire* of the proposed testimony outside the presence of the jury. After hearing the testimony, the trial court indicated that it would admit the evidence. Defendant's counsel noted an exception for the record, which the trial court acknowledged. The jury was then called back in, and the State offered the testimony into evidence. However, when the State offered the testimony in the presence of the jury, Defendant's counsel did not object.

Our Supreme Court has held that a defendant who objects during a forecast of evidence outside the presence of the jury does not preserve the objection *unless he objects when the testimony is offered into evidence in the jury's presence*:

Generally speaking, the appellate courts of this state will not review a trial court's decision to admit evidence unless there has been a timely objection. To be timely, an objection to the admission of evidence *must be made at the time it is actually introduced at trial*. It is insufficient to object only to the presenting party's forecast of the evidence. As such, in order to 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) (citations and internal marks omitted) (emphasis added).

Much like in the present case, in *Ray*, the trial court excused the jury while it conducted a *voir dire* of a line of questioning that the State wanted to pursue during its cross-examination of the defendant. The defendant's counsel objected to the line of questioning during the *voir dire* but failed to renew the objection when the evidence was offered in the presence of the jury. *Id.* at 276, 697 S.E.2d at 321. The Supreme Court held that the defendant did not preserve the objection; and, therefore, any error could only be reviewed for plain error. *Id.* at 277, 697 S.E.2d at 322. The Supreme Court reaffirmed its holding just last year in *State v. Snead*, 368 N.C. 811, 816, 783 S.E.2d 733, 737-38 (2016).

The majority argues that it would be “fundamentally unfair” to fault Defendant on appeal. I understand the majority's argument.¹ However,

1. The majority relies, in part, on *State v. Randolph*, 224 N.C. App. 521, 735 S.E.2d 845 (2012). *Randolph*, though, does not cite any Supreme Court opinions to support its holding. We are bound to follow Supreme Court precedent until that precedent is overruled,

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the Supreme Court has been clear on this point. And we are compelled to follow holdings from our Supreme Court. *See Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993). Accordingly, I conclude that we must apply plain error.²

Turning to the merits of the present appeal, I conclude that, even assuming *arguendo* that the admission of the testimony was error, the error did not amount to plain error. There was sufficient evidence from which a jury could infer that Defendant possessed a weapon. For instance, there was evidence that he was driving the car where one of the weapons was found. *See State v. Best*, 214 N.C. App. 39, 47, 713 S.E.2d 556, 562 (2011) (suggesting that control of the vehicle where weapons are found is sufficient to go to the jury on the issue of constructive possession). Further, an officer testified that he observed Defendant standing on the same side of the car where one weapon was later found lying on the ground under the car. Therefore, I cannot say that the jury “probably” would have reached a different verdict had the challenged testimony not been offered.

Defendant also argues on appeal that the trial court erred in certain portions of its instructions to the jury. The majority does not address this issue, based on its conclusion that the admission of the testimony from the State’s witness constituted reversible error. Regarding Defendant’s argument concerning the jury instructions, I conclude that, even assuming the instructions were error, the jury “probably” would not have reached a different verdict without those instructions.

In conclusion, I believe that Defendant received a fair trial, free from plain error.

notwithstanding a contrary opinion from our Court. *See Andrews v. Haygood*, 188 N.C. App. 244, 248, 655 S.E.2d 440, 443 (2008) (“[T]his Court has no authority to overrule decisions of our Supreme Court and we have the responsibility to follow those decisions until otherwise ordered by our Supreme Court.” (citations and internal marks omitted)).

2. The majority relies, in part, on the trial judge’s statement that Defendant’s objection made during *voir dire* was noted in the record. However, the trial court did not offer its legal opinion that the objection was sufficient to preserve it for appellate review. And it is evident that the trial judges in *Ray* and *Snead* also allowed the objections made during *voir dire* to be part of the record, as our Supreme Court references those objections in its opinions. *See Ray*, 364 N.C. at 276-77, 697 S.E.2d at 321-22; *Snead*, 368 N.C. at 816, 783 S.E.2d at 737-38. However, the fact that the objections were part of the record in those cases did not satisfy the requirement that the record had to show that the objections were renewed when the challenged evidence was offered in the presence of the jury.

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[253 N.C. App. 622 (2017)]

SHAUN WEAVER, EMPLOYEE, PLAINTIFF,

v.

DANIEL GLENN DEDMON D/B/A DAN THE FENCE MAN D/B/A BAYSIDE
CONSTRUCTION, EMPLOYER, NONINSURED, AND DANIEL GLENN DEDMON,
INDIVIDUALLY; AND SEEGARS FENCE COMPANY, INC. OF ELIZABETH CITY, EMPLOYER, AND
BUILDERS MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS.

No. COA16-55

Filed 16 May 2017

1. Workers' Compensation—injury in the course of employment—findings—inconsistent—remanded

The question in a Workers' Compensation case of whether an injury to a forklift driver occurred in the scope of his employment was remanded to the Industrial Commission where the findings were inconsistent, too material to be disregarded as surplusage, and the question could not be resolved by reference to other findings. The injured forklift driver may have been turning donuts when the forklift turned over.

2. Workers' Compensation—findings—use of “may”

In a case remanded on other grounds, the Industrial Commission's use of “may” when finding that plaintiff may have initially performed work-related activities, along with the lack of a finding that plaintiff was credible, left the Court of Appeals to guess what the Commission would have done if it had correctly applied precedent.

3. Workers' Compensation—forklift driver doing donuts—misapprehension of law

In a case decided on another issue, the Court of Appeals pointed out that the Industrial Commission's finding that an injured forklift driver's decision to do donuts constituted an extraordinary deviation from his employment indicated a misapprehension of the law. The finding reflected a legal analysis applicable only to incidental activity not related to the employment.

4. Workers' Compensation—forklift driver—donuts—imputed negligence analysis—erroneous

In a Workers' Compensation case involving a forklift driver injured when the forklift turned over while he was doing donuts, the Industrial Commission acted under a misapprehension of law by grounding its findings in the speed and manner in which plaintiff operated the forklift, appearing to impute negligence, rather than

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addressing whether plaintiff operated the forklift in furtherance of his job duties.

Judge TYSON dissenting.

Appeal by Plaintiff from an Opinion and Award entered 2 September 2015 by the Full North Carolina Industrial Commission. Heard in the Court of Appeals 7 June 2016.

The Jernigan Law Firm, by Leonard T. Jernigan, Jr. and Kristina Brown Thompson, for Plaintiff-Appellant.

Lewis & Roberts, by J. Timothy Wilson, for Defendants-Appellees.

INMAN, Judge.

A decision by the North Carolina Industrial Commission that contains contradictory factual findings and misapplies controlling law must be set aside and remanded to the Commission to determine, in light of the correct legal standards, factual and legal issues regarding whether an employee's injury arose out of and in the course of his employment.

Shaun Weaver ("Plaintiff" or "Mr. Weaver") appeals from an Opinion and Award of the Full Commission of the North Carolina Industrial Commission (the "Commission"), denying him compensation for injuries suffered in an on-the-job accident. For the reasons explained in this opinion, we remand.

Factual and Procedural History

Mr. Weaver's appeal arises from an accident that occurred in October 2012 in an outdoor storage yard of Seegars Elizabeth City, a facility owned and operated by Seegars Fence Company ("Defendant Seegars"). Mr. Weaver, at that time 20 years old, was in the yard with Daniel Glenn Dedmon ("Dedmon"), who owned a small business known alternatively as Dan the Fence Man or Bayside Construction.

The record tends to show the following:

A few weeks before the accident, Defendant Seegars had hired Dedmon as a subcontractor in anticipation of a brief period of high-volume contracts for fence construction. Defendant Seegars provided fencing materials as well as a truck and trailer, and Dedmon provided the tools. Dedmon hired Mr. Weaver to do the work. Dedmon directed and

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controlled Mr. Weaver's work. Mr. Weaver had worked building fences with Dedmon, the father of Mr. Weaver's half-brother, for a few years.

Defendant Seegars delivered fencing supplies to construction worksites on flatbed trucks. Other supplies were picked up by Dedmon and Mr. Weaver from the Seegars storage yard. After completing their work each day, Dedmon and Mr. Weaver would return to the storage yard, unload unused supplies, and reload supplies needed for the following day. According to Mr. Weaver's testimony, to load and unload supplies, Dedmon regularly operated a Bobcat skid-steer loader kept in the yard and Mr. Weaver regularly operated a forklift kept in a nearby warehouse. Mr. Weaver had no certificate to drive the forklift but testified that he was never told that he was not allowed to operate it. The storage yard is a quarter-acre gravel yard approximately 200 feet behind the warehouse and an adjacent office. A seven-foot fence with privacy slats and barbed wire surrounds the yard.

Between 5:30 and 5:40 p.m. on 17 October 2012, Mr. Weaver and Dedmon returned to the storage yard after finishing their day's work on a construction site. Dedmon operated the Bobcat while Mr. Weaver operated the forklift. At approximately 5:50 p.m., the forklift overturned, entrapping Mr. Weaver between the roll bars of the top portion of the forklift. Mr. Weaver testified that he had completed loading and unloading items with the forklift and was about to return the forklift to the warehouse when he turned it too quickly, causing it to overturn.

Charles Mapes, the owner and operator of a business next door to Seegars who was working about 300 to 350 feet from the storage yard that afternoon, witnessed Mr. Weaver operating the forklift prior to the accident. Mapes heard the loud noise of equipment "running at a high throttle" and looked over the fence to see the forklift being driven in circles or "donuts."¹ Mapes did not see any work materials and "there was no indication that there was any work being done." Mapes turned around to carry some lumber into his building when he heard a loud boom, followed by screaming. Mapes ran over to the yard and found Dedmon trying without success to use the Bobcat to lift the forklift off of Mr. Weaver's body, which was folded in half.

Paramedics arrived at approximately 5:55 p.m., freed Mr. Weaver from the forklift, and transported him to a nearby hospital. Mr. Weaver was

1. The transcript of proceedings before the Commission uses this spelling of the term which most commonly refers to a circular fried dough pastry. "Donut" is the predominant spelling, while "doughnut" is a less common spelling. "Donut." *Merriam-Webster Online Dictionary*. 2017. <http://www.merriam-webster.com> (19 Apr. 2017).

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diagnosed with, *inter alia*, a crush injury; closed head injury; cervical, thoracic, lumbar, and pelvic fractures; liver and renal lacerations; splenic injury; and cardiac arrest. Mr. Weaver required several months of in-patient care and at the time of the hearing of this matter remained in an assisted living facility.

At the time of the accident, Defendant Seegars had workers' compensation insurance. Dedmon had no workers' compensation insurance. Defendant Seegars had not obtained a certificate of workers' compensation insurance coverage from Dedmon prior to the accident.

On 23 October 2012, one week after the accident, Defendant Seegars filed a Form 19 Notice of Accident pursuant to the Workers' Compensation Act. On 5 November 2012, Defendant Seegars's insurance carrier filed a Form 61 Denial of Workers' Compensation Claim explaining that a claim by Mr. Weaver arising from the accident would be denied because "[e]mployee did not sustain an injury by accident or specific traumatic event arising out of and during the course and scope of his employment." On 11 April 2013, Mr. Weaver filed a Form 18 Notice of Injury pursuant to the Workers' Compensation Act. On 20 August 2013, Mr. Weaver filed a Form 33 Request for Hearing.

Mr. Weaver and Defendant Seegars, through counsel, appeared at a hearing on 20 February 2014 before Deputy Commissioner Adrian Phillips. Dedmon did not appear and did not participate in the proceedings below. Following depositions and briefing, the Deputy Commissioner on 7 October 2014 entered an Opinion and Award denying Mr. Weaver's claim in its entirety. The Deputy Commissioner found credible testimony by Mapes that Mr. Weaver was driving the forklift in high-speed turns or "donuts" and found that the turns caused the forklift to tip over onto Mr. Weaver.

Mr. Weaver appealed to the Full North Carolina Industrial Commission pursuant to N.C. Gen. Stat. § 97-85 and Commission Rule 701, and the matter was heard on 10 March 2015. The parties, again with the exception of Dedmon, appeared through counsel and submitted briefs and oral arguments. The Commission entered an Opinion and Award on 6 July 2016 affirming the Deputy Commissioner's Opinion and Award and providing extensive findings of fact and conclusions of law denying Mr. Weaver's claim for compensation. The Commission recited Mr. Weaver's testimony in its findings of fact but did not make a finding that the testimony was credible, or that it was not credible. The Commission found Mapes's testimony—including his account of seeing the forklift doing "donuts"—was credible because he "was an

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unbiased, disinterested eyewitness of the events immediately preceding and subsequent to the flipping of the forklift.”

The Commission also found credible testimony by an accident reconstruction expert that photographs showing curved tire impressions at the accident scene were consistent with the forklift driving in tight circles. The Commission found that Mr. Weaver “was operating the forklift at such a speed to cause it to rollover and inflict the resulting serious injuries from which [he] now suffers.” The Commission further found that “the manner in which Plaintiff operated the forklift preceding his injury was unreasonable and reckless, in essence joy riding and/or thrill seeking.” The Commission concluded that Mr. Weaver’s injury did not arise out of and in the course of his employment and is therefore not compensable.

Commissioner Bernadine Ballance dissented, asserting that Mr. Weaver was injured while operating the forklift “for the purpose of moving and loading materials needed to accomplish the job for which he was hired,” and “in the presence of, at the direction of, and under the supervision of his employer,” Dedmon. As the statutory employer, Commissioner Ballance concluded that Defendant Seegars should be liable to the same extent Dedmon would have been if he had purchased workers’ compensation insurance. Beyond disputing the Commission’s findings based on the evidence, Commissioner Ballance noted that the Commission’s finding that Plaintiff was operating the forklift at an excessive or high speed “indicates that Plaintiff may have been negligently operating the forklift” at the time of the accident. Commissioner Ballance reasoned that “neither negligence, nor gross negligence would bar compensation to Plaintiff, if Plaintiff’s actions in operating the forklift were reasonably related to the accomplishment of the tasks for which he was hired.”

Mr. Weaver timely appealed the Commission’s Opinion and Award.

Analysis

[1] Mr. Weaver argues the Commission’s legal conclusions are inconsistent with its factual findings and are not supported by the relevant case law. Specifically, Mr. Weaver argues the Commission’s findings do not support the legal conclusion that his manner of operating the forklift removed him from the scope of his employment. He also argues that the Commission failed to make findings necessary to support the conclusion that he was injured while engaging in an activity unrelated to the job duties he was performing. After careful review, we agree and remand this matter to the Commission to reconsider and to determine,

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based on the North Carolina Workers' Compensation Act and our precedent, whether Mr. Weaver's injuries arose out of and in the course of his employment.

I. Standard of Review

Our review of an opinion and award of the Commission is limited to determining: (1) whether the findings of fact are supported by competent evidence, and (2) whether those findings support the Commission's conclusions of law. *Chambers v. Transit Mgmt.*, 360 N.C. 609, 611, 636 S.E.2d 553, 555 (2006). Unchallenged findings of fact "are 'presumed to be supported by competent evidence' and are, thus 'conclusively established[.]'" *Chaisson v. Simpson*, 195 N.C. App. 463, 470, 673 S.E.2d 149, 156 (2009) (quoting *Johnson v. Herbie's Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118 (2003)).

The Commission's conclusions of law are reviewed *de novo*. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004) (citation omitted). Challenged findings of fact are conclusive on appeal "when such competent evidence exists, even if there is plenary evidence for contrary findings." *Hardin v. Motor Panels, Inc.*, 136 N.C. App. 351, 353, 524 S.E.2d 368, 371 (2000). This Court has no authority to re-weigh the evidence or to substitute its view of the facts for those found by the Commission.

Because appellate courts have no jurisdiction to determine issues of fact, errors by the Commission regarding mixed issues of law and fact are generally corrected by remand rather than reversal. "When the Commission acts under a misapprehension of the law, the award must be set aside and the case remanded for a new determination using the correct legal standard." *Ballenger v. ITT Grinnell Indus. Piping, Inc.*, 320 N.C. 155, 158, 357 S.E.2d 683, 685 (1987) (citations omitted).

In this appeal, Mr. Weaver challenges some aspects of the Commission's Opinion and Award that are denominated conclusions of law but which actually are findings of fact. Our standard of review depends on the actual nature of the Commission's determination, rather than the label it uses. *Barnette v. Lowe's Home Ctrs., Inc.*, ___ N.C. App. ___, ___, 785 S.E.2d 161, 165 (2016) ("Regardless of how they may be labeled, we treat findings of fact as findings of fact and conclusions of law as conclusions of law for purposes of our review.").

"[T]he determination of whether an accident arises out of and in the course of employment is a mixed question of law and fact, and this Court may review the record to determine if the findings and conclusions are

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supported by sufficient evidence.” *Gallimore v. Marilyn’s Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977). Because the amount of deference provided to the Commission by the appellate court can determine the ultimate outcome of an appeal, it is imperative that we take care to apply the appropriate standard of review to each determination in dispute.

II. “*Arising Out of and in the Course of Employment*”

The first issue disputed between the parties is whether Mr. Weaver’s injury arose out of and in the course of his employment.

The North Carolina Workers’ Compensation Act (the “Act”) defines compensable injury as “only injury by accident arising out of and in the course of the employment.” N.C. Gen. Stat. § 97-2(6) (2015). The terms “arising out of” and “in the course of” employment “are not synonymous, but involve two distinct ideas and impose a double condition, both of which must be satisfied in order to render an injury compensable.” *Williams v. Hydro Print, Inc.*, 65 N.C. App. 1, 5, 308 S.E.2d 478, 481 (1983) (citation omitted). As both requirements are “parts of a single test of work-connection . . . , ‘deficiencies in the strength of one factor are sometimes allowed to be made up by strength in the other.’” *Id.* at 9, 308 S.E.2d at 483 (quotation marks and citation omitted). “The term ‘arising out of’ refers to the origin or cause of the accident, and the term ‘in the course of’ refers to the time, place, and circumstances of the accident.” *Hoyle v. Isenhour Brick & Tile Co.*, 306 N.C. 248, 251, 293 S.E.2d 196, 198 (1982) (citation omitted).

In *Teague v. Atlantic Co.*, 213 N.C. 546, 196 S.E. 875 (1938), the Supreme Court of North Carolina denied a workers’ compensation claim by the estate of an employee who died while riding on a crate conveyor belt, despite a previous warning by his supervisor that riding the belt was dangerous and prohibited. The Commission relied on the Act’s definition of compensable injury and concluded that the employee’s death did not arise out of his employment because “there was no causal connection between the conditions under which the work was required to be performed and the resulting injury.” *Id.* at 548, 196 S.E. at 876. The Supreme Court also quoted the Commission’s reasoning that the employee died, not as a result of a risk inherent in his work activities, but rather

by stepping aside from the sphere of his employment and voluntarily and in violation of his employer’s orders, for his own convenience or for the thrill of attempting a hazardous feat, attempted to ride on machinery installed and used for another purpose and obviously dangerous for

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the use he attempted to make of it rather than take the usual course of going from the basement to the first floor by way of the stairs provided and used for that purpose.

Id. at 548, 196 S.E. at 876.

In *Spratt v. Duke Power Co.*, 65 N.C. App. 457, 465, 310 S.E.2d 38, 43 (1983), this Court allowed compensation pursuant to the Act for an employee who was injured while breaking a safety rule. The employee, who worked in an industrial plant, was running toward the canteen to buy chewing gum when he slipped on coal dust and fell. *Id.* at 459, 310 S.E.2d at 40. He knew that running inside the plant was prohibited and had been warned previously not to do so. *Id.* at 459, 310 S.E.2d at 40. This Court held “[t]he fact that the employee is not engaged in the actual performance of the duties of the job does not preclude an accident from being one within the course of employment.” *Id.* at 468, 310 S.E.2d at 45 (citing *Brown v. Aluminum Co.*, 224 N.C. 766, 32 S.E.2d 320 (1944)) (holding an employee’s injury, which occurred when he was returning to the bathroom to retrieve his flashlight, arose in the course of employment).

In *Rivera v. Trapp*, 135 N.C. App. 296, 299, 519 S.E.2d 777, 779 (1999), this Court affirmed an award of compensation to an employee who was injured while operating a forklift, even though the employee’s job duties did not include using the forklift. The Court distinguished *Teague*:

Teague dealt with a situation where a thrill-seeking employee took action that bore no resemblance to accomplishing his job. Here, the record shows that plaintiff acted solely to accomplish his job. Plaintiff rode on the forklift to move necessary materials to the third floor. While this action may have been outside the “narrow confines of his job description” as a roofer, it is clear that plaintiff’s actions were reasonably related to the accomplishment of the task for which he was hired. Further, in *Teague*, the foreman had given the plaintiff an express order not to ride the conveyor belt. Here, plaintiff testified that Schuck authorized him to ride the forklift.

Id. at 301-02, 519 S.E.2d at 780 (internal citations omitted); *see also Hensley v. Carswell Action Com. Inc.*, 296 N.C. 527, 531-32, 251 S.E.2d 399, 401-02 (1979) (holding that a groundskeeper who drowned after wading in a lake to cut weeds, ignoring a specific instruction not to go in the water, was injured in the course of and arising from his employment).

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Arp v. Parkdale Mills Inc., 150 N.C. App. 266, 274, 563 S.E.2d 62, 68 (2002) (Tyson, J., dissenting), *adopted per curiam*, 356 N.C. 657, 576 S.E.2d 326 (2003), provides an analytical framework for assessing whether an employee's injury was causally related to the employment. In *Arp*, the North Carolina Supreme Court adopted the dissent of Judge Tyson ("*Arp*" or "the opinion"), which denied compensation to an employee who was injured when he fell from a seven and one-half foot fence on his employer's premises. *Id.* at 268, 563 S.E.2d at 64. The employee, who was leaving fifteen minutes before the end of his shift, had climbed the fence instead of exiting through a gate, which remained locked until the shift ended. *Id.* at 268, 563 S.E.2d at 64. *Arp* held that work-related activities are generally divided into two types:

- (1) actual performance of the direct duties of the job activities, and
- (2) incidental activities. The former are almost always within the course of employment, regardless of the method chosen to perform them. Incidental activities are afforded much less protection. If they are: (1) too remote from customary usage and reasonable practice or (2) are extraordinary deviations, neither are incidents of employment and are not compensable.

Id. at 277, 563 S.E.2d at 69-70 (internal citations omitted). *Arp* held that the plaintiff's activity—leaving work before his shift ended—was not in the actual performance of a direct job duty, and then assessed whether the plaintiff's actions constituted a reasonable incidental activity. *Id.* at 277, 563 S.E.2d at 69-70. The opinion noted that *Teague* and other North Carolina appellate decisions "have consistently denied compensation where the incidental activity was unreasonable." *Id.* at 278, 563 S.E.2d at 70. Distinguishing its analysis from negligence theory, the opinion concluded that the "[p]laintiff's unreasonable actions, *not* the grossly negligent manner in which he performed them, produced his injuries." *Id.* at 280, 563 S.E.2d at 71. In adopting this Court's opinion in *Arp*, the Supreme Court did not overturn *Spratt*, *Rivera*, or other decisions distinguishing *Teague*.

Considering our precedent, we now explain why the Commission's Opinion and Award in this case must be set aside and remanded.

The Commission's Conclusion of Law #3, challenged by Mr. Weaver, reads:

The Full Commission's finding that Plaintiff was "joy-riding" or "thrill seeking," which bore no relation to accomplishing the duty for which Plaintiff was hired,

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removed Plaintiff from the scope of his employment. To the extent Plaintiff may have initially performed some work-related tasks with the forklift, his decision to do donuts on the Seegars' forklift, was too remote from customary usage and reasonable practice and constituted an extraordinary deviation from his employment. Pursuant to *Arp v. Parkdale Mills, Inc.*, 356 N.C. 657, 576 S.E.2d 326 (2003), the Full Commission concludes that Plaintiff's activity leading to his injury on 17 October 2012 was unreasonable. Consequently, Plaintiff's injury did not arise out of and in the course of his employment and is not compensable. N.C. Gen. Stat. § 97-2(6).

The Commission's determination that Mr. Weaver's "joyriding" or "thrill seeking" bore no relation to his job duties, despite being denominated as a conclusion of law, is actually a finding of fact. So is the Commission's determination that "Plaintiff may have initially performed some work related tasks with the forklift," contained in this same denominated conclusion of law. "Any determination reached through logical reasoning from the evidentiary facts is more properly classified a finding of fact." *Barnette*, ___ N.C. App. at ___, 785 S.E.2d at 165 (quoting *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997)). These inconsistent factual findings—one stating that Mr. Weaver's actions bore no relation to his job duties, and the other stating that Mr. Weaver may have initially performed some work-related tasks with the forklift—preclude this Court from determining whether the Commission's findings support the legal conclusion that Plaintiff's operation of the forklift removed him from the scope of employment. Because these inconsistencies are factual, too material to be disregarded as surplusage, and cannot be resolved by reference to other findings in the Opinion and Award, we must vacate the decision and remand for redetermination by the Commission. To guide the Commission in its proceedings on remand, we will address further the legal issues disputed between the parties and the applicable law.

[2] The Commission's finding that Mr. Weaver "may have initially performed some work-related tasks with the forklift" undermines the Commission's conclusion that the injury did not arise out of and in the course of the employment. Mr. Weaver testified that the accident occurred as he was returning the forklift to the warehouse after using it for work purposes. The Commission noted this testimony in its findings of fact but did not indicate whether it found the testimony credible.

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“[A]n injury arises out of the employment when it is a natural and probable consequence or incident of the employment and a natural result of one of its risks, so there is some causal relation between the injury and the performance of some service of the employment.” *Robbins v. Nicholson*, 281 N.C. 234, 239, 188 S.E.2d 350, 354 (1972) (internal quotation marks omitted). The analysis in *Robbins*, which pre-dated the Act, has been followed by this Court in applying the Act’s definition of “injury.” See *McGrady v. Olsten Corp.*, 159 N.C. App. 643, 647-48, 583 S.E.2d 371, 373 (2003) (holding a certified nursing assistant whose duties included preparing meals was injured in the course of and arising from her employment when she fell while climbing a tree in her employer’s back yard to pick a pear).

The only statutory exceptions to guaranteed compensation for injuries from a work-related accident are (1) intoxication; (2) impairment from a controlled substance; and (3) willful intent to injure or kill oneself or another. N.C. Gen. Stat. § 97-12 (2015). Even an employee’s willful violation of a safety rule does not preclude recovery, but instead reduces the recovery by ten percent. *Id.* We are aware of no prior North Carolina appellate decision addressing a claim by an employee who was engaged in thrill seeking while returning equipment used for work-related tasks. But the Commission did not clearly find that Mr. Weaver’s accident occurred while he was returning the forklift after using it for a work-related task, and this Court cannot make factual findings.

The Commission’s finding that Mr. Weaver “may have initially performed some work-related tasks with the forklift” materially alters the findings of fact contained in the Opinion and Award, and we cannot disregard the finding as surplusage. The Commission’s use of the word “may” and its omission of any finding that Mr. Weaver’s testimony was credible, so that the circumstances he testified about are not necessarily found as a fact, leave this Court only to guess what the Commission would have found if it had correctly applied *Arp*, *Spratt*, and other precedent.

[3] For the benefit of the Commission on remand, we also note that the Commission misapplied the law in a second finding in the same sentence. The finding —immediately following the finding that Mr. Weaver may have used the forklift for work-related tasks—that “his decision to do donuts . . . was too remote from customary usage and reasonable practice and constituted an extraordinary deviation from his employment” reflects a legal analysis applicable only to an incidental activity not related to the employment. The sentence as a whole, and considered in the context of the entire decision, indicates that the Commission misapprehended the law.

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III. *Negligence Theory*

[4] The second issue before us is whether the Commission erroneously applied a negligence analysis to deny compensation to Mr. Weaver. Defendants contend the Commission did not apply a fault analysis, but rather determined that the nature of Mr. Weaver's actions was so far removed from his job duties that the accident was not causally related to the employment.

The Act “was created to ensure that injured employees receive sure and certain recovery for their work-related injuries without having to prove negligence on the part of the employer or defend against charges of contributory negligence.” *Whitaker v. Town of Scotland Neck*, 357 N.C. 552, 556, 597 S.E.2d 665, 667 (2003) (citation omitted).

Here, the Commission found the following facts:

35. Based upon a preponderance of the credible evidence of record, the Full Commission finds that Plaintiff was operating the forklift at such a speed to cause it to rollover and inflict the resulting serious injuries from which Plaintiff now suffers.

36. The Full Commission further finds that the manner in which Plaintiff operated the forklift preceding his injury was unreasonable and reckless, in essence joy riding and/or thrill seeking.

Unlike *Teague* and other decisions denying compensation for injuries caused by “dangerous thrill-seeking completely unrelated to the employment[,]” *Hensley*, 296 N.C. at 531, 251 S.E.2d at 401, here the Commission's conclusion is grounded in findings that characterize the *speed* and *manner* in which Plaintiff operated the forklift. These findings do not address whether Mr. Weaver was operating the forklift in furtherance of—or incidental to—his job duties and his employer's interest. These findings appear to impute negligence on behalf of the employee, indicating that the Commission reached its decision under a misapprehension of law.

[T]he Workers' Compensation Act was ‘intended to eliminate the fault of the workman as a basis for denying recovery’ and that ‘the only ground set out in the statute upon which compensation may be denied on account of the fault of the employee is when the injury is occasioned by his intoxication or willful intention to injure himself or another.’ Thus, except as expressly provided in the statute

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(as in section 97–12, which is not involved here), fault has no place in the workers’ compensation system.

Hassell v. Onslow Cty. Bd. of Educ., 362 N.C. 299, 304, 661 S.E.2d 709, 713 (2008) (internal citations and brackets omitted).

Because the Commission apparently misapplied the law and made contradictory findings of fact that preclude a resolution as a matter of law, we remand the matter to the Commission for redetermination based on the correct legal standards.

This is hardly the first decision by an appellate court in North Carolina remanding a case to the Full Commission to redetermine issues of fact and law because the Commission’s opinion and award reflected an incorrect legal standard. “If the findings of the Commission are insufficient to determine the rights of the parties, the appellate court may remand to the Industrial Commission for additional findings.” *Lanning v. Fieldcrest-Cannon, Inc.*, 352 N.C. 98, 106, 530 S.E.2d 54, 60 (2000) (citation omitted). “ ‘The evidence tending to support [the] plaintiff’s claim is to be viewed in the light most favorable to [the] plaintiff, and [the] plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence.’ ” *Id.* at 106, 530 S.E.2d at 60 (quoting *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998)).

In *Ballenger*, 320 N.C. at 157-58, 357 S.E.2d at 685, our Supreme Court modified a decision of this Court affirming a decision of the Commission in part but remanding the case to the Commission because the Commission employed an incorrect standard for resolving conflicting medical testimony. This Court mandated a remand “for a determination whether, uninfluenced by the . . . misstatement, the Commission actually and dispassionately weighed the evidence before it concluded there was sufficient evidence to support a finding in plaintiff’s favor.” *Id.* at 157-58, 357 S.E.2d at 685 (internal quotation marks omitted) (alterations in original). The Supreme Court held that this Court erred “in not remanding to the Commission for new findings of fact and conclusions of law applying the correct legal standard.” *Id.* at 158, 357 S.E.2d at 685. Like the Supreme Court in *Ballenger*, this Court expresses no opinion as to the merits of Mr. Weaver’s case. “We hold only that the [F]ull Commission must make a complete redetermination,” *id.* at 158, 357 S.E.2d at 685, based upon the correct legal standard.

A series of decisions by this Court in a case outside the context of workers’ compensation is instructive. In *In re A.B.*, 239 N.C. App. 157, 172, 768 S.E.2d 573, 581-82 (2015) (“*A.B. I*”), this Court reversed an order terminating parental rights because “[t]he contradictory nature of the

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trial court's findings of fact and conclusions of law prohibit this Court from adequately determining if they support the court's conclusions of law . . ." and remanding to the trial court "for entry of a new order clarifying its findings of fact and conclusions of law." Following remand, the trial court entered a revised order terminating the respondent's parental rights. This Court affirmed that order on appeal. *See In re A.B.*, ___ N.C. App. ___, ___, 781 S.E.2d 685, 692 (2016), *review denied sub nom.*, ___ N.C. ___, 793 S.E.2d 695 (2016) ("A.B. II"). In *A.B. II*, the respondent contended that the trial court exceeded this Court's remand for a revised order "clarifying" its findings of fact because the trial court made new findings. *Id.* at ___, 781 S.E.2d at 692. This Court held that when read in context of the entire decision, the word "clarifying" indicates "that this Court remanded this case for the trial court to make whatever changes necessary to have an internally consistent order." *Id.* at ___, 781 S.E.2d at 692.

To make sure our mandate is clear, we remand this matter to the Commission to weigh the evidence and redetermine the factual and legal issues necessary to resolve Mr. Weaver's claim. It is not necessary that the Commission receive any additional evidence, although in its discretion it may do so. The Commission is not precluded from restating findings and conclusions from the Opinion and Award we have set aside, if those findings and conclusions are consistent with this opinion, based on competent evidence, and reflect that the Commission has applied the correct legal standards.

Conclusion

For all of the reasons stated above, we set aside the Commission's Opinion and Award and remand this matter for further proceedings consistent with this opinion.

VACATED and REMANDED.

Judge BRYANT concurs. Judge TYSON dissents with separate opinion.

TYSON, Judge, dissenting.

The Commission's Opinion and Award concluded Plaintiff's "decision to do donuts on the Seegars' forklift, was too remote from customary usage and reasonable practice and constituted an extraordinary deviation from his employment." Competent evidence in the record supports the Commission's findings. These findings of facts are binding

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upon appeal and support the Commission's conclusions of law. This Court is bound by the standard of appellate review on the Commission's Opinion and Award. The decision of the Commission should be affirmed. I respectfully dissent.

I. Standard of Review

This Court reviews an opinion and award of the Commission to determine "whether there is any competent evidence in the record to support the Commission's findings and whether those findings support the Commission's conclusions of law." *Oliver v. Lane Co.*, 143 N.C. App. 167, 170, 544 S.E.2d 606, 608 (2001).

"[T]he Commission is the fact finding body. . . [and is] the sole judge of the credibility of the witnesses and the weight to be given to their testimony." *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) (internal citations and quotation marks omitted). "Where there is competent evidence to support the Commission's findings, they are binding on appeal even in light of evidence to support contrary findings." *Starr v. Gaston Cty. Bd. of Educ.*, 191 N.C. App. 301, 304-05, 663 S.E.2d 322, 325 (2008).

The Commission's conclusions of law are reviewed *de novo*. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004).

II. Plaintiff's Unreasonable Activity

Plaintiff argues the Commission erred by finding his actions removed him from the course and scope of his employment and that his injury did not arise out of his employment. After reviewing the Commission's *binding and unchallenged* findings of fact, his contention is without merit.

A. Arise Out Of and In The Course Of Employment

"In order to be compensable under our Workers' Compensation Act, an injury must arise out of and in the course of employment." *Barham v. Food World, Inc.*, 300 N.C. 329, 332, 266 S.E.2d 676, 678 (1980). Our courts have stated that "'course of employment' and 'arising out of employment' are both parts of a single test of work-connection and therefore, 'deficiencies in the strength of one factor are sometimes allowed to be made up by strength in the other.'" *Williams v. Hydro Print, Inc.*, 65 N.C. App. 1, 9, 308 S.E.2d 478, 483 (1983) (quoting *Watkins v. City of Wilmington*, 290 N.C. 276, 280, 225 S.E.2d 577, 580 (1976)). "Together, the two phrases are used in an attempt to separate work-related injuries from nonwork-related injuries." *Id.* at 5, 308 S.E.2d at 481.

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“In general, the term ‘in the course of’ refers to the time, place and circumstances under which an accident occurs, while the term ‘arising out of’ refers to the origin or causal connection of the accidental injury to the employment.” *Gallimore v. Marilyn’s Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977) (citations omitted); see *Williams*, 65 N.C. App. at 7, 308 S.E.2d at 482 (“An injury arises out of employment when it comes from the work the employee is to do, or out of the service he is to perform, or as a natural result of one of the risks of the employment[.]” (citation and internal quotation marks omitted)).

“‘There must be some causal relation between the employment and the injury.’” *Bass v. Mecklenburg County*, 258 N.C. 226, 231, 128 S.E.2d 570, 574 (1962) (quoting *Conrad v. Cook-Lewis Foundry Co.*, 198 N.C. 723, 153 S.E. 266 (1930)). Where no causal connection exists, the injury is not compensable. *Arp v. Parkdale Mills, Inc.*, 150 N.C. App. 266, 274, 563 S.E.2d 62, 68 (2002) (Tyson, J., dissenting), *adopted per curiam*, 356 N.C. 657, 576 S.E.2d 326 (2003). “The burden of proving the causal relationship or connection rests with the claimant.” *Id.* (citing *McGill v. Town of Lumberton*, 218 N.C. 586, 587, 11 S.E.2d 873, 874 (1940)).

Our Supreme Court has held:

[W]hether plaintiff’s claim is compensable turns upon whether the employee acts for the benefit of his employer to any appreciable extent or whether the employee acts solely for his own benefit or purpose or that of a third person.

... we find that thrill seeking which bears no conceivable relation to accomplishing the job for which the employee was hired moves the employee from the scope of his employment.

Hoyle v. Isenhour Brick & Tile Co., 306 N.C. 248, 258-59, 293 S.E.2d 196, 202 (1982) (emphasis supplied) (citations and quotation marks omitted).

B. Employment Related Activities

Employment related activities are divided into two types:

(1) actual performance of the direct duties of the job activities, and (2) incidental activities. The former are almost always within the course of employment, regardless of the method chosen to perform them. Incidental activities are afforded much less protection. If they are: (1) too remote from customary usage and reasonable practice or

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(2) are extraordinary deviations, neither are incidents of employment and are not compensable.

Arp, 150 N.C. App. at 277, 563 S.E.2d at 69-70 (internal citations omitted).

The Industrial Commission and North Carolina courts have consistently denied compensation where the incidental activity by the employee was unreasonable. *See id.* at 278, 563 S.E.2d at 70 (denying compensation where the employee left his shift early and was injured when he attempted to exit by climbing a barb wire gate, rather than exiting through an available gate); *see also Matthews v. Carolina Standard Corp.*, 232 N.C. 229, 234, 60 S.E.2d 93, 96 (1950) (holding plaintiff's injury and death "did not result from a hazard incident to his employment" when he attempted to jump onto a truck moving across employer's property after hearing the lunch whistle); *Moore v. Stone Co.*, 242 N.C. 647, 647-48, 89 S.E.2d 253, 254 (1955) (holding the employee's injuries did not arise out of employment when the employee for unknown reasons or for curiosity, while eating lunch, attempted to set off a single dynamite cap and accidentally detonated other dynamite caps); *Teague v. Atlantic Co.*, 213 N.C. 546, 548, 196 S.E. 875, 876 (1938) (denying compensation where the employee "stepp[ed] aside from the sphere of his employment and voluntarily . . . for his own convenience or for the thrill of attempting a hazardous feat, attempted to ride" a conveyor belt instead of taking the employer provided steps).

C. Analysis

The Commission made the following relevant findings of fact which the majority's opinion agrees are supported by competent evidence:

15. Several minutes after they arrived at the workyard, Mr. Mapes testified he heard "lots of loud noises nextdoor [sic] of equipment running at a high throttle." Mr. Mapes testified that "peeking over I did see a forklift, green and white, and the Bobcat as well." However, it was unusual to see the forklift in use at any time other than the mornings, according to Mr. Mapes. He further testified that he observed "[t]he forklift was being operated rather recklessly." In addition, Mr. Mapes testified that he did not see any work materials and that "there was no indication that there was any work being done." Rather, Mr. Mapes testified he observed the forklift being driven in circles or donuts.

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32. Andrew Webb, a professional accident reconstructionist, was hired by Defendant-Seegars to investigate the accident. . . . Mr. Webb stated the impressions were consistent with the testimony of Mr. Mapes in that the vehicle Plaintiff was operating was doing high-speed turns or donuts. Mr. Webb testified that the maneuvers Plaintiff performed on the forklift were consistent with the photographs showing the curved tire impressions which were consistent with donuts.

. . .

34. The Full Commission finds, based upon a preponderance of the evidence, that Mr. Webb's accident reconstruction and resulting opinions are not speculative and that Mr. Webb's opinions are credible.

35. Based upon a preponderance of the credible evidence of record, the Full Commission finds that Plaintiff was operating the forklift at such a speed as to cause it to rollover and inflict the resulting serious injuries from which Plaintiff now suffers.

36. The Full Commission further finds that the manner in which Plaintiff operated the forklift preceding his injury was unreasonable and reckless, in essence joy riding and/or thrill seeking.

The Commission then concluded:

3. The Full Commission's finding that Plaintiff was "joyriding" or "thrill seeking," which bore no relation to accomplishing the duty for which Plaintiff was hired, removed Plaintiff from the scope of his employment. To the extent Plaintiff may have initially performed some work-related tasks with the forklift, his decision to do donuts on the Seegars' forklift, was too remote from customary usage and reasonable practice and constituted an extraordinary deviation from his employment. Pursuant to *Arp v. Parkdale Mills, Inc.*, 356 N.C. 657, 576 S.E.2d 326 (2003), the Full Commission concludes that Plaintiff's activity leading to his injury on 17 October 2012 was unreasonable. Consequently, Plaintiff's injury did not arise out of and in the course of his employment and is not compensable. N.C. Gen. Stat. § 97-2(6).

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The majority's opinion states Conclusion of Law 3 contains inconsistent factual findings: "one stating that Mr. Weaver's actions bore no relation to his job duties, and the other stating that Mr. Weaver may have initially performed some work-related tasks with the forklift[.]" Because the Commission found Mr. Weaver "may" have been initially engaged in a work-related task, the majority's opinion asserts the Commission's findings fail to support the conclusion that Plaintiff's injuries did not arise out of and in the course of his employment. The majority's opinion further notes the Commission's Opinion and Award demonstrates a misapprehension of the law. I respectfully disagree.

Even if or "[t]o the extent" Conclusion of Law 3 contains some re-stated findings of fact, *see Barnette v. Lowe's Home Ctrs., Inc.*, ___ N.C. App. ___, ___, 785 S.E.2d 161, 165 (2015), these findings are entirely consistent with and support the Commission's ultimate conclusion. The majority's opinion unduly parses the Commission's findings and conclusions. The majority fails to apply the plain and ordinary meanings of the Commission's words to wrongfully conclude they are inconsistent with one another in order to compel a different result. Such substitution of a result is inconsistent with this Court's standard of review. *See Adams*, 349 N.C. at 680-81, 509 S.E.2d at 413-14.

The Commission, as the sole judge of the credibility of the witnesses, merely acknowledged "[t]o the extent" Mr. Weaver may have initially or even arguably used the forklift to perform work-related activities, "his decision to do donuts on the Seegars' forklift, was too remote from customary usage and reasonable practice and constituted an extraordinary deviation from his employment" and constituted joyriding or thrill seeking. In every previous case denying compensation, the employee was at work and may have performed activities consistent with his employment prior to engaging in conduct or actions which "bore no relation to his job duties."

It appears that on remand, the majority is requiring the Commission to reweigh the evidence to again determine whether Mr. Weaver's testimony he was initially using the forklift for work-related activities is credible, because "the Commission did not clearly find that Mr. Weaver's accident occurred while he was returning the forklift after using it for a work-related task[.]" This notion ignores binding precedents.

Whether Mr. Weaver initially performed work-related activities is wholly inconsequential, as the employee carries the burden and a causal connection is still required to find that an employee's injuries arose out of and in the course of employment at the time of the injury. *See Arp*, 150 N.C. App. at 274, 563 S.E.2d at 68.

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Here, after weighing all the competent evidence, the Commission specifically found Mr. Weaver was engaged in joyriding or thrill seeking. This finding is fully supported by the competent testimonies of Mr. Webb and Mr. Mapes, which the Commission found to be credible. The Commission then proceeded to conclude Mr. Weaver's joyriding or thrill seeking was an unreasonable activity, which bore no relation to his employment; constituted an extraordinary deviation from his employment; and even "[t]o the extent" Mr. Walker was "at work" or may have initially performed some work-related tasks, his joyriding or thrill seeking *ultimately broke the causal connection between his employment and his injuries*.

The Commission's conclusion is entirely consistent with our precedents. *See id.* at 277, 563 S.E.2d at 70 ("If [the activities] are: (1) too remote from customary usage and reasonable practice or (2) are extraordinary deviations, neither are incidents of employment and are not compensable."); *Hoyle*, 306 N.C. at 259, 293 S.E.2d at 202 ("[T]hrill seeking which bears no conceivable relation to accomplishing the job for which the employee was hired moves the employee from the scope of his employment.").

Competent and credible evidence in the record demonstrates Mr. Weaver clearly engaged in joyriding or thrill seeking. Though this thrill seeking activity unfortunately resulted in serious injuries, competent evidence supports and the Commission correctly concluded Mr. Weaver's actions clearly removed him from any prior or asserted activity within the "scope of his employment" such that his injuries did not arise out of and in the course of his employment. *See Hoyle*, 306 N.C. at 259, 293 S.E.2d at 202. The Commission's Opinion and Award denying Plaintiff compensation is entirely consistent with long standing Supreme Court of North Carolina precedents, is supported by competent evidence, and is properly affirmed. *See id.*

III. Negligence Analysis

Plaintiff further argues the Commission erroneously applied a negligence standard to hold Plaintiff's injuries are not compensable. I disagree.

North Carolina precedents clearly hold negligence, and even gross negligence, do not bar Plaintiff from recovery. *See, e.g., Whitaker v. Town of Scotland Neck*, 357 N.C. 552, 556, 597 S.E.2d 665, 667 (2003). However, binding precedents also distinguish a claimant's unreasonable actions from negligence or gross negligence. *Arp*, 150 N.C. App. at 280,

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563 S.E.2d at 71. Where the Commission's decision is based on the claimant's "unreasonable actions, *not* the grossly negligent manner in which he performed them," Plaintiff has failed to carry his burden and compensation is properly denied. *See id.* (emphasis original).

Here, nothing in the record or in the Commission's findings of fact or conclusions of law indicate it relied upon any negligence theory to deny compensation. Furthermore, the Commission found Mr. Weaver's decision to engage in joyriding or thrill seeking was an *unreasonable activity*. As such, his argument is without merit. *See id.*

IV. Conclusion

Plaintiff failed to carry his burden to prove his injuries are compensable. The Commission's findings of fact are supported by competent evidence, which support its conclusions of law. *See Oliver*, 143 N.C. App. at 170, 544 S.E.2d at 608 (2001). The record and Opinion and Award demonstrate the Commission correctly understood and applied the law and did not erroneously apply a negligence standard to this case.

While this Court may remand a case to the Industrial Commission under certain circumstances, in this case remand is error, entirely unnecessary, and does not promote judicial economy. *See, e.g., Lanning v. Fieldcrest-Cannon, Inc.* 352 N.C. 98, 106, 530 S.E.2d 54, 60 (2000).

Based upon long standing and binding precedents and our standard of review, the Commission's Opinion and Award denying Plaintiff compensation should be affirmed. I respectfully dissent.

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RICHARD C. WILSON, PLAINTIFF

v.

PERSHING, LLC; BANK OF NEW YORK MELLON CORPORATION; JBS LIBERTY SECURITIES, INC.; THE PNC FINANCIAL SERVICES GROUP, INC.; SYNERGY INVESTMENT GROUP, LLC; JBS GROUP, LLC; RBC CAPITAL MARKETS CORPORATION; AND JOHN DOE 1, DEFENDANTS

No. COA16-803

Filed 16 May 2017

1. Appeal and Error—appellate rules violation—Rule 28(b)(6)—no sanctions

The Court of Appeals elected not to impose any sanctions for plaintiff's failure to follow N.C. R. App. 28(b)(6), requiring a brief to contain a concise statement of the applicable standard of review.

2. Appeal and Error—preservation of issues—failure to object at trial

Plaintiff abandoned the issue that his motion to continue a hearing on defendants' motion to dismiss all charges should have been granted based on plaintiff's filing of an amended complaint. Plaintiff failed to object at trial.

3. Appeal and Error—preservation of issues—standing—abandonment of argument

Plaintiff abandoned the issue of standing based on his failure to argue it in his brief. The trial court's dismissal of all claims against certain defendants under Rule 12(b)(1) remained undisturbed.

4. Statutes of Limitation and Repose—breach of fiduciary duty—fraud—constructive fraud—outdated uncashed check in storage—due diligence

In a case involving the discovery of an outdated uncashed check found in storage files, the trial court did not err by concluding that plaintiff real estate company owner's claims for breach of fiduciary duty, fraud, and constructive fraud against defendants Synergy and JBS Liberty were barred by the applicable statute of limitations. Plaintiff's failure to use due diligence in discovering the alleged fraud was established as a matter of law.

Appeal by plaintiff from order entered 17 December 2015 by Judge Timothy S. Kincaid in Catawba County Superior Court. Heard in the Court of Appeals 7 March 2017.

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Law Offices of Matthew K. Rogers, PLLC, by Matthew K. Rogers, for plaintiff-appellant.

McGuireWoods, LLP, Charlotte, by Brian P. Troutman, Wm. Grayson Lambert, and Anita Foss, for defendants-appellees Pershing, LLC and Bank of New York Mellon Corporation.

Jones Law Firm, by Jeffrey D. Jones, for defendants-appellees JBS Liberty Securities, Inc. and Synergy Investment Group, LLC.

Poyner Spruill LLP, Charlotte, by Thomas L. Ogburn III and John M. Durnovich, for defendant-appellee The PNC Financial Services Group, Inc.

Womble Carlyle Sandridge & Rice, LLP, by W. Clark Goodman, for defendant-appellee RBC Capital Markets Corporation.

ZACHARY, Judge.

Plaintiff Richard C. Wilson appeals from an order dismissing his civil claims against Pershing, LLC (Pershing), Bank of New York Mellon (BNY Mellon), JBS Liberty Securities, Inc. (JBS Liberty), Synergy Investment Group, LLC (Synergy), JBS Group, LLC (JBS Group), RBC Capital Markets Corporation (RBCCMC), and John Doe I (collectively, defendants) pursuant to Rules 12(b)(1), (4), and (6) of the North Carolina Rules of Civil Procedure. For the reasons that follow, we affirm the trial court's order in its entirety.

I. Background

Wilson is the founder of Ipswich Bay, LLC (Ipswich), a real estate development company. In 1996, Wilson sought to purchase and develop 112 acres of real property located on Lake Norman. This development project was entitled "Harbor Cove." After Wilson obtained a revolving line of credit from Centura Bank (the Centura Loan) to finance the Harbor Cove project, he engaged a tax attorney to provide tax treatment and planning advice related to the Centura Loan. Working with Centura, Wilson's legal team determined that Wilson could obtain certain tax advantages if funds to be used as security for the Centura Loan were held in a trust account.

According to Wilson, on 28 February 1996, Centura Bank Vice President Greg Grier stated that \$250,000.00 could be deposited into

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a trust account at Centura Bank, and that the funds would serve as collateral for the Centura Loan as well as other potential loans. These funds were subsequently invested in mutual fund investment accounts (the Ipswich Security Account) that were managed by either Centura Bank or Centura Securities, Inc. (Centura Securities). As part of Wilson's tax strategy, the funds in the Ipswich Security Account were held for his benefit, but not in his name. It appears that Chris Teague, a Centura employee, was responsible for managing the Ipswich Security Account. Wilson understood that the \$250,000.00 deposit would remain invested in mutual funds until he requested that the money be returned to him, that he would benefit from mutual fund appreciation, and that no taxes would be levied on funds in the Ipswich Security Account or on any gains accruing while those monies were held in trust.

It is not clear how long the Harbor Cove project lasted, but Wilson alleges that he "continued to sell property in Harbor Cove through and after 2006." Wilson also alleges that while he met with his accountant, attorneys, and bankers concerning the Harbor Cove project "on a quarterly basis for many years[,] none of Wilson's "trusted advisors" ever indicated that the funds from the Ipswich Security Account needed to be transferred or liquidated. In 2013, Wilson met with his accountant to discuss potential tax write-offs related to Ipswich's developments at Lake Norman. While gathering information concerning Ipswich's depreciation schedules reaching back to 1985, Wilson "discovered Ipswich's detailed documentary records that had been kept in storage for [him]." Wilson found within the Ipswich files a certified check issued by Centura Securities in the amount of \$250,000.00. The check, dated 23 October 1998, was made payable to "Richard Gregg Wilson"¹ and stated on its face that it was "void after 180 days." In addition, the check displayed references to defendant BNY Mellon and defendant Pershing, a wholly owned subsidiary of BNY Mellon. Wilson later learned that Pershing was a service provider on the Ipswich Security Account.

Wilson contacted PNC Bank, N.A. (PNC)—an entity that Wilson believed was the successor in interest to Centura Securities—in late 2013 regarding the check, and PNC indicated that it would research the matter. While his inquiry was pending with PNC, Wilson presented the check to Wells Fargo, N.A., which refused to honor it and referred Wilson to the check's maker. By letter dated 15 January 2014, PNC informed Wilson

1. On appeal, Wilson maintains that his name is "Richard Craig Wilson." However, a copy of Wilson's drivers' license contained in the record appears to list Wilson's middle name as "Gregg" or "Cregg."

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that “[a]lthough the assets in the account with Centura Securities, Inc. [(i.e., the Ipswich Securities Account)] secured a loan made by Centura Bank, Centura Bank never had possession of the funds or the account other than its security interest.” The letter further stated that PNC never acquired any portion of Centura Securities; rather, Centura Securities became RBC Centura Securities, an entity that sold some of its assets to RBC Dain Rausher, which was later acquired by defendants Synergy and JBS Group in 2007. After Wilson filed a complaint with the U.S. Consumer Financial Protection Bureau, PNC reiterated that it never acquired any part of Centura Securities, and that Wilson’s claim had to be directed to Synergy or JBS.

Wilson eventually retained legal counsel, who presented the check to and demanded payment from BNY Mellon in August 2014. Pershing’s general counsel, Jane Myers, responded to this demand by letter dated 10 September 2014. Myers explained that Pershing acted as a “clearing” firm for the investment account managed by Centura Securities. In this capacity, Pershing was limited to providing “custodial, execution[,] and clearance services” for the Ipswich Security Account. Myers also rejected Wilson’s demand for payment on the check as follows:

[T]he check here was not a “certified casher’s” check as you claim, but was drawn against the assets held in the Account. On its face, the check stated that it was “void after 180 days” when it was issued 15 years ago. . . .

Because the age of the check exceeds the record retention period, [Pershing has] very limited information about the check and the Account. However, [Pershing’s] records reflect that the check was stopped on or about October 26, 1998. The Account was subsequently closed in July 1999.² Accordingly, there are no funds on deposit with Pershing and/or BNY Mellon purportedly owed to [Wilson] on the check. [Pershing] must direct you to the drawer of the check for any amounts allegedly owed.

Unable to negotiate the check or otherwise locate the Ipswich Security Account funds, Wilson filed a verified complaint (original

2. Before Wilson’s demand for payment on the check was refused, Wilson’s attorney had spoken with David Butler, an attorney in Pershing’s legal department. Wilson alleges that Butler “refused to tell [Wilson’s counsel] who directed that the Ipswich Security Account be closed[,]” and that “Butler represented he was not able to discern or disclose to whom the money in the Ipswich Security Account was distributed.”

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complaint) in Catawba County Superior Court against Pershing, BNY Mellon, Synergy, JBS Liberty, JBS Group, RBCCMC, and John Doe I. The original complaint, filed 22 May 2015, alleged claims for breach of fiduciary duty, constructive fraud, unjust enrichment, breach of contract, fraud, and unfair and deceptive trade practices. Defendants all filed motions to dismiss Wilson's original complaint. On 2 November 2015, the Honorable Timothy Kincaid conducted a hearing on defendants' motions to dismiss.

Shortly before Judge Kincaid called the case for hearing, Wilson's attorney filed an amended complaint and served it on defendants' attorneys. The amended complaint contained some new allegations and added a claim for civil conspiracy,³ but it generally mirrored the original complaint. Once the case came on for hearing, Wilson's attorney argued that the filing of the amended complaint rendered moot defendants' motions to dismiss, which were directed at the original complaint. Wilson's attorney then asserted that the trial court should not proceed with the hearing, and that the parties should be granted time to brief issues raised by the amended complaint. Defense counsel, however, advised the court that they were prepared to proceed as scheduled. Judge Kincaid refused to continue the hearing, reserved his ruling on Wilson's motion to amend, and proclaimed as follows:

[I]f I'm able to determine that [Wilson's] amended complaint can be filed as a matter of right, and would make any ruling that I make moot, then that's what I'll do. But I can't make a ruling on whether or not to hear the thing until I hear the thing. So . . . that's what I'm going to do.

As the hearing went forward, both parties referenced the original complaint and the amended complaint in their arguments to the court. Toward the end of the hearing, Judge Kincaid announced that he would dismiss all claims against defendants, and explained that his ruling applied to the original complaint. Defendants then sought clarification as to whether Judge Kincaid's ruling extended to the amended complaint. Acknowledging that he "had not determined whether or not it ha[d] been filed as a matter of right[.]" Judge Kincaid stated that because it was "clear argument was referenced to the amended complaint[.] I'm going to consider that as a waiver of any objection [by defendants] to amend, allow the amendment, and then grant the motions [to dismiss] that I

3. More specifically, the new claim alleged that "[o]ne or more of the [d]efendants conspired" to commit a breach of fiduciary duty, constructive fraud, and fraud.

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just granted on the original the same as to the amended.” Judge Kincaid also concluded that Wilson had waived any objection to the trial court’s decision to proceed with the hearing and to rule on the defendants’ oral motions to dismiss the amended complaint.

On 17 December 2015, Judge Kincaid entered a written order that memorialized his oral rulings at the 2 November 2015 hearing. Judge Kincaid concluded that all of Wilson’s claims should be dismissed pursuant to Rule 12(b)(6) because they were time-barred by the applicable statutes of limitations. The written order also contained additional reasons as to why Wilson’s claims against individual defendants were dismissed.

The claims against Pershing, BNY Mellon, PNC, and RBCCMC were dismissed by the court pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure for lack of standing. Judge Kincaid further ruled that dismissal was proper under Rule 12(b)(6) because Wilson failed to allege the existence of a contractual and a fiduciary relationship between either BNY Mellon or RBCCMC⁴ and Wilson, and that Wilson failed to plead any alleged fraudulent acts by BNY Mellon and RBCCMC with particularity, as required by Rule 9(b) of the North Carolina Rules of Civil Procedure. The fraud claims against Synergy and JBS Liberty were also dismissed because they failed to satisfy Rule 9(b)’s particularity requirements. Wilson appeals from the order dismissing his claims against defendants.

II. Discussion

A. Trial Court’s Refusal to Continue the 2 November 2015 Hearing

We first address Wilson’s assertion that Judge Kincaid improperly proceeded with the hearing on defendants’ motions to dismiss. A trial court’s ruling on a motion to continue is reviewed for abused of discretion. *Morin v. Sharp*, 144 N.C. App. 369, 373, 549 S.E.2d 871, 873 (2001) (citation omitted). “[T]here is power inherent in every court to control the disposition of causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Watters v. Parrish*, 252 N.C. 787, 791, 115 S.E.2d 1, 4 (1960).

[1] Initially we note that defense counsel has brought to the Court’s attention the fact that Wilson’s brief violates Rule 28(b)(6) of the Rules of Appellate Procedure because it does not contain a concise statement

4. The claims against RBCCMC were also dismissed pursuant to Rule 12(b)(4) of the North Carolina Rules of Civil Procedure for insufficient service of process.

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of the applicable standard of review for this issue. The Appellate Rules are mandatory, and failure to comply with them subjects an appeal or issue to dismissal. *State v. Hart*, 361 N.C. 309, 311, 644 S.E.2d 201, 202 (2007). However, our Supreme Court has held that failure to comply with a nonjurisdictional rule, such as Rule 28(b)(6), “normally should not lead to dismissal[.]” *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 198, 657 S.E.2d 361, 365 (2008), though some other sanction pursuant to Rules 25(b) or 34 may be appropriate. *Hart*, 361 N.C. at 311, 644 S.E.2d at 202. In this instance, we elect not to take any action.

[2] Wilson argues that his motion to continue the hearing should have been granted because the filing of his amended complaint—which occurred minutes before the hearing—rendered defendants’ motions to dismiss the original complaint moot. However, Wilson’s argument ignores defendants’ oral motions to dismiss the amended complaint, and Wilson does not challenge on appeal the trial court’s consideration of those motions.

It is true that defendants’ motions to dismiss the original complaint eventually became moot. However, this did not occur until the trial court *allowed* Wilson to amend the original complaint at the end of the hearing. See *Houston v. Tillman*, 234 N.C. App. 691, 695, 760 S.E.2d 18, 20 (2014) (holding that the “plaintiff’s amendment and restatement of the complaint[.]” which was accepted by the trial court, “rendered any argument [by the defendants] regarding [their motions to dismiss] the original complaint moot”). As the hearing unfolded, defendants and Wilson referenced the amended complaint while making their arguments. Although Judge Kincaid initially granted the defendants’ motions to dismiss the original complaint, shortly thereafter, he granted Wilson’s motion to amend, concluding that defendants had waived any objection to the amendment. Judge Kincaid then dismissed the amended complaint upon the same grounds that warranted dismissal of the original complaint.

The gravamen of Wilson’s contention is that he was prejudiced by Judge Kincaid’s decisions to hear arguments on the original complaint, dismiss the original complaint in its entirety, and then extend that ruling to the amended complaint. However, we need not decide this issue. Although Wilson’s counsel argued that the court should not proceed with the hearing, Judge Kincaid’s conclusion that Wilson waived “any objection to the [trial court’s] consideration of the Motion to Dismiss with respect to the Amended Complaint” has not been challenged on

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appeal. Consequently, we deem this issue abandoned pursuant to Rule 28(b)(6) of the Rules of Appellate Procedure.

B. Scope of Appeal

[3] Because the “Issues Presented” section of Wilson’s principal brief purports to raise thirteen issues on appeal, we must first determine whether all of those issues are properly before us. One point of considerable dispute is whether Wilson has preserved for appellate review the trial court’s dismissal of his claims against Pershing, BNY Mellon, PNC, and RBCCMC for lack of standing.

Standing, which is properly challenged by a Rule 12(b)(1) motion to dismiss, *Fuller v. Easley*, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001), “is a necessary prerequisite to a court’s proper exercise of subject matter jurisdiction.” *Aubin v. Susi*, 149 N.C. App. 320, 324, 560 S.E.2d 875, 878 (2002). “If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim.” *Estate of Apple v. Commercial Courier Express Inc.*, 168 N.C. App. 175, 177, 607 S.E.2d 14, 16 (2005).

Wilson argues in his reply brief that the “Issues Presented, Statement of the Case, relevant parts of the Statement of Facts, and Argument Section F [(Wilson’s challenge to the trial court’s decision to proceed with the 2 November 2015 hearing)] clearly challenge (and defeat) [the] erroneous assertion that [the standing] arguments were abandoned.” Wilson’s position is inherently flawed for the following reasons. To begin, the issues presented, statement of the case, and statement of the facts sections of an appellant’s brief cannot substitute for substantive *arguments* on an issue. See N.C. R. App. P. 28(b)(6) (requiring that a principal brief “contain the *contentions* of the appellant with respect to each issue presented” and providing that “[i]ssues not presented in a party’s brief, or in support of which *no reason or argument* is stated, will be taken as abandoned”) (emphasis added). As Wilson’s principal brief does not contain any substantive arguments on standing, this issue has been abandoned. *Id.* Wilson’s reply brief cannot be used to correct this deficiency in his principal brief. *Larsen v. Black Diamond French Truffles, Inc.*, __ N.C. App. __, __, 772 S.E.2d 93, 96 (2015) (a party’s reply brief could not correct the omission of a statement of the grounds for appellate review in the party’s principal brief); *Beckles-Palomares v. Logan*, 202 N.C. App. 235, 246, 688 S.E.2d 758, 765 (2010) (the defendant’s contention that the plaintiff’s claim was barred by the applicable statute of repose was abandoned and the issue could not be revived via reply brief). In addition, no portion of Wilson’s argument concerning the

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2 November 2015 hearing challenges the trial court's dismissal on the basis of lack of standing. Because any argument on the standing issue has been abandoned, the trial court's dismissal of all of Wilson's claims against Pershing, BNY Mellon, PNC, and RBCCMC under Rule 12(b)(1) remains undisturbed.

As a result, the only issues remaining on appeal are those related to the trial court's dismissal of Wilson's claims against Synergy and JBS Liberty. Wilson does not assert that his claims for unjust enrichment, breach of contract, unfair and deceptive trade practices, and civil conspiracy against Synergy and JBS Liberty were improperly dismissed. Any argument that those claims were erroneously dismissed is abandoned, N.C. R. App. P. 28(b)(6), and the trial court's unchallenged dismissal of those claims remains undisturbed. A careful review of Wilson's principal brief, however, reveals that he does specifically challenge the trial court's Rule 12(b)(6) dismissal of his claims against Synergy and JBS Liberty for breach of fiduciary duty, constructive fraud, and fraud. Consequently, our review is limited to whether the trial court erred in dismissing any or all of these three claims, as alleged against Synergy and JBS Liberty.

C. Standard of Review under Rule 12(b)(6)

Rule 12(b)(6) provides for the dismissal of an action when the complaint "fail[s] to state a claim upon which relief can be granted." N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2015). Our review of an order granting a Rule 12(b)(6) motion has several aspects. We consider "whether the allegations of the complaint . . . are sufficient to state a claim upon which relief can be granted under some legal theory." *Coley v. State*, 360 N.C. 493, 494-95, 631 S.E.2d 121, 123 (2006) (citation and internal quotation marks omitted). Under this mode of review, "the well-pleaded material allegations of the complaint are taken as true[.]" *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970) (citation omitted), and "the complaint is liberally construed[.]" *Wells Fargo Bank, N.A. v. Corneal*, 238 N.C. App. 192, 195, 767 S.E.2d 374, 377 (2014). Legal conclusions, however, are not entitled to a presumption of validity." *Id.* Similarly, this Court is "not required . . . to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Strickland v. Hedrick*, 194 N.C. App. 1, 20, 669 S.E.2d 61, 73 (2008) (citations and internal quotation marks omitted). In sum, 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." *Craven v. Cope*, 188 N.C. App. 814, 816, 656 S.E.2d 729, 732 (2008) (citation omitted).

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D. Statutes of Limitations

[4] Judge Kincaid dismissed all of Wilson’s claims on the basis that they were time-barred by the applicable statutes of limitations. As explained above, however, the dismissal of Wilson’s claims for breach of fiduciary duty, fraud, and constructive fraud against Synergy and JBS Liberty are the only issues that remain subject to appellate review.

A Rule 12(b)(6) motion to dismiss is the proper vehicle for asserting “ ‘[a] statute of limitations defense . . . if it appears on the face of the complaint that such a statute bars the claim. Once the defendant raises a statute of limitations defense, the burden of showing that the action was instituted within the prescribed period is on the plaintiff.’ ” *Birtha v. Stonemor, N. Carolina, LLC*, 220 N.C. App. 286, 292, 727 S.E.2d 1, 6-7 (2012) (quoting *Horton v. Carolina Medicorp*, 344 N.C. 133, 136, 472 S.E.2d 778, 780 (1996)).

Wilson makes a general argument that the relevant statutes of limitations did not begin to run until he discovered the uncashed check and unsuccessfully attempted to negotiate it. Wilson then makes the more specific argument that he has sufficiently “alleged his efforts supporting his diligence (including periodic meetings with his advisors), and that his trusted advisors’ representations prevented Wilson from learning earlier in time that the Ipswich Security Account was closed.” We disagree.

“Allegations of breach of fiduciary duty that do not rise to the level of constructive fraud are governed by the three-year statute of limitations applicable to contract actions contained in N.C. Gen. Stat. § 1-52(1) ([2015]).” *Toomer v. Branch Banking & Trust Co.*, 171 N.C. App. 58, 66, 614 S.E.2d 328, 335, *disc. review denied*, 360 N.C. 78, 623 S.E.2d 263 (2005). In contrast, “[a] claim of constructive fraud based upon a breach of a fiduciary duty falls under the ten-year statute of limitations contained in N.C. Gen. Stat. § 1-56 ([2015]).” *NationsBank of N. Carolina, N.A. v. Parker*, 140 N.C. App. 106, 113, 535 S.E.2d 597, 602 (2000). Claims for actual fraud are subject to a three-year statute of limitations. N.C. Gen. Stat. § 1-52(9) (2015).

In general, “[s]tatutes of limitation are . . . seen as running from the time of injury, or discovery of the injury in cases where that is difficult to detect. They serve to limit the time within which an action may be commenced after the cause of action has accrued.” *Trustees of Rowan Tech. v. Hammond Assoc.*, 313 N.C. 230, 234 n.3, 328 S.E.2d 274, 276-77 n.3 (1985).

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With respect to actual fraud claims, “the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake.” N.C. Gen. Stat. § 1-52(9) (2015). “[D]iscovery’ means either actual discovery or when the fraud should have been discovered in the exercise of reasonable diligence.” *State Farm Fire & Cas. Co. v. Darsie*, 161 N.C. App. 542, 547, 589 S.E.2d 391, 396 (2003). The circumstances at issue dictate whether this determination falls within the province of the jury or the trial court. Whether a plaintiff exercised due diligence in discovering the fraud is ordinarily an issue of fact for the jury “when the evidence is not conclusive or is conflicting.” *Huss v. Huss*, 31 N.C. App. 463, 468, 230 S.E.2d 159, 163 (1976). “Failure to exercise due diligence may be determined as a matter of law, however, where it is clear that there was both *capacity* and *opportunity* to discover the [fraud].” *Spears v. Moore*, 145 N.C. App. 706, 708-09, 551 S.E.2d 483, 485 (2001) (emphasis added) (citing *Huss*, 31 N.C. App. at 468, 230 S.E.2d at 163). Furthermore, “it is generally held that when it appears that by reason of the confidence reposed the confiding party is *actually deterred* from sooner suspecting or discovering the fraud, he is under no duty to make inquiry until something occurs to excite his suspicions.” *Vail v. Vail*, 233 N.C. 109, 116-17, 63 S.E.2d 202, 208 (1951) (emphasis added; citation and internal quotation marks omitted).

This Court has also applied the “due diligence” standard in determining when the statute of limitations begins to run on a claim for breach of fiduciary duty. *Dawn v. Dawn*, 122 N.C. App. 493, 495, 470 S.E.2d 341, 343 (1996) (“The statute begins to run when the claimant ‘knew or, by due diligence, should have known of the facts constituting the basis for the claim.’ ”) (internal quotation marks omitted) (citing *Pittman v. Barker*, 117 N.C. App. 580, 591, 452 S.E.2d 326, 332, *review denied*, 340 N.C. 261, 456 S.E.2d 833 (1995)). We also find it appropriate to apply this standard to Wilson’s constructive fraud claim. *See Hunter v. Guardian Life Ins. Co. of Am.*, 162 N.C. App. 477, 485, 593 S.E.2d 595, 601 (2004) (applying the “reasonable diligence” standard applicable to actions grounded in fraud to determine whether the pertinent statutes of limitations barred the plaintiffs’ claims for fraud, constructive fraud, negligent misrepresentation, and unfair and deceptive trades practices).

Here, the relevant events concerning the timing of the alleged fraudulent acts were as follows: Wilson deposited \$250,000.00 in the Ipswich Security Account in 1996; the check was issued on 23 October 1998, and it became void in April 1999; and the Ipswich Security Account was closed in July 1999. The gravamen of Wilson’s amended complaint is that the relevant fraudulent act occurred when the Ipswich

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Security Account funds were “secretly” transferred in July 1999. Wilson inadvertently came across the check in 2013 after he “discovered [and searched] Ipswich’s detailed documentary records that had been kept in storage for [him].” In pleading his claims for breach of fiduciary duty and constructive fraud, Wilson alleges that:

95. Despite meeting with his trusted advisors on regular basis until through at least 2005, at no point was Wilson notified or did Wilson receive a statement indicating that funds in the Ipswich Security Account were transferred or the Ipswich Security Account was closed.

...

98. Wilson placed his confidence and trust in the Defendants and the Defendants acted in a manner that did not cause Wilson to become suspicious. This relationship of trust and confidence delayed Wilson’s discovery of the fraud, and until Wilson’s recent discovery of the check and refusal to honor the check or provide funds in the Ipswich Security Accounts, the refusal to provide Wilson with information regarding the Trust Account, and the “No Action Letter,” the acts of one or more of the Defendants were only recently discovered and could not have been discovered with reasonable diligence, until recently.

Paragraph 127 of Wilson’s fraud claim contains the allegation that “one or more of the Defendants intentionally failed to disclose [the transfer of the Ipswich Security Account funds in July 1999] to Wilson intending to fraudulently conceal knowledge of the transfer to Wilson.”

Critically, despite the conclusory allegation at the end of paragraph 98, Wilson fails to allege how the exercise of due diligence would not have led Wilson to discover that the funds had been transferred or withdrawn. Wilson had the capacity to investigate the Ipswich Security Account’s status at any time, as the account was opened with *his* funds for *his* benefit, and the check was found in the “detailed documentary records” that had been kept for *him*. There is no allegation that Wilson was denied access to his own files. Wilson also had the opportunity to discover that the funds had been transferred simply by inquiring as to the account’s status or balance. Significantly, Wilson alleges that his “trusted advisors” never notified him or furnished him with a statement indicating that the Ipswich Security Account had been closed. It is possible that Wilson’s advisors were tasked with handling certain matters related to the Harbor Cove project, and that they made representations

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that lulled Wilson into a sense of security. But those advisors have not been named in this action. Nothing in the amended complaint suggests that any of the defendants (or their predecessors in interest) took any action or made any representation that prevented Wilson from learning about the issuance of the check or the subsequent transfer of funds. Although Wilson alleges that his trusted advisors never furnished him with a statement concerning the transfer of funds, Wilson does not allege that any of the defendants failed to *issue* such a statement. Similarly, while paragraph 127 in the amended complaint contains the conclusory allegation that one or more defendants fraudulently concealed the transfer, Wilson does not allege that he was denied access in any manner to information concerning the Ipswich Security Account.

“Our courts have determined that a plaintiff cannot simply ignore facts which should be obvious to him or would be *readily discoverable upon reasonable inquiry*.” *S.B. Simmons Landscaping & Excavating, Inc. v. Boggs*, 192 N.C. App. 155, 161-62, 665 S.E.2d 147, 151 (2008) (emphasis added) (citing *Peacock v. Barnes*, 142 N.C. 215, 218, 55 S.E. 99, 100 (1906)). Moreover, even assuming that relationships of trust and confidence existed between Wilson and Synergy, and Wilson and JBS Liberty, Wilson’s failure to use due diligence in discovering the allegedly fraudulent acts could be excused only if he were “actually deterred” from “suspecting or discovering the fraud.” *Vail*, 233 N.C. at 116, 63 S.E.2d at 208. Based on the unique circumstances of this case, we conclude that had Wilson made a reasonably diligent inquiry, he could have discovered the acts of which he now complains, or the lack thereof. Our conclusion rests upon the notion that Wilson was ultimately responsible for his own affairs. If Wilson’s advisors negligently or fraudulently deterred him from inquiring as to the status of the \$250,000.00 principal (plus gains) contained in the Ipswich Security Account, those advisors should have been named in this action. Wilson has not alleged that any defendant denied him the opportunity to investigate,⁵ and nothing in the amended complaint—apart from references to trusted advisors—suggests that Wilson lacked the capacity to discover the alleged fraud when it supposedly occurred in 1999. Accordingly, Wilson’s failure to use due diligence in discovering the alleged fraud has been established as a matter of law.

5. We note that while paragraph 129 of Wilson’s fraud claim contains a very general allegation that one of more of defendants “*are intentionally withholding information*”—meaning, currently withholding information—from him, Wilson fails to allege that he was denied the opportunity to investigate the Ipswich Security Account’s status before or at the time when the allegedly fraudulent transfer took place (July 1999), or at any point until he discovered the check in 2013. (Emphasis added).

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Wilson's arguments are without merit, and the trial court properly concluded that all of Wilson's claims—including the claims against Synergy and JBS Liberty—were barred by the applicable statutes of limitations.

III. Conclusion

For the reasons stated above, we affirm the trial court's order dismissing all of Wilson's claims against defendants.

AFFIRMED.

Judges BRYANT and INMAN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 16 MAY 2017)

BLANTON SUPPLIES OF LITTLE RIVER, INC. v. WILLIAM BARBER, INC. CUSTOM HOME BUILDER No. 16-916	Brunswick (12CVS1454)	Vacated and Remanded
EDWARDS v. PCC AIRFOILS No. 16-951	N.C. Industrial Commission (377113)	Affirmed
IN RE A.G. No. 16-1200	Rowan (12JA55)	Affirmed
IN RE FORECLOSURE OF RANKIN No. 16-771	Mecklenburg (15SP1520)	Affirmed
IN RE J.D.C. No. 16-1256	Caldwell (15J96)	Affirmed
IN RE J.F. No. 16-1169	New Hanover (15JA202)	Affirmed in Part; Vacated in Part; and Remanded.
IN RE J.R.E. No. 16-1140	Ashe (15JA26) (15JA27) (15JA28) (15JA29)	Affirmed in Part and Reversed in Part
IN RE J.S. No. 16-1039	Robeson (13JA118-119) (15JA340)	Affirmed in Part, Vacated and Remanded in Part.
IN RE McLEAN No. 16-1173	Franklin (14SP75)	Affirmed
MILLS v. MAJETTE No. 16-1145	Forsyth (13CVS7369)	Affirmed in Part, Reversed in Part and Remanded
MOSES v. N.C. INDUS. COMM'N No. 16-1197	N.C. Industrial Commission (TA-24351)	Affirmed
POSEY v. WAYNE MEM'L HOSP., INC. No. 16-1218	Wayne (16CVS1202)	Affirmed

STATE FARM MUT. AUTO. INS. v. PHILLIPS No. 16-162	Onslow (14CVS2747)	Affirmed
STATE v. BOYD No. 16-1090	Pitt (14CRS56115)	No Error
STATE v. BROOKS No. 16-828	Durham (15CRS52820) (15CRS52822) (15CRS52824)	Affirmed
STATE v. CRAIN No. 16-844	Gaston (14CRS61004)	No Error
STATE v. ELLISON No. 16-879	Cumberland (12CRS50249) (12CRS54162)	No plain error
STATE v. GANN No. 15-1344-2	Buncombe (14CRS311) (14CRS84454) (14CRS84455)	Vacated in Part, Dismissed in Part, No Error in Part, and Remanded in Part for Resentencing.
STATE v. GREENE No. 16-891	Watauga (15CRS50072)	No Error
STATE v. HOLLOWAY No. 16-940	Wake (13CRS218273) (13CRS218275)	No Error
STATE v. HUGHES No. 16-779	Yancey (13CRS50288) (13CRS50348)	Affirmed
STATE v. WATERS No. 16-985	Henderson (15CRS52360)	No Error
STATE v. WILKINS No. 16-1146	Wake (13CRS228201)	No Error
STATE v. WILSON No. 16-1043	Iredell (14CRS55588-89) (16CRS1418)	No Error in Part, Vacated and Remanded in Part.
WYNN v. TYRRELL CTY. BD. OF EDUC. No. 16-1130	Tyrrell (15CVS47)	Affirmed
ZENG v. DURHAM No. 16-1276	Durham (16CVD2432)	Affirmed

BUNCH v. BRITTON

[253 N.C. App. 659 (2017)]

WILLIAM BUNCH, III, PLAINTIFF

v.

LISA BRITTON, OFFICIALLY AND MICHAEL PROCTOR, OFFICIALLY, DEFENDANTS

No. COA16-181

Filed 6 June 2017

1. Constitutional Law—sovereign immunity—not a bar to state constitutional claims

In a civil case arising from plaintiff being required to register as a sexual offender in North Carolina for a Michigan offense, sovereign immunity was not a bar to plaintiff's claims under the North Carolina Constitution against individuals in their official capacity. There is a long-standing emphasis in our state on ensuring redress for every constitutional injury.

2. Constitutional Law—state constitution—removal from sex offender registration list—adequacy of state remedy

Where plaintiff was required to register as a sex offender and his petition to terminate that registration was granted, his state constitutional claims against the individuals who required him to register, in their official capacities, was his only way to seek redress. Another form of "adequate state remedy," such as a common law claim for monetary damages, would invoke immunity by defendants.

3. Jurisdiction—standing—declaratory judgment—monetary damages—injunction

Where plaintiff was required to register as a sex offender and his petition to terminate that registration was granted, plaintiff had standing to bring his civil claims for declaratory judgment and monetary damages against the government employees who, in their official capacities, had compelled plaintiff's sex offender registration. A declaratory judgment would clarify and settle one portion of the legal relations at issue, as well as afford relief from uncertainty and controversy. However, the trial court properly dismissed plaintiff's request for an injunction requiring a new legal process applicable to all future registrants that would have required statutory changes and allowed no benefit to plaintiff who was no longer registered.

4. Constitutional Law—liberty interests—due process—sex offender registration

In a civil case against a county and a state employee in their official capacity arising from plaintiff being compelled to register

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in North Carolina for a Michigan sex offense, the trial court did not err by concluding that plaintiff failed to state a claim that his liberty interests were violated. Plaintiff was afforded due process in Michigan, which gave him the opportunity to avoid any wrongful deprivation due to a change in its statute by requesting removal from the registry, but plaintiff failed to exercise that opportunity.

5. Constitutional Law—equal protection—conviction in another state requiring sex offender registration

The trial court did not err by concluding that plaintiff failed to state a claim that his equal protection rights were violated in a civil case against government employees in their official capacities who compelled plaintiff to register as a sex offender. Although plaintiff contended that he was treated differently from other 17-year-olds who have consensual sex with 15-year-olds, defendant was convicted in Michigan and initially required to register in Michigan (before a change in Michigan law). North Carolina treated plaintiff exactly like all individuals who had a final conviction in another state of an offense that required registration under the sex offender registration statutes of that state.

6. Pleadings—motion for judgment on pleadings—declaratory judgment—injunctive relief—monetary damages—government employee—non-discretionary job function

In a civil case arising from plaintiff being compelled to register as a sex offender, the trial court did not err by granting a motion for judgment on the pleadings against a county employee who compelled plaintiff to register as a sex offender. Defendant was performing a non-discretionary function of his job.

Appeal by plaintiff from order entered 4 December 2015 by Judge Donald W. Stephens in Superior Court, Wake County. Heard in the Court of Appeals 22 August 2016.

Tim, Fulton, Walker & Owen, PLLC, by S. Luke Largess, for plaintiff-appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General J. Joy for defendant-appellee Britton.

Womble Carlyle Sandridge & Rice, LLP, by Scott D. MacLatchie, for defendant-appellee Proctor.

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[253 N.C. App. 659 (2017)]

STROUD, Judge.

Plaintiff appeals a trial court order dismissing plaintiff's action with prejudice. Defendants each raised several defenses, and the trial court dismissed plaintiff's claims as to both defendants without stating the legal rationale for the dismissal. Because plaintiff has asserted constitutional violations of liberty interests and equal protection under Article I, Section 19 of the North Carolina Constitution, these claims are not barred by sovereign or governmental immunity. Plaintiff also had standing to bring all of his claims except his claim for injunctive relief. But plaintiff's liberty interest claim ultimately fails because he was afforded due process as to his sex offender registration though he failed to exercise his statutory right in Michigan to request removal from the registry before he moved to North Carolina. Plaintiff's equal protection claim fails because the State of North Carolina treated plaintiff exactly as it treats all individuals who have final convictions that require sex offender registration in other states. Because ultimately both of plaintiff's claims fail on the face of the complaint, we affirm the trial court's order of dismissal.

I. Background

In February of 2012, “[a]fter consulting with the local sheriff,” plaintiff compulsorily registered as a sex offender in Cleveland County, North Carolina. *In re Bunch*, 227 N.C. App. 258, 259, 742 S.E.2d 596, 598 (2013) (“*Bunch I*”). Plaintiff then petitioned “to terminate his registration requirement” and ultimately prevailed. *Id.* Thereafter, plaintiff filed a civil action, *this action*, against two government employees whom he alleged had wrongfully compelled his unnecessary registration. To understand the background of plaintiff's current appeal, we turn first to plaintiff's original action for termination of his registration as a sex offender. *See generally In re Bunch*, 227 N.C. App. 258, 742 S.E.2d 596 (2013) (“*Bunch I*”).

A. *Bunch I*In *Bunch I*

[i]n April 1993, when he was seventeen years old, petitioner pleaded guilty to third-degree criminal sexual conduct in Wayne County, Michigan for sexual intercourse with a female between the ages of thirteen and fifteen. In Michigan, consensual sexual intercourse between a seventeen-year-old and a person at least 13 years of age and

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under 16 years of age constituted criminal sexual conduct in the third degree. Petitioner has no other convictions that could be considered reportable sexual offenses.

Nine years later, in July 2002, petitioner's son was born. When his son was seven years old, the Circuit Court for the County of Wayne, Michigan, awarded petitioner sole custody of his child, by order entered 5 November 2009. On 18 January 2012, the Michigan court entered an order allowing petitioner to change the domicile of his child to North Carolina, and petitioner and his son moved to North Carolina. After consulting with the local sheriff, petitioner registered with the North Carolina Sex Offender Registry on 8 February 2012. He then filed a petition to terminate his registration requirement in superior court, Cleveland County. On 7 June 2012, the superior court held a hearing on his petition, wherein petitioner was represented by counsel and the State was represented by the elected District Attorney for Cleveland County.

At the hearing, petitioner presented the records of his Michigan conviction and records relating to the custody of his son and argued that he was never required to register in North Carolina because the offense for which he was convicted in Michigan is not a reportable conviction, or even a crime, in North Carolina; was not a reportable conviction in Michigan in 1993; and has not been a reportable conviction in Michigan since 1 July 2011. In addition, petitioner presented evidence that he met all requirements under N.C. Gen. Stat. § 14-208.12A for termination of registration other than ten years of registration in North Carolina. The State presented no evidence and made no argument. After considering the documents and petitioner's argument, the trial court announced that it was granting the petition on the basis that petitioner was never required to register in North Carolina, rather than on the passage of time. Again, the State registered no objection to the trial court's decision. At the close of the hearing, the trial court executed an order on the pre-printed form entitled Petition and Order for Termination of Sex Offender Registration, AOC-CR-263, Rev. 12/11 granting the petition, but also directed petitioner's attorney to prepare a more detailed order including the court's rationale as stated in the rendition of the order in open

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court for allowing termination of petitioner's registration. The trial court entered its full written order on 19 June 2012. The State filed written notice of appeal from the 19 June order on 19 July 2012.

227 N.C. App. 258, 259–60, 742 S.E.2d 596, 597–98 (citations, quotation marks, and brackets omitted).

This Court dismissed the State's appeal because it had not preserved the issue before the trial court. *Id.* at 259, 742 S.E.2d at 597. The State then petitioned the Supreme Court for discretionary review which was denied. *See In re Bunch*, 367 N.C. 224, 747 S.E.2d 541 (2013). Thus, ultimately the trial court's order was upheld for plaintiff to be removed from the sex offender registry. *See generally Bunch I*, 227 N.C. App. 258, 742 S.E.2d 596, *disc. rev. denied*, 367 N.C. 224, 747 S.E.2d 541. With this background in mind, we turn to the action before us.

B. This Case

In August of 2015, plaintiff filed an amended complaint against Ms. Lisa Britton, "supervisor or head administrator of the State's sex offender registration program[,] for the State Bureau of Investigation in the Department of Public Safety and Mr. Michael Proctor, "administrator of the sex offender registration program" for the Cleveland County Sheriff's Department, based upon his requirement to register which was ultimately overturned in *Bunch I*. *See id.* Plaintiff alleged that when he moved to North Carolina he was contacted by defendant Proctor. Defendant Proctor informed plaintiff he would need to register as a sex offender. Plaintiff explained to defendant Proctor that he did not believe he should have to register because "his offense in Michigan was not a crime in North Carolina and was no long[er] a mandatory sex registry offense in Michigan[.]" Defendant Proctor informed plaintiff that if he did not register, he would be arrested.

To avoid arrest and criminal prosecution, on 8 February 2012, plaintiff registered "under protest." Thereafter, plaintiff was barred from going to his son's school and accompanying his son to the doctor and was required to move because his apartment was too close to a daycare facility. Plaintiff brought these claims under Article I, Section 19 of the North Carolina Constitution regarding violations of his liberty interests and equal protection. Plaintiff requested damages in excess of \$10,000.00.

In September 2015, defendant Proctor answered plaintiff's complaint and pled the affirmative defenses of sovereign immunity based on

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allegations of the Sheriff's Office's lack of liability insurance coverage; estoppel; plaintiff's failure to mitigate his damages; and failure to state a claim upon which relief could be granted. Also in September 2015, defendant Britton filed a motion to dismiss plaintiff's amended complaint under North Carolina Rules of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction due to sovereign and governmental immunity and Rule 12(b)(6) for failure to state a proper claim. In November of 2015, defendant Proctor filed a motion for judgment on the pleadings, citing North Carolina Rule of Civil Procedure 12(c), "on the grounds the Amended Complaint on file herein fails to state a claim upon which relief may be granted in that Plaintiff was properly advised of state law requirements for sex offender registration upon relocating to North Carolina." On 4 December 2015, the trial court allowed defendants' motions to dismiss. Thus, all claims were dismissed with prejudice. Plaintiff appeals.

II. Basis for Dismissal

The entire substance of the trial court's order dismissing plaintiff's claims reads:

This matter is before the Court upon Defendant Britton's motions to dismiss pursuant to Rule 12(b)(1) and 12(b)(6). The Defendant's motions are allowed and claims against Britton are dismissed with prejudice.

This matter is also before the Court upon Defendant Proctor's motion for judgment on the pleadings pursuant to Rule 12(c). The Defendant's motion is allowed and claims against Proctor are dismissed with prejudice.

So ordered this, the 1st day of December, 2015.

Thus, the trial court allowed defendant Britton's motion under North Carolina Rule of Civil Procedure 12(b)(1) and (b)(6) and defendant Proctor's motion under North Carolina Rule of Civil Procedure 12(c). Plaintiff makes several arguments on appeal, but we first consider plaintiff's last argument relating to dismissal based upon North Carolina Rule of Civil Procedure 12(b)(1).

A. Dismissal for Lack of Subject Matter Jurisdiction under Rule 12(b)(1)

We first note that since the trial court did not specifically identify the legal basis for the dismissal, and defendants raised several different grounds for dismissal, we must consider each possible rationale. We will start with sovereign or governmental immunity, since if defendants

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are protected by sovereign or governmental immunity, the court has no subject matter jurisdiction over plaintiff's claims, and jurisdiction is the essential prerequisite for any claim. *See Hentz v. Asheville City Bd. of Educ.*, 189 N.C. App. 520, 522, 658 S.E.2d 520, 521–22 (2008) (“Subject matter jurisdiction is a prerequisite for the exercise of judicial authority over any case or controversy.”).

Plaintiff has sued both defendants in their official capacities, and not in their individual capacities. “[A] suit against a defendant in his official capacity means that the plaintiff seeks recovery from the entity of which the public servant defendant is an agent.” *Meyer v. Walls*, 347 N.C. 97, 110, 489 S.E.2d 880, 887 (1997) (citation omitted). We note that when a county or county agency is the named defendant, the immunity is appropriately identified as governmental immunity; conversely, the doctrine of sovereign immunity applies when suit is brought against the State or one of its agencies. *See id.* at 104, 489 S.E.2d at 884. (“Under the doctrine of sovereign immunity, the State is immune from suit absent waiver of immunity. Under the doctrine of governmental immunity, a county is immune from suit for the negligence of its employees in the exercise of governmental functions absent waiver of immunity.” (citation omitted)).¹

Only plaintiff's last argument addresses the dismissal under Rule 12(b)(1), based upon sovereign immunity. Plaintiff contends that he “[p]roperly [n]amed [a]ppellees in [t]heir [o]fficial [c]apacities[.]” Defendant Britton argues that there were actually three reasons the trial court properly dismissed pursuant to Rule 12(b)(1) because “[p]laintiff did not allege or identify any waiver of sovereign immunity[.]” “failed to allege sufficient facts in the amended Complaint to establish that there is no adequate remedy available to him such that a direct claim under the Constitution would be allowable[.]” and “lacks standing to bring the amended Complaint or request declaratory or injunctive relief.”

Rule 12(b)(1) permits a party to contest, by motion, the jurisdiction of the trial court over the subject matter in controversy. *See* N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) (2015).

Rule 12(b)(1) of the Rules of Civil Procedure allows for the dismissal of a complaint due to a lack of jurisdiction

1. Although both defendants raised the defense of sovereign or governmental immunity, defendant Proctor did not address this argument on appeal, and thus we will not either. We are also uncertain whether the trial court considered the defense of immunity as to defendant Proctor since the order says only that his motion was allowed under Rule 12(c).

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over the subject matter of the claim or claims asserted in that complaint. The standard of review on a motion to dismiss under Rule 12(b)(1) for lack of jurisdiction is *de novo*.

State ex rel. Cooper v. Seneca-Cayuga Tobacco Co., 197 N.C. App. 176, 181, 676 S.E.2d 579, 583 (2009) (citation, quotation marks, and brackets omitted).

1. Sovereign Immunity

[1] Defendant Britton argues that

[i]n the Complaint filed by Plaintiff, Defendant Britton, an employee of the State Bureau of Investigation (hereinafter ‘SBI’) was sued in her official capacity. As such, in her official capacity Defendant Britton is immune from suit absent a waiver. . . .

In order to withstand a motion to dismiss for failure to state a cause of action against government actors, the complaint must allege a valid waiver of immunity. . . . To establish a waiver of sovereign immunity a plaintiff must specifically allege a waiver in his complaint.

But our courts have thoroughly addressed similar issues and ultimately determined that sovereign immunity is not a bar to a constitutional claim based upon Article I of the North Carolina Constitution:

As a general rule, the doctrine of governmental, or sovereign immunity bars actions against, *inter alia*, the state, its counties, and its public officials sued in their official capacity. Thus, a state may not be sued unless it has consented by statute to be sued or has otherwise waived its immunity from suit.

In the present case, defendants are state officials sued in their official capacity. As they contend on appeal, defendants have not expressly waived sovereign immunity. Defendants further contend that there is no statutory waiver applicable to plaintiff’s claim and that the common law waiver of sovereign immunity identified by our Supreme Court in *Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276 (1992), does not apply to plaintiff’s claim in the present case. We disagree.

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In *Corum*, our Supreme Court held that the doctrine of sovereign immunity cannot stand as a barrier to North Carolina citizens who seek to remedy violations of their rights guaranteed by the Declaration of Rights of our Constitution]. . . .

. . . .

Following *Corum*, in *Peveall v. County of Alamance*, 154 N.C. App. 426, 573 S.E.2d 517 (2002), this Court noted that it is well established that sovereign immunity does not protect the state or its counties against claims brought against them directly under the North Carolina Constitution. In *Sanders v. State Personnel Comm'n*, 183 N.C. App. 15, 644 S.E.2d 10 (2007), this Court again held that sovereign immunity is not available as a defense to a claim brought directly under the state constitution.

However, relying on this Court's opinion in *Petroleum Traders Corp. v. State*, 190 N.C. App. 542, 660 S.E.2d 662 (2008), defendants argue that the holding in *Corum* does not apply to plaintiff's action in the present case because plaintiff's action arises under Article IX, rather than Article I, of our Constitution. In *Petroleum Traders*, we noted that our appellate courts have applied the holding of *Corum* to find a waiver of sovereign immunity only in cases wherein the plaintiff alleged a violation of a right protected by the Declaration of Rights. Our opinion in *Petroleum Traders* distinguished the holdings in *Sanders* and *Peveall*, noting that the plaintiffs in those cases, as in every other case waiving sovereign immunity based on *Corum*, alleged a violation of a right protected by the Declaration of Rights. *Corum* contains no suggestion of an intention to eliminate sovereign immunity for any and all alleged violations of the N.C. Constitution. Accordingly, we concluded in *Petroleum Traders* that *Corum* is properly limited to claims asserting violation of the plaintiff's personal rights as set out in the N.C. Constitution Declaration of Rights.

. . . .

. . . [O]ur Supreme Court again addressed the issue of waiver of sovereign immunity as against constitutional claims in *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 678 S.E.2d 351 (2009). In *Craig*, our Supreme

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Court stated, [t]his Court could hardly have been clearer in its holding in *Corum*: In the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution. Our Supreme Court emphasized that *Corum* clearly established the principle that sovereign immunity could not operate to bar direct constitutional claims. In *Craig*, our Supreme Court allowed the plaintiff to proceed on his constitutional claims, including not only two claims under Article I, but also one claim under Article IX of our Constitution. Our Supreme Court expressed that to hold otherwise would be contrary to our opinion in *Corum* and inconsistent with the spirit of our long-standing emphasis on ensuring redress for every constitutional injury. Notably, our Supreme Court did not hold that the defendant's assertion of sovereign immunity in *Craig* barred the plaintiff's Article IX claim.

. . . .

In light of this line of cases allowing constitutional claims to proceed against the State under Article IX of our Constitution, we have likewise uncovered no case in which a plaintiff's Article IX constitutional claim was barred by the defense of sovereign immunity. Moreover, in reviewing the merits of the plaintiff school boards' claims in these cases, neither this Court nor our Supreme Court has acknowledged the possibility that sovereign immunity might bar the plaintiffs' constitutional action under Article IX, Section 7. . . .

. . . .

Given the long line of cases in North Carolina allowing local boards of education to pursue constitutional claims under Article IX, Section 7 against the State and its agencies as described herein, and in light of our Supreme Court's holding in *Craig* allowing a plaintiff to pursue an Article IX claim in addition to his Article I claims despite the defendants' assertion of sovereign immunity, we hold plaintiff in the present case has sufficiently alleged a common law waiver of sovereign immunity by the State under the principle established by our Supreme Court in *Corum* for plaintiff's direct Article IX constitutional claim.

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Richmond Cnty. Bd. of Educ. v. Cowell, 225 N.C. App. 583, 587–91, 739 S.E.2d 566, 569-71 (2013) (citations, quotation marks, ellipses, and brackets omitted). Therefore, the trial court could not have properly dismissed plaintiff’s claims under Article I of the North Carolina Constitution pursuant to 12(b)(1) based on sovereign or governmental immunity. *See id.*

2. Adequate State Remedy

[2] Defendant Britton also contends that plaintiff’s removal from the sex offender registry *was* plaintiff’s remedy, and thus the Court now has no grounds upon which to hear his current action. Even if we assume that removal from the registry was one form of a remedy, we disagree that this was necessarily an “adequate state remedy,” particularly where he has alleged monetary damages and requested other relief. One possible alternative for plaintiff to recover monetary damages from defendants would be our State’s tort law, but such a claim would be barred by sovereign immunity and therefore, is not an adequate State remedy. *See Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 339–40, 678 S.E.2d 351, 355 (2009) (“Here, plaintiff’s remedy cannot be said to be adequate by any realistic measure. Indeed, to be considered adequate in redressing a constitutional wrong, a plaintiff must have at least the opportunity to enter the courthouse doors and present his claim. Under the facts averred by plaintiff here, the doctrine of sovereign immunity precludes such opportunity for his common law negligence claim because the defendant Board of Education’s excess liability insurance policy excluded coverage for the negligent acts alleged. Plaintiff’s common law cause of action for negligence does not provide an adequate remedy at state law when governmental immunity stands as an absolute bar to such a claim. But as we held in *Corum*, plaintiff may move forward in the alternative, bringing his colorable claims directly under our State Constitution based on the same facts that formed the basis for his common law negligence claim.” (footnote omitted)).

Plaintiff here specifically pled he “has no remedy at common law for the conduct complained of herein. A violation of the rights enumerated in Article I of the state constitution, the Declaration of Rights, shall be brought against a defendant in his or her official capacity and is not subject to governmental or sovereign immunity under *Corum*.” As a constitutional claim is plaintiff’s only way to seek redress without invoking immunity on the part of defendants, some other form of an “adequate state remedy” will not serve as a basis for dismissal under Rule 12(b)(1).

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3. Standing

[3] Lastly, as to Rule 12(b)(1), defendant Britton argues “[p]laintiff lacks standing to bring the amended Complaint or request declaratory or injunctive relief.”

The party invoking jurisdiction has the burden of proving the elements of standing. As a jurisdictional requirement, standing relates not to the power of the court but to the right of the party to have the court adjudicate a particular dispute. North Carolina courts began to use

the term “standing” in the 1960s and 1970s to refer generally to a party’s right to have a court decide the merits of a dispute. Standing most often turns on whether the party has alleged “injury in fact” in light of the applicable statutes or caselaw. Here, we must also examine the forms of relief sought. *See Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 185[,] 120 S.Ct. 693, 706[,] 145 L. Ed. 2d 610, 629 (2000) (“a plaintiff must demonstrate standing separately for each form of relief sought”).

Cherry v. Wiesner, ___ N.C. App. ___, ___, 781 S.E.2d 871, 876, *disc. rev. denied*, ___ N.C. ___, 792 S.E.2d 779 (2016) (citations omitted).

Plaintiff’s complaint requested three forms of relief: (1) a declaratory judgment that his constitutional rights were violated, (2) “[a]n injunction requiring defendant Britton, as supervisor of the registry, to establish a p[re]-deprivation process to allow any person facing registration a meaningful opportunity to be heard as to whether he or she has a reportable conviction *before* being compelled to register” and (3) monetary damages. (Emphasis in original.)

Our Supreme Court has further specified that an action may not be maintained under the Declaratory Judgment Act to determine rights, status, or other relations unless the action involves a present actual controversy between the parties. A declaratory judgment may be used to determine the construction and validity of a statute, but the plaintiff must be directly and adversely affected by the statute. Most recently, our Supreme Court has explained that a declaratory judgment should issue

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(1) when it will serve a useful purpose in clarifying and settling the legal relations at issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity and controversy giving rise to the proceeding.

Wake Cares, Inc. v. Wake Cty. Bd. of Educ., 190 N.C. App. 1, 11, 660 S.E.2d 217, 223–24 (2008), *aff'd*, 363 N.C. 165, 675 S.E.2d 345 (2009) (citations, quotation marks, and brackets omitted). If the trial court entered a declaratory judgment stating that defendant’s wrongful placement on the sex offender registry violated his constitutional rights that would indeed “clarify[] and settl[e]” one portion of “the legal relations at issue” and “terminate and afford relief from the uncertainty, insecurity and controversy giving rise to the proceeding[;]” thus, plaintiff had standing to request a declaratory judgment. *Id.*

As to plaintiff’s request for an injunction,

[i]t is well established that ordinarily an injunction will not lie to restrain the enforcement of a statute, since the constitutionality, defects, or application of the statute may be tested in a prosecution for the violation of the statute.

A party has no standing to enjoin the enforcement of a statute or ordinance absent a showing that his rights have been impinged or are imminently threatened by the statute.

Commodities International, Inc. v. Eure, Sec. of State, 22 N.C. App. 723, 725, 207 S.E.2d 777, 779 (1974) (citation omitted). Plaintiff’s claim for an injunction goes beyond asking “to restrain the enforcement of a statute” but instead asks the trial court to order the State to establish a new legal process applicable to all future registrants. *Id.* We find no legal basis for a private party to have standing to *require* a specific modification of our current statutes. *See generally id.* Plaintiff is requesting that one state employee, defendant Britton, be ordered to modify how individuals are placed on the sex offender registry. This change could only occur through changes to our current statutes, and plaintiff does not have standing to request this relief, particularly where his registration has already been terminated, and he cannot benefit from any such future legal process. *See generally id.* Thus, the trial court properly dismissed plaintiff’s request for an injunction pursuant to Rule 12(b)(1).

Lastly, defendant Britton argues that “Plaintiff has failed to identify any action taken by Defendant Britton that caused any harm to Plaintiff.” “As a general matter, the North Carolina Constitution confers standing

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on those who suffer harm[.]” *Mangum v. Raleigh Bd. of Adjust.*, 362 N.C. 640, 642, 669 S.E.2d 279, 281 (2008). Plaintiff’s complaint has sufficiently alleged harm from his compelled registration. Whether defendant Britton is liable for that harm is a different question, but plaintiff has identified harm caused by his registration. *See generally id.* Therefore, the trial court properly granted defendant Britton’s Rule 12(b)(1) motion as to plaintiff’s request for an injunction. Thus, from here on, we need only consider the trial court’s dismissal of plaintiff’s requests for declaratory judgment and monetary damages.

B. Dismissal as to Defendant Britton under Rule 12(b)(6)

Defendant Britton also based her motion to dismiss upon Rule 12(b)(6).

The standard of review of an order granting a 12(b)(6) motion is whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true. On a motion to dismiss, the complaint’s material factual allegations are taken as true. Dismissal is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff’s claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff’s claim. On appeal of a 12(b)(6) motion to dismiss, this Court conducts a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court’s ruling on the motion to dismiss was correct.

Burgin v. Owen, 181 N.C. App. 511, 512, 640 S.E.2d 427, 428–29 (2007) (citations and quotation marks omitted).

Although well-pleaded factual allegations of the complaint are treated as true for purposes of a 12(b)(6) motion, conclusions of law or unwarranted deductions of facts are not admitted.

A complaint is not sufficient to withstand a motion to dismiss if an insurmountable bar to recovery appears on the face of the complaint. Such an insurmountable bar may consist of an absence of law to support a claim, an absence of facts sufficient to make a good claim, or the

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disclosure of some fact that necessarily defeats the claim.

Mitchell v. Pruden, ___ N.C. App. ___, ___, 796 S.E.2d 77, 81 (2017) (citations and quotation marks omitted). Both of plaintiff's claims are based upon Article I, Section 19 of the North Carolina Constitution which provides:

Law of the land; equal protection of the laws.

No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.

N.C. Const. art. 1, § 19.

1. Liberty Interests – Law of the Land

[4] Plaintiff's first claim was for a violation of his liberty interests. Plaintiff contends "that he was wrongly placed on the state's sex offender registry by Britton and Proctor, violating his protected interest in liberty without any pre-violation opportunity to be heard." Before we address the parts of plaintiff's arguments that are properly before this Court, we must address those that are not. First, plaintiff's brief often focuses on when an *initial* determination is made that allegedly violates a defendant's rights, but that is simply not what happened here nor is the reasoning applicable. Here, the initial determination that defendant was subject to registration was made in Michigan and Michigan conveyed that information to North Carolina. Thus, to the extent plaintiff's arguments rely on law or reasoning regarding due process for initial registration as a sex offender, we will not consider these arguments. Secondly, much of plaintiff's brief focuses on federal or out-of-state law that simply is not binding upon this Court, and thus we will rely upon the law cited by plaintiff that controls in this jurisdiction. *See generally Herring v. Winston-Salem/Forsyth Cty. Bd. of Educ.*, 188 N.C. App. 441, 449, 656 S.E.2d 307, 313 (2008) ("Plaintiff also cites several out-of-state cases in support of her position. However, these cases are not binding[.]"); *Soderlund v. Kuch*, 143 N.C. App. 361, 370, 546 S.E.2d 632, 638 (2001) ("We recognize that with the exception of the United States Supreme Court, federal appellate decisions are not binding upon either the appellate or trial courts of this State." (citation and quotation

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marks omitted)). Third, plaintiff focuses on arguments as to why he has properly pled a deprivation of his fundamental liberty interests. Again, we take the allegations of the complaint as true, *see Burgin*, 181 N.C. App. at 512, 640 S.E.2d at 428, and plaintiff undoubtedly suffered from the consequences of his registration. Plaintiff was the sole caretaker of his son and due to his status on the sex offender registry he was unable to go on school premises, attend school functions and doctor's appointments with his child, and was forced to move. But even if we assume plaintiff has properly pled a loss of some fundamental liberty interests, plaintiff would still need to tie the violation of that interest to the government, or more specifically here, defendants Britton and Proctor:

Our courts have long held that the law of the land clause has the same meaning as due process of law under the Federal Constitution. Due process provides two types of protection for individuals against improper governmental action. Substantive due process protection prevents the government from engaging in conduct that shocks the conscience, or interferes with rights implicit in the concept of ordered liberty. Procedural due process protection ensures that when government action depriving a person of life, liberty, or property survives substantive due process review, that action is implemented in a fair manner.

Substantive due process is a guaranty against arbitrary legislation, demanding that the law shall not be unreasonable, arbitrary or capricious, and that the law be substantially related to the valid object sought to be obtained. Thus, substantive due process may be characterized as a standard of reasonableness, and as such it is a limitation upon the exercise of the police power.

The fundamental premise of procedural due process protection is notice and the opportunity to be heard. Moreover, the opportunity to be heard must be at a meaningful time and in a meaningful manner.

In order to determine whether a law violates substantive due process, we must first determine whether the right infringed upon is a fundamental right. If the right is constitutionally fundamental, then the court must apply a strict scrutiny analysis wherein the party seeking to

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apply the law must demonstrate that it serves a compelling state interest. If the right infringed upon is not fundamental in the constitutional sense, the party seeking to apply it need only meet the traditional test of establishing that the law is rationally related to a legitimate state interest.

State v. Fowler, 197 N.C. App. 1, 20–21, 676 S.E.2d 523, 540–41 (2009) (citations, quotation marks, and brackets omitted).

Plaintiff relies primarily upon *In re W.B.M.*, 202 N.C. App. 606, 690 S.E.2d 41 (2010). In *W.B.M.*, a mother reported to the New Hanover County Department of Social Services that she believed her child was being sexually abused during visitation with his father. *Id.* at 611, 690 S.E.2d at 46. In October of 2006, the father was interviewed and denied the allegations. *Id.* at 612, 690 S.E.2d at 46. The father was not contacted again until January 2007 when he was informed that the sexual abuse allegations had been substantiated and he would be placed on the Responsible Individuals List (“RIL”).² *Id.* at 612, 690 S.E.2d at 46.

Within 30 days of being notified of his placement on the RIL, [the father] requested that the DSS Director review that decision. On 27 February 2007, the DSS Director notified [the father] that he was upholding the decision to place [him] on the RIL.

[The father] timely requested that the District Attorney’s office review the decision of the DSS Director.

2. “The RIL procedures are triggered by reports of suspected child maltreatment made to the department of social services. State law places an affirmative duty on all individuals and institutions who have cause to suspect that any juvenile is abused, neglected, or dependent to report the case of that juvenile to the director of the department of social services in the county where the juvenile resides or is found. Upon receipt of a report, the director of the department of social services shall make a prompt and thorough assessment in order to ascertain the facts of the case, the extent of the abuse or neglect, and the risk of harm to the juvenile. Within five working days of completing an investigative assessment response that results in a determination of abuse or serious neglect, the director must notify DHHS of the results of the assessment and must give personal written notice to the individual deemed responsible for the abuse or serious neglect. The notice to the responsible individual must include the following: (1) A statement informing the individual of the nature of the investigative assessment response and whether the director determined abuse or serious neglect or both. (2) A statement summarizing the substantial evidence supporting the director’s determination without identifying the reporter or collateral contacts. (3) A statement informing the individual that the individual’s name has been placed on the responsible individuals list as provided in N.C. Gen. Stat. § 7B–311[.] (4) A clear description of the actions the individual must take to have his or her name removed from the responsible individuals list.” *In re W.B.M.*, 202 N.C. App. at 607-08, 690 S.E.2d at 44 (citations, quotation marks, ellipses, and brackets omitted).

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On 24 May 2007, New Hanover County Assistant District Attorney Connie Jordan notified [the father] that she was upholding the DSS Director's decision to keep [him] on the RIL.

On 21 June 2007, [the father] filed a Petition for Expunction from the RIL in New Hanover County District Court. After a hearing on 23 August and 12 September 2007, Judge Corpening denied [the father's] expunction request and ordered DSS attorney Dean Hollandsworth to prepare an order with detailed findings of fact.

Although N.C. Gen. Stat. § 7B-323(d) requires that a written order containing findings of fact and conclusions of law be entered within 30 days after conclusion of the expunction hearing, as of 7 July 2008, no order had been entered.

On 7 July 2008, [the father] filed a Motion to Remove Kelly Holt's Name from the Responsible Individual's List, alleging, *inter alia*, that N.C. Gen. Stat. § 7B-323 is unconstitutional. On 30 July 2008, a written order denying Petitioner's Petition for Expunction was entered. Also on that date, a hearing on Petitioner's Motion to Remove was held, and the trial court orally denied the motion. On 17 October 2008, the trial court entered a written order denying Petitioner's Motion to Remove and declining to find at this stage of the proceeding that N.C. Gen. Stat. § 7B-323 is unconstitutional. From the 30 July and 17 October 2008 orders, [the father] appeal[ed].

Id. at 613, 690 S.E.2d at 46-47 (quotation marks and brackets omitted).

This Court analyzed the procedures by which an individual is placed on and potentially removed from the RIL and noted there were three distinct stages of review: DSS, district attorney, and the trial court. *Id.* at 607-10, 690 S.E.2d at 43-45. At every level of review, the reviewer had the responsibility to review the facts and the *discretion* to determine if the individual should be or remain on the list, *id.* at 608-10, 690 S.E.2d at 44-45, and though in *W.B.M.*, this Court ultimately determined that due process had been violated, *id.* at 623-24, 690 S.E.2d at 53, the review process renders *W.B.M.* entirely distinguishable from this case. *Contrast id.*, 202 N.C. App. 606, 690 S.E.2d 41. In *W.B.M.*, three entities had the discretion and ability to either place or leave the father on the RIL *and* remove him from it. *Id.* at 608-10, 690 S.E.2d at 44-45. That is not the case here. *See* N.C. Gen. Stat. § 14-208.7(a) (2011).

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Here, North Carolina General Statute § 14-208.7(a) *mandates* that

[a] person who is a State resident and who has a reportable conviction shall be required to maintain registration with the sheriff of the county where the person resides. If the person moves to North Carolina from outside this State, the person shall register within three business days of establishing residence in this State, or whenever the person has been present in the State for 15 days, whichever comes first.

Id. A reportable conviction is

[a] final conviction in another state of an offense, which if committed in this State, is substantially similar to an offense against a minor or a sexually violent offense as defined by this section, or a *final conviction in another state of an offense that requires registration under the sex offender registration statutes of that state.*

N.C. Gen. Stat. § 14-208.6(4)(b) (2011) (emphasis added).

The trial court ultimately concluded that “no sex offender registration should have ever been required in North Carolina[.]” Thus, the alleged violations of due process against plaintiff occurred between the time he was required to register, in February of 2012 until June of 2012, when the trial court ordered that his registration be terminated. But unlike in *W.B.M.*, no discretionary reviews took place between February and June of 2012. *Contrast W.B.M.*, 202 N.C. App. 606, 690 S.E.2d 41.

Plaintiff’s own complaint admits he was aware he had to register as a sex offender, that he did so in Michigan, and that when the Michigan law changed such that his conviction would no longer require registration, he *unsuccessfully* attempted to have his criminal conviction overturned in Michigan. Thus, plaintiff does not dispute that he had “a final conviction in another state of an offense” which at one time required registration under the statutes of Michigan. When the law in Michigan changed and plaintiff was no longer required to be on the registry in Michigan, plaintiff does not allege that he took the proper steps to be removed from the registry in Michigan, and because of this failure, plaintiff’s complaint must fail.

While plaintiff seeks to lay the blame upon defendants Britton and Proctor for his time on the sex offender registry, unfortunately for plaintiff, our law does not give defendants any discretion in placing an

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individual on the sex offender registry. *See* N.C. Gen. Stat. § 14-208.7(a). The portion of our statutes which required plaintiff's registration was mandatory. *See id.*; *see also* N.C. Gen. Stat. § 14-208.6(4)(b). But plaintiff actually did have both the ability and most importantly for a due process analysis, the opportunity to keep this hardship from taking place before his Michigan registration reached North Carolina. *See Fowler*, 197 N.C. App. at 20, 676 S.E.2d at 540. Michigan law allows registrants such as plaintiff to petition to be removed from the sex offender registry. Mich. Comp. Laws. Ann. §28.728C (2011). Plaintiff failed to petition to be removed from the Michigan registry.

Plaintiff makes many broad arguments regarding our Constitution and the fundamental rights of citizens to be heard before they are deprived of basic liberties, but the facts here are really quite simple: Plaintiff was afforded due process when he pled guilty to a crime in Michigan that required registration. Later, Michigan law changed, plaintiff's offense no longer required registration, and plaintiff had the opportunity to request removal from the sex offender registry in Michigan. Plaintiff then failed to exercise his statutory right in Michigan to request removal from the registry and moved to North Carolina where the law requires him to register because of his Michigan conviction and registration.³

We agree with the trial court that plaintiff failed to state a claim that his liberty interests were violated by defendant Britton since the state of Michigan gave plaintiff the opportunity to be heard and avoid any wrongful deprivation due to the change in statute, but plaintiff failed to exercise that opportunity. Thus, plaintiff is not entitled to a declaratory judgment that "his liberty interest" was violated by defendant Britton nor is plaintiff entitled to monetary relief from defendant Britton, who was performing a non-discretionary function of her job. *See generally* N.C. Gen. Stat. § 14-208.7(a). This claim was properly dismissed as defendant Britton demonstrated that plaintiff "fail[ed] to state a claim upon which relief [could] be granted." N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2015).

2. Equal Protection

[5] Plaintiff's remaining claim was for equal protection.

The Equal Protection Clause of Article I, Section 19 of the North Carolina Constitution and the Equal Protection Clause of Section 1 of the Fourteenth Amendment to the

3. Under federal law, states routinely share information regarding residents on their sex offender registries. *See generally* 42 U.S.C.A. § 16911 *et. seq.* (2013).

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United States Constitution forbid North Carolina from denying any person the equal protection of the laws, and require that all persons similarly situated be treated alike.

Our state courts use the same test as federal courts in evaluating the constitutionality of challenged classifications under an equal protection analysis. When evaluating a challenged classification, the court must first determine which of several tiers of scrutiny should be utilized. Then it must determine whether the statute meets the relevant standard of review.

Fowler, 197 N.C. App. at 26, 676 S.E.2d at 543–44 (citations, quotation marks, and brackets omitted).

Plaintiff dedicates only two pages of his brief to his equal protection argument. Plaintiff's main contention is that he was treated differently than other 17-year-olds who have had consensual sex with 15-year-olds in the state and were not required to register. But North Carolina did not convict plaintiff of the crime of which he complains; Michigan did. North Carolina also did not determine plaintiff was initially required to be placed on the sex offender registry; Michigan did. Here, the State of North Carolina actually treated plaintiff exactly as it treats all individuals who have a "final conviction in another state of an offense that requires registration under the sex offender registration statutes of that state." N.C. Gen. Stat. § 14-208.6(4)(b). To the extent that Michigan no longer required such registration, plaintiff was afforded the opportunity in Michigan to be removed, but did not do so. Again, we agree with the trial court that plaintiff was not entitled to a declaration that "his right to equal protection" was violated nor is plaintiff entitled to monetary relief for defendant Britton's performance of her duties. This claim was properly dismissed, and this argument is overruled because plaintiff "fail[ed] to state a claim upon which relief [could] be granted." N.C. Gen. Stat. § 1A-1, Rule 12(b)(6).

C. Dismissal as to Defendant Proctor under Rule 12(c)

[6] Defendant Proctor made his motion for judgment on the pleadings under Rule 12(c).⁴

4. Defendant Proctor's brief addresses the trial court's order as an order granting summary judgment. We were unable to determine whether the trial court relied solely upon the pleadings, as appropriate under Rule 12(c), or if the trial court considered other documents outside the pleadings, which could require us to consider the order as

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[I]n ruling upon motions under Rule 12(b)(6) and 12(c), the trial court must take the factual allegations of the complaint as true. . . . The standard of review for a Rule 12(c) motion is whether the moving party has shown that no material issue of fact exists upon the pleadings and that he is clearly entitled to judgment.

Affordable Care, Inc. v. N. Carolina State Bd. of Dental Examiners, 153 N.C. App. 527, 532, 571 S.E.2d 52, 57 (2002). Based on the same analyses as above, plaintiff is not entitled to a declaratory judgment that “his liberty interest” or “his right to equal protection” were violated by defendant Proctor nor is plaintiff entitled to monetary relief. Like defendant Britton, defendant Proctor was performing a non-discretionary function of his job. *See generally* N.C. Gen. Stat. § 14-208.7(a). This claim was properly dismissed as defendant Proctor demonstrated “that no material issue of fact exists upon the pleadings and that he is clearly entitled to judgment.” *Id.* This argument is overruled.

III. Conclusion

For the foregoing reasons, we affirm.

Affirmed.

Chief Judge McGEE and Judge INMAN concur.

a summary judgment order – and the record did include other documents beyond the pleadings. But since we have no transcript of the motion hearing in the record, we have treated the order according to its terms, as an order allowing a motion for judgment on the pleadings under Rule 12(c).

FARMER v. FARMER

[253 N.C. App. 681 (2017)]

TONY LEE FARMER, PLAINTIFF

v.

ELLA DEMETRICE FARMER, DEFENDANT

No. COA16-760

Filed 6 June 2017

1. Appeal and Error—appealability—waiver—venue—participation in trial court proceedings

Defendant mother in a child custody modification case waived her right to challenge venue on appeal where she participated in the trial court proceedings and failed to contest venue.

2. Child Custody and Support—child custody modification—visitation—sufficiency of evidence—substantial change in circumstances—best interest of child

The trial court erred in a child custody modification case by entering an order modifying custody and visitation where no evidence was presented at the hearing, and instead the court attempted to mediate the parties' visitation disputes. The court needed to find that there existed a substantial change in circumstances and that modification of visits would be in the children's best interest.

Judge DILLON concurring in part and dissenting in part.

Appeal by defendant-mother from order entered 3 February 2016 by Judge William Moore in Robeson County District Court. Heard in the Court of Appeals 8 February 2017.

No brief filed for plaintiff-appellee father.

Tiffany Pegwise-Powers for defendant-appellant mother.

ELMORE, Judge.

Defendant Ella Demetrice Farmer (“Mother”) appeals a custody modification order that also set aside a prior custody modification order. She argues the order should be vacated and this case remanded for a new hearing because no evidence was presented to support it. We vacate the portions of the order relating to custody modification and remand the case to the trial court for further fact-finding. In its discretion, the court may hear and consider additional evidence.

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I. Background

Mother and Father married in Georgia in 2000 and separated in 2006. Two children were born of the marriage. About three months after separation, Father filed a complaint seeking split custody and child support.

On 17 October 2006, the trial court entered an initial custody order awarding Mother primary legal and physical custody of three-year-old, Tracy, and one-year-old, Tommy,¹ and awarding Father visitation from Wednesday to Sunday during the last week of each month and for four non-consecutive weeks each summer. The court also ordered Father to pay \$547.00 in child support per month. About two weeks later, the court amended its order and modified the visitation schedule, eliminating summer visitation and allowing Father alternating weekend visits until such time as visitation would be reconsidered on 2 March 2007 (“Initial Custody Order”). The record is unclear whether this reconsideration ever took place.

About six years later, on 5 October 2012, Father filed a “Motion to Modify Custody/Visitation Order.” Father alleged that the children “are old enough now to travel and stay overnight while visiting [him] in Georgia,” and requested “Custody/Visitation” be modified to replace alternating weekend visits with visitation rights essentially aligning with the children’s school breaks. Father requested “Custody/Visitation” during even-numbered years for President’s Day, one week during spring break, nine consecutive weeks during summer break, Columbus Day, Thanksgiving Day, and the second half of the children’s Christmas break. During odd-numbered years, Father essentially requested the same schedule save for replacing visitation on Thanksgiving Day with Memorial Day, as well as replacing second-half visitation during the children’s Christmas break with first-half visitation.

Although the record indicates Father’s motion was heard on 31 January 2013, a corresponding order was not entered until 22 January 2015 (“Jan. 2015 Order”). The Jan. 2015 Order failed to acknowledge the Initial Custody Order, stated the order arose from “[Father’s] complaint for child custody” yet found “this matter is before this court pursuant to [Father’s] motion to modify custody/visitation of the children,” and purported to make an initial custody and visitation determination, concluding “[i]t would be in the children’s best interest that [Mother] have custody and control of the minor children and that [Father] exercise visitation” The Jan. 2015 Order awarded Mother primary custody

1. Pseudonyms are used to protect the minors’ identities.

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of the children and awarded Father alternating weekend visitation, summer visitation for the entire month of July, alternating visitation for Thanksgiving, and visitation from 25 December until 2 January each year.

On 3 March 2015, Father moved under Rule 60 to set aside the Jan. 2015 Order because it purported to make an initial custody determination, which had already been adjudicated in the Initial Order, and because it failed to address, *inter alia*, his “request to suspend every other weekend visitation” and “add additional summer visitation and holiday visits.” Father alleged his purpose for filing the “Motion to Modify Custody/Visitation Order” was to “modify the visitation schedule to suspend weekend visits because [he] reside[d] in Georgia and [Mother] reside[d] in North Carolina,” and he was “financially unable to travel to and from Georgia every other Friday and Sunday to exercise visits with the minor children.” Father also requested the court “clarify the Order by suspending weekend visits” and “increase [Father’s] visitation . . . during summer and holidays.”

After a 1 June 2015 hearing on Father’s motion, the court entered an order setting aside the Jan. 2015 Order due to mistake of circumstance, i.e., that Father lives six hours away, and modifying the visitation schedule (“Jun. 2015 Order”). Most relevant here, the Jun. 2015 Order eliminated weekend visitation, allowed Father visitation rights for certain school holidays and for eight consecutive weeks during summer break, and ordered that Father’s “child support obligation . . . be suspended during . . . periods of custody.”

In response, on 29 June 2015, Mother filed motions to stay the Jun. 2015 Order and for a new trial or to reopen evidence, or, in the alternative, to set aside the Jun. 2015 Order on the basis of mistake and good cause. Mother alleged the Jun. 2015 Order should be set aside under Rule 60 because “there was no testimonial evidence presented at the hearing.” Further, Mother alleged, because no evidence was presented, there was “no basis to modify the current [custody] order,” and because Father never filed a motion to modify child support, “the issue of child support was not properly before the [c]ourt and could not be addressed.”

Additionally, in her motions, Mother alleged that Father had not seen the children in almost three years, that the children “have sent hundreds of requests to come get them from [Father’s] home over the last two . . . weeks,” and “have threatened to run away from [Father’s] home.” That same day, on 29 June 2015, the trial court entered an *ex parte* order granting temporary injunctive relief in Mother’s favor,

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staying enforcement of the Jun. 2015 Order, reinstating the Jan. 2015 Order, and ordering Father to show cause on 10 July 2015 as to why Mother’s motion for temporary relief should not be granted.

It is unclear from the record who had custody of the children during this time, or whether the show cause hearing was ever held. It appears from a continuance order that, on 10 July 2015, the Father “had not yet been served with th[e] action,” and the court rescheduled the matter for 31 July 2015. It appears from a subsequent continuance order that, on 31 July 2015, Father still “had not yet been served with th[e] action,” but rather than rescheduling the matter, in its order the court decreed that its *ex parte* order “shall remain in full force and effect pending further orders of the court.”

On 23 October 2015, the court heard Mother’s motions for a new trial or to reopen evidence, or, in the alternative, to set aside the Jun. 2015 Order. Father was present for this hearing. Mother argued that, at the 1 June 2015 hearing on Father’s motion to set aside the Jan. 2015 Order, no evidence was presented or considered yet the court entered an order allowing Father’s motion to set aside the order and significantly modified visitation. Further, Mother argued, the Jan. 2015 Order decreed that Father’s child support obligations be suspended during periods when he had custody of the children; however, child support was never addressed at the hearing and there was no pending motion to modify child support. On or around 3 February 2016, the court entered an order (“Feb. 2016 Order”) setting aside the Jun. 2015 Order on the basis that it improperly modified child support without a properly pending motion, dismissing as moot Mother’s motions for a new trial or to reopen evidence, and drastically modifying visitation. Mother appeals.

II. Analysis

Mother contends the trial court erred by entering the Feb. 2016 Order because (1) “it was not based on any evidence” and (2) “neither party resided in Robeson County,” so “the court was without proper venue to rule in the case.”

A. Venue

[1] As an initial matter, Mother waived her right to challenge venue on appeal by participating in the Robeson County proceedings and never contesting venue. *See Zetino-Cruz v. Benitez-Zetino*, ___ N.C. App. ___, ___, 791 S.E.2d 100, 104 (2016) (“[V]enue is not jurisdictional and may be waived.” (citing *Bass v. Bass*, 43 N.C. App. 212, 215, 258 S.E.2d 391, 393 (1979) (“Plaintiff voluntarily appeared and participated in the 27 June

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1977 hearing on child support. He did not object to the venue or move for change of venue. . . . [H]e waived it.”)). Accordingly, we decline to address this challenge.

B. Visitation Modification Unsupported by Evidence

[2] Mother contends the court erred by entering the Feb. 2016 Order modifying custody and visitation because no evidence was presented at the hearing on the matter. We agree.

Before a trial court may modify an existing custody order, it “must determine that a substantial change of circumstances has occurred and that the change has affected the children’s welfare.” *Davis v. Davis*, 229 N.C. App. 494, 502, 748 S.E.2d 594, 600 (2013) (citing *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003)). A trial court must then “further conclude[] that a change in custody is in the child’s best interests.” *Shipman*, 357 N.C. at 474, 586 S.E.2d at 253.

“Our review of a trial court’s decision to modify an existing child custody order is limited to determining (1) whether the trial court’s findings of fact are supported by substantial evidence; and (2) whether those findings of fact support its conclusions of law.” *Spoon v. Spoon*, 233 N.C. App. 38, 41, 755 S.E.2d 66, 69 (2014) (citing *Shipman*, 357 N.C. at 474–75, 586 S.E.2d at 253–54). “ ‘Absent an abuse of discretion, the trial court’s decision in matters of child custody should not be upset on appeal.’ ” *Dixon v. Gordon*, 223 N.C. App. 365, 368, 734 S.E.2d 299, 302 (2012) (quoting *Everette v. Collins*, 176 N.C. App. 168, 171, 625 S.E.2d 796, 798 (2006)).

However, when an order is entered affecting juveniles after a hearing in which “no evidence [is] presented, the trial court’s findings of fact are unsupported, and its conclusions of law are in error.” *In re D.Y.*, 202 N.C. App. 140, 143, 688 S.E.2d 91, 93 (2010) (reversing permanency planning order that relied solely on written reports, prior court orders, and oral arguments by attorneys and remanding with instructions to hold a proper hearing); *see also In re D.L.*, 166 N.C. App. 574, 583, 603 S.E.2d 376, 382 (2004) (same). Further, “when the court fails to find facts so that this Court can determine that . . . the welfare of the child is subserved, then the order entered thereon must be vacated and the case remanded for detailed findings of fact.” *Evans v. Evans*, 138 N.C. App. 135, 142, 530 S.E.2d 576, 580 (2000) (quoting *Crosby v. Crosby*, 272 N.C. 235, 238–39, 158 S.E.2d 77, 80 (1967)).

Here, the transcript reveals that the trial court never heard or considered evidence relating to custody modification at the hearing

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on Mother's motions to reopen evidence or to set aside the Jun. 2015 Order. Rather, the court attempted to mediate an agreement between the parties' attorneys to resolve the parties' visitation disputes, which it later memorialized in its Feb. 2016 Order.

According to the transcript of the hearing on Mother's motions to reopen evidence or to set aside the Jun. 2015 Order, Mother argued that no evidence was presented or considered in the prior hearing on Father's motion to set aside the Jan. 2015 Order. Yet following that prior hearing, Mother argued, the court entered its Jun. 2015 Order, which granted Father's motion to set aside the Jan. 2015 Order; modified visitation significantly by awarding Father, who had not seen the children in nearly three years, visitation rights for the entire summer; and suspended Father's child support obligations when he had custody of the children. Mother argued that before making such a drastic modification, "the court needed to hear evidence about the fact that [Father] had not had visitation for a long period of time. And there needed to be some reintroduction before sending these kids down there [to Georgia] for a period of three months suddenly." Mother also argued that child support was never discussed at that hearing nor was there a pending motion for the trial court to issue a decision on child support. Accordingly, Mother explained to the trial court, she moved under Rules 52 and 59 to reopen evidence for a new trial that would allow her to present evidence regarding whether the Jan. 2015 Order should be set aside, or, alternatively, moved under Rule 60 to set aside the Jun. 2015 Order because there was no evidentiary basis for it. Yet rather than address Mother's motions, the trial court attempted to mediate the parties' visitation disputes:

THE COURT: The case comes down—it still comes down to what your client wants. What does [Mother] want? . . .

. . . .

THE COURT: Is [Father] agreeable to that?

[FATHER'S COUNSEL]: Well, Your Honor, certainly not to having four weeks in the summer. That doesn't give him time to arrange for visitation, for holidays, for family events. Certainly, he's willing to break up the summer.

. . . .

THE COURT: All right, then what's—what's the disagreement then? It sounds like to me like it's—

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[MOTHER'S COUNSEL]: Your Honor, the disagreement is about the amount of time I guess that he wants during the summer, Your Honor. . . .

. . . .

THE COURT: Yeah, I don't know what we're fighting about. I honestly don't.

[FATHER'S COUNSEL]: I believe it's summer visits, Judge. I believe it's the amount of time. My client's—

THE COURT: How much time does he want?

[FATHER'S COUNSEL]: He would like the first three weeks, the children return to their mother the second two weeks, and then . . . they would return to [Father] up until two weeks before school started.

. . . .

THE COURT: And what does she want?

[MOTHER'S COUNSEL]: She's . . . asking that he have four weeks with the kids broken up into two two-week[] increments.

THE COURT: We're talking about the difference of two weeks, maybe?

. . . .

THE COURT: That's fine with me. She don't oppose to that [sic], does she?

. . . .

THE COURT: Okay. That's the order then.

The transcript does not reflect that any evidence was actually presented or that the court ever considered whether there existed a substantial change in circumstances, how that change affected the children, or whether modifying visitation would be in the children's best interest.

Following this hearing, the trial court entered its Feb. 2016 Order, which granted Mother's motion to set aside the Jun. 2015 Order on the basis that it made a child support determination without a properly pending motion on child support. The Feb. 2016 Order also dismissed as moot Mother's motions to reopen evidence or to hold a new hearing,

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allowed both parties' attorneys to withdraw, and modified in great detail child custody and the existing visitation schedule.

When the findings of fact relating to jurisdiction and the prior history of the case are omitted, the provisions of the Feb. 2016 Order modifying visitation are supported by a single finding of fact: "It is appropriate for the visitation during the school year to be suspended because of [Father's] distance and summer to [be] expanded." Based on this finding, the trial court concluded as law: "There has been a substantial change in circumstances that affects the best interest[s] of the minor children." The Feb. 2016 Order then substantially modified the existing visitation arrangement, granting Father visitation rights during certain holidays and for six weeks during the children's summer break. Additionally, without explanation, the Feb. 2016 Order purported to change the children's legal custody, which the Initial Order vested solely with Mother, to joint legal custody between Mother and Father.

The trial court's order was wholly inadequate to support these custody changes. Because no evidence was presented at the hearing, the findings are unsupported. Even if evidence supported those findings, they are "too meager" to support its conclusions and decrees. *See, e.g., Dixon v. Dixon*, 67 N.C. App. 73, 76–77, 312 S.E.2d 669, 672 (1984) ("[C]ustody orders are routinely vacated where the 'findings of fact' consist of mere conclusory statements that the party being awarded custody is a fit and proper person to have custody and that it will be in the best interest of the child to award custody to that person. A custody order will also be vacated where the findings of fact are too meager to support the award."). "Without further fact-finding, we cannot determine whether the trial court's conclusions are supported by its findings." *In re D.M.O.*, __ N.C. __, __, 794 S.E.2d 858, 866 (2016). Accordingly, we vacate the provisions of the Feb. 2016 Order relating to custody and visitation and remand this case to the trial court for appropriate findings and conclusions resolving these matters. In its discretion, the court may hear and consider additional evidence.

On remand, we instruct the trial court to remain mindful that its "examination of whether to modify an existing child custody order is twofold." *Shipman*, 357 N.C. at 474, 586 S.E.2d at 253. First, "[t]he trial court must determine whether there was a change in circumstances and then must examine whether such a change affected the minor child." *Id.* To support a conclusion that a substantial change in circumstances occurred which affected the children, "the evidence must demonstrate a connection between the substantial change in circumstances and the welfare of the child, and flowing from that prerequisite is the requirement

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that the trial court make findings of fact regarding that connection.” *Id.* at 478, 586 S.E.2d at 255.

Second, the trial court “must . . . examine whether a change in custody is in the child’s best interests. If the trial court concludes that modification is in the child’s best interests, only then may the court order a modification of the original custody order.” *Id.* at 47, 586 S.E.2d at 253. “Whenever the trial court is determining the best interest of a child, any evidence which is competent and relevant to a showing of the best interest of that child must be heard and considered by the trial court, subject to the discretionary powers of the trial court to exclude cumulative testimony.” *In re Shue*, 311 N.C. 586, 597, 319 S.E.2d 567, 574 (1984). “Without hearing and considering such evidence, the trial court cannot make an informed and intelligent decision concerning the best interest of the child.” *Id.* We further emphasize that “a trial court’s principal objective is to measure whether a change in custody will serve to promote the child’s best interests.” *Shipman*, 357 N.C. at 474, 586 S.E.2d at 253.

III. Conclusion

Because the trial court failed to conduct a proper hearing, consider evidence, or engage in the appropriate analysis before modifying the existing custody decree, we vacate the portions of the Feb. 2016 Order relating to custody and visitation. Because the Feb. 2016 Order set aside the Jun. 2015 Order modifying custody, which itself set aside the Jan. 2015 Order modifying custody, the custody arrangement established by the Initial Order remains in effect pending final resolution by the trial court of whether there has been a substantial change of circumstances since the Initial Order and whether modifying custody is in the children’s best interests. We instruct the trial court on remand to make proper findings and conclusions under the appropriate analytical framework established by law, and, if necessary, to hold a swift and proper hearing resolving the matter.

VACATED IN PART AND REMANDED.

Judge ZACHARY concurs.

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

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

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I concur with the majority concerning the issue of venue.

I also concur with the majority's conclusion that the trial court erred in modifying custody in the Feb. 2016 Order without hearing evidence. However, I dissent from the majority's mandate that custody revert back to the arrangement set forth in the Initial Order entered in 2006. I conclude that custody should revert back to the June 2015 Order, entered just prior to the Feb. 2016 Order.

There are four custody orders, entered by the trial court from 2006 to 2016, which are pertinent to this appeal. Mother's main contention is in regard to the summer visitation awarded to Father. These four orders awarding Father summer visitation are summarized as follows:

1. The "Initial Order," entered November 2006, awarded Father four non-consecutive weeks of summer visitation. This visitation order was temporary in nature, stating "that the matter shall be reset before the undersigned [judge] for reconsideration of the visitation schedule."
2. The "Jan. 2015 Order" awarded Father summer visitation for the entire month of July. This order also awarded Father visitation every other weekend during the remainder of the year. The trial court noted in the order that Father resided in Georgia. The trial court did not make any finding concerning changed circumstances but found that the new visitation schedule was in the best interest of the children.
3. In its "June 2015 Order," the trial court extended Father's summer visitation from the month of July to eight consecutive weeks. The trial court did not consider the change to be a custody modification, but rather a correction of a mistake pursuant to Rule 60(b) which it had made in its prior order. Specifically, the court stated that it made a mistake in its prior Jan. 2015 order by failing to take into account where in Georgia Father lived. The trial court then noted that Father lived six hours from Mother and that this distance made regular weekend visitation unworkable and that eliminating the regular weekend visits was in the best interest of the children. Therefore, the trial court replaced Father's regular weekend visitation with extended summer visitation.
4. In its "Feb. 2016 Order," the trial court modified Father's summer visitation from the entire summer to six weeks

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after Mother sought to reduce Father's summer visitation to four weeks. The trial court also denied Mother's motion to allow for an evidentiary hearing on custody. Mother had argued that the June 2015 order was a modification order; and, therefore, the trial court should have considered new evidence.

Mother contends in her brief that the trial court impermissibly modified visitation twice without considering new evidence: (1) in its June 2015 Order, extending Father's summer visitation from the month of July to all summer; and (2) in its Feb. 2016 Order, reducing Father's summer visitation from eight weeks to six weeks, rather than to four weeks as she requested. In her brief, however, Mother only argues that the Feb. 2016 Order should be vacated.

The majority agreed with Mother that the trial court improperly modified Father's summer visitation without hearing any evidence in its most recent order, the Feb. 2016 Order. I agree, as well. The majority, however, reinstated the visitation as set forth in the 2006 Initial Order (which appears to be a temporary custody order), rather than the more recent June 2015 Order or Jan. 2015 Order.

I do not believe that the June 2015 Order was erroneous, notwithstanding the fact that the trial court did not base the June 2015 Order on new evidence. Rather, I believe that the trial court has authority pursuant to Rule 60(b) to set aside a custody order based on a mistake, without having to hear evidence of some change in circumstances. *See* N.C. Gen. Stat. § 1A-1, Rule 60(b)(1) (“[T]he court may relieve a party . . . from a final judgment, order, or proceeding for . . . [m]istake, inadvertence, surprise, or excusable neglect[.]”). Here, the trial court found that it had failed to consider *where* in Georgia Father resided when it awarded part of Father's visitation in the form of regular weekend visitation. The trial court corrected this failure in its June 2015 Order, finding that regular weekend visitations were *not* in the best interest of the children.

Even if the trial court was correct in its Feb. 2016 Order to set aside the June 2015 Order (based on its failure to consider evidence), custody should revert back to the arrangement in the Jan. 2015 Order, not to the eleven-year-old Initial Order.

In any event, I do not think the trial court was required to consider new evidence when it changed custody based on a mistake in a prior order. *See* N.C. Gen. Stat. § 1A-1, Rule 60(b). Therefore, my vote is to vacate the Feb. 2016 Order *in its entirety*, as requested by Mother, thereby reverting to the June 2015 Order, without prejudice to either party's right to seek modification of custody in the future.

IN RE WILL OF ALLEN

[253 N.C. App. 692 (2017)]

IN THE MATTER OF THE WILL OF JAMES PAUL ALLEN, DECEASED

No. COA16-1209

Filed 6 June 2017

Wills—handwritten notation on will—holographic codicil—present testamentary intent—sufficiency of words standing alone

The trial court erred by granting summary judgment in favor of the propounder where the record established that a handwritten notation on decedent's will was not a valid holographic codicil. Even assuming arguendo that the notation was written entirely by decedent, it did not establish a present testamentary intention rather than a plan for a future change, and it referred to another part of the will. Holographic notes that refer to another part of the will are not valid holographic codicils.

Appeal by Caveators from order entered 14 September 2016 by Judge Jeffrey B. Foster in Beaufort County Superior Court. Heard in the Court of Appeals 1 May 2017.

Ranee Singleton, PLLC, by Ranee Singleton, for propounder-appellee.

Lanier, King & Paysour, PLLC, by Jeremy Clayton King and Steven F. Johnson, II, for caveators-appellants.

ZACHARY, Judge.

Hope Paiyton Robinson and Christian Ann Robinson (the caveators) appeal from an order granting summary judgment in favor of Melvin Ray Woolard (the propounder). On appeal, the caveators argue that the trial court erred by ruling that handwritten notes on a will executed by James Paul Allen (the decedent) constituted a valid holographic codicil to the decedent's will. We conclude that the caveators' argument has merit.

I. Factual and Procedural Background

On 29 August 2002, the decedent executed a typewritten will drafted by Mr. William Mayo, an attorney who represented the decedent in his legal matters. The will was executed and sworn to by the decedent and two witnesses, and the parties do not dispute that it meets the requirements of N.C. Gen. Stat. § 31-3.3 (2015) for a properly attested self-proving will. The will included, as relevant to this appeal, the following disposition of the decedent's property:

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Article III

I will, devise and bequeath all of my real and personal property of every sort, kind and description, both tangible and intangible, wheresoever located, in fee simple absolute unto, RENA T. ROBINSON of 9096 Hwy 99 N, Pantego, N.C. 27860.

Article IV

In the event, RENA T. ROBINSON, does not survive me, I will and devise a life estate unto, MELVIN RAY WOOLARD, in all real property located in Beaufort, Hyde and Washington Counties with a vested remainder therein unto HOPE PAIYTON ROBINSON and CHRISTIAN ANN ROBINSON, in equal shares, in fee simple absolute, subject to the life estate herein devised unto MELVIN RAY WOOLARD.

Article V

In the event, RENA T. ROBINSON, does not survive me, I will and bequeath, all remaining real and personal property both tangible and intangible, wheresoever located, to include all farming equipment unto my nephew, MELVIN RAY WOOLARD, in fee simple.

The parties do not dispute that the propounder is the decedent's nephew; Melva Marlene Woolard is the propounder's sister and the decedent's niece; Ms. Robinson was a woman with whom the decedent had a relationship; and the caveators are Ms. Robinson's granddaughters. Article IV of the will includes the only devise benefitting the caveators. This section provides that if Ms. Robinson did not survive the decedent, the propounder would receive a life estate in the decedent's real property located in Beaufort, Hyde, and Washington Counties, with the caveators receiving the remainder interest. Pursuant to Article V of the will, the propounder would also inherit other property in fee simple. The present appeal arises from the parties' dispute over the legal effect, if any, of the following handwritten notation on the will: "Beginning 7-7-03 do not honor Article IV Void Article IV James Paul Allen" (absence of punctuation in original). If the handwritten note were given effect as a holographic codicil, the result would be to disinherit the caveators.

On 8 March 2014, the decedent died in Beaufort County, North Carolina. Ms. Robinson had died at an earlier date. On 13 March 2014, the propounder filed an affidavit for probate of a holographic codicil,

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using Administrative Office of the Courts (AOC) Form AOC-E-302. On this form Ms. Woolard averred that she had found the will among the decedent's valuable papers or effects, and Mr. May and Ms. Tammy Hodges averred that they were familiar with the decedent's handwriting and believed that the handwritten notes on the will were entirely in the decedent's handwriting.

On 17 March 2014, the will was offered for probate. On 1 October 2015, the caveators filed a caveat to the will, asserting that the handwritten notes on the will did not constitute a holographic codicil to the will. The caveators asked that the matter be transferred from the office of the Clerk of Court to Beaufort County Superior Court, and sought a judgment "setting aside and declaring as null and void the probate in common form of the purported Holographic Codicil, with an adjudication that the Will is the Last Will and Testament of the Decedent[.]" The propounder filed an amended response to the caveat on 7 October 2015. On 10 March 2016, the Clerk of Court entered an order transferring the matter to Superior Court, and on 8 April 2016, the trial court entered an Order of Alignment.

The propounder filed a motion for summary judgment on 11 August 2016. Following a hearing conducted on 29 August 2016, the trial court entered an order on 14 September 2016, granting summary judgment in favor of the propounder. The caveators noted a timely appeal to this Court.

II. Standard of Review

"A caveat is an in rem proceeding and operates as 'an attack upon the validity of the instrument purporting to be a will.'" *Matter of Estate of Phillips*, __ N.C. App. __, __, 795 S.E.2d 273, 278 (2016) (quoting *In re Will of Cox*, 254 N.C. 90, 91, 118 S.E.2d 17, 18 (1961)). "[S]ummary judgment may be entered in a caveat proceeding in factually appropriate cases." *In re Will of Mason*, 168 N.C. App. 160, 165, 606 S.E.2d 921, 924 (2005).

Pursuant to N.C. Gen. Stat. § 1A-1, Rule 56(c) (2015), summary judgment is properly granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." "When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (internal quotation omitted). In addition:

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

DeWitt v. Eveready Battery Co., 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002) (internal quotation and citation omitted).

"[O]nce the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial." *Pacheco v. Rogers & Breece, Inc.*, 157 N.C. App. 445, 448, 579 S.E.2d 505, 507 (2003) (internal quotation omitted).

"The standard of review for summary judgment is *de novo*." *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007) (citation omitted). " 'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (quoting *In re Appeal of The Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

III. Requirements for a Holographic Codicil to a Typewritten Will

"A codicil is a supplement to a will, annexed for the purpose of expressing the testator's after-thought or amended intention." *Smith v. Mears*, 218 N.C. 193, 197, 10 S.E.2d 659, 661 (1940). "[T]he mere making of a codicil gives rise to the inference of a change in the testator's intention, importing some addition, explanation, or alteration of a prior will." *Armstrong v. Armstrong*, 235 N.C. 733, 735, 71 S.E.2d 119, 121 (1952) (citations omitted).

The statutory requirements for partial revocation or change to a will are found in N.C. Gen. Stat. § 31-5.1 (2015), which states in relevant part that "[a] written will, or any part thereof, may be revoked only (1) [b]y a subsequent written will or codicil or other revocatory writing executed in the manner provided herein for the execution of written wills[.]" The "manner provided" for the execution of a holographic will is set out in N.C. Gen. Stat. § 31-3.4 (2015), which provides in pertinent part as follows:

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(a) A holographic will is a will

(1) Written entirely in the handwriting of the testator but when all the words appearing on a paper in the handwriting of the testator are sufficient to constitute a valid holographic will, the fact that other words or printed matter appear thereon not in the handwriting of the testator, and not affecting the meaning of the words in such handwriting, shall not affect the validity of the will, and

(2) Subscribed by the testator . . . and

(3) Found after the testator's death among the testator's valuable papers or effects[.] . . .

Our Supreme Court has held that in some circumstances “an addenda in the handwriting and over the signature of the testatrix written on the face of the typewritten attested will may be upheld as a holograph codicil thereto.” *In re Will of Goodman*, 229 N.C. 444, 445, 50 S.E.2d 34, 35 (1948). However, our appellate jurisprudence has established specific requirements for a valid holographic codicil to a will. N.C. Gen. Stat. § 31-3.4(a)(1) states that “the fact that other words or printed matter appear [in a holographic will] not in the handwriting of the testator, and not affecting the meaning of the words in such handwriting, shall not affect the validity of the will[.]” *Goodman* applied this rule to a holographic codicil to a typewritten will:

While the derivative and applied meaning of the word holograph indicates an instrument entirely written in the handwriting of the maker, this would not necessarily prevent the probate of a will where other words appear thereon not in such handwriting but not essential to the meaning of the words in such handwriting. But where words not in the handwriting of the testator are essential to give meaning to the words used, the instrument will not be upheld as a holograph will.

Goodman, 229 N.C. at 446, 50 S.E.2d at 35 (emphasis added) (citations omitted). In *Goodman*, the testatrix added and signed the following handwritten words to her typewritten will: “To my nephew Burns Elkins 50 dollars” . . . “Mrs. Stamey gets one-half of estate if she keeps me to the end”; and . . . “My diamond ring to be sold if needed to carry out my will, if not, given to my granddaughter Mary Iris Goodman[.]” *Goodman* at 444-45, 50 S.E.2d at 34. Because the effect of these additions to the

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testatrix's will could be determined without reference to any other part of her will, our Supreme Court held that the handwritten notes on the testatrix's will constituted a valid holographic codicil:

[T]he additional words placed by her on this will written in her own handwriting and again signed by her are sufficient, standing alone, to constitute a valid holograph will; that is, the legacy of \$ 50 to Burns Elkins, the devise of one-half of her estate to Mrs. Stamey, and the bequest of the diamond ring to Mary Iris Goodman are sufficiently expressed to constitute a valid disposition of property to take effect after death.

Goodman at 446, 50 S.E.2d at 36 (emphasis added). However, where the meaning or effect of holographic notes on a will requires reference to another part of the will, the holographic notations are not a valid holographic codicil to the will. For example, in *In re Smith's Will*, 218 N.C. 161, 10 S.E.2d 676 (1940), the decedent's will was "duly probated as a holographic will[.]" *Smith*, 218 N.C. at 161, 10 S.E.2d at 676. Thereafter, the decedent's widow submitted for probate "a purported codicil or supplemental will" that included both typewritten and holographic elements. *Smith* at 162, 10 S.E.2d at 677. Our Supreme Court held that:

[T]he paper writing presented 6 March, 1939, was improvidently admitted to probate in common form. An examination of the instrument leads us to the conclusion that it was not in form sufficient to be entitled to probate as a holographic will. . . . Words not in the handwriting of the testator are essential to give meaning to the words used.

Id. at 163-64, 10 S.E.2d at 677-78 (emphasis added) (citations omitted).

In addition to the requirement discussed above, a codicil, whether typewritten or handwritten, must establish a present testamentary intention of the decedent, and not merely a plan for a possible future alteration to the decedent's will. "An intent to make a future testamentary disposition is not sufficient." *Stephens v. McPherson*, 88 N.C. App. 251, 254, 362 S.E.2d 826, 828 (1987) (citing *In re Will of Mucci*, 287 N.C. 26, 30, 213 S.E.2d 207, 210 (1975)). For example, in *In re Johnson's Will*, 181 N.C. 303, 106 S.E. 841 (1921), the Court held that a letter written by the decedent directing his attorney to "write my will for me" "indicat[ed] a clear purpose to have a will prepared" and "outlin[ed] the contents of a will" but did not show the decedent's present testamentary purpose, instead constituting instructions for the future preparation of a will. *Johnson*, 181 N.C. at 306, 106 S.E.2d at 842.

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IV. Discussion

Preliminarily, we note that the parties have advanced arguments concerning the extent to which there is a genuine issue of material fact as to whether the notation on the decedent's will was entirely in the decedent's handwriting. As discussed below, we have concluded that even assuming, *arguendo*, that the notation on the decedent's will was written entirely by him, the note nonetheless does not meet the requirements for a valid holographic codicil. As a result, we find it unnecessary to address the parties' arguments on the legal significance of their respective affidavits on the question of whether the entire notation is in the decedent's handwriting.

The following handwritten notation appears on the margin of the decedent's will: "Beginning 7-7-03 do not honor Article IV Void Article IV James Paul Allen". For two separate reasons, this notation does not meet the requirements for a valid holographic codicil. First, the notation directs that "beginning 7-7-03" Article IV should no longer be honored. The decedent executed the will on 29 August 2002. The record does not indicate whether the decedent added the handwritten note on 7 July 2003 or at an earlier date, in which case it would have been an expression of the decedent's intention to make a future change to his will.

In addition, the words of the handwritten notation are not sufficient, standing alone, to establish their meaning. In order to understand the notation, it is necessary to incorporate or refer to the contents of "Article IV" to which the note refers. As discussed above, our appellate jurisprudence establishes that a holographic codicil is invalid if "[w]ords not in the handwriting of the testator are essential to give meaning to the words used." *Smith* at 163-64, 10 S.E.2d at 677-78. We conclude that under binding precedent of our Supreme Court, the handwritten notation does not constitute a valid holographic codicil to the will.

In reaching this conclusion, we have carefully considered the cases cited by the caveators. We take judicial notice that one of the cases cited by the caveators, *Jones v. Jones*, 17 N.C. 387 (1833), was decided more than three decades prior to the invention of the typewriter and as a result does not address the requirements for a holographic codicil to a typewritten will. The other cases cited by the caveators state various general principles governing the proper interpretation of wills and codicils. However, these cases do not address or purport to alter the rule that in order to be valid, the meaning of a holographic codicil must not require reference to other words in the typewritten part of the will.

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For the reasons discussed above, we conclude that the trial court erred by granting summary judgment for the propounder. Because the record establishes that, as a matter of law, the handwritten notation on the decedent's will is not a valid holographic codicil, the trial court's order must be reversed and remanded for entry of summary judgment in favor of the caveators.

REVERSED AND REMANDED.

Chief Judge McGEE and Judge HUNTER, JR. concur.

IN THE MATTER OF HUGHES, BY AND THROUGH V.H. INGRAM, ADMINISTRATRIX OF THE ESTATE OF HUGHES, CLAIM FOR COMPENSATION UNDER THE NORTH CAROLINA EUGENICS ASEXUALIZATION AND STERILIZATION COMPENSATION PROGRAM, CLAIMANT-APPELLANT

Nos. COA15-699-2

IN THE MATTER OF REDMOND, BY AND THROUGH L. NICHOLS, ADMINISTRATRIX OF THE ESTATE OF REDMOND, CLAIM FOR COMPENSATION UNDER THE NORTH CAROLINA EUGENICS ASEXUALIZATION AND STERILIZATION COMPENSATION PROGRAM, CLAIMANT-APPELLANT

No. COA15-763-2

IN THE MATTER OF SMITH, CLAIM FOR COMPENSATION UNDER THE NORTH CAROLINA EUGENICS ASEXUALIZATION AND STERILIZATION COMPENSATION PROGRAM, CLAIMANT-APPELLANT

No. COA15-829-2

Filed 6 June 2017

1. Constitutional Law—equal protection—Eugenics Asexualization and Sterilization Compensation Program—special benefits—sacrifices for governmental objective

The Industrial Commission did not err by concluding that the Eugenics Asexualization and Sterilization Compensation Program, providing benefits for living claimants who were asexualized involuntarily or sterilized involuntarily, did not violate equal protection rights. The United States Supreme Court has held that special benefits can be provided to certain citizens based upon voluntary or involuntary sacrifices they have made in the furtherance of some governmental objective.

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2. Constitutional Law—equal protection—Eugenics Asexualization and Sterilization Compensation Program—living victims—similarly situated

The Industrial Commission did not err by concluding that the Eugenics Asexualization and Sterilization Compensation Program, providing benefits for living claimants who were asexualized involuntarily or sterilized involuntarily, did not violate equal protection rights even though it required that claimants be alive on June 30, 2013. The intended beneficiaries of the compensation program were the living victims and not their heirs, and thus, the estates of victims were not similarly situated with living victims.

3. Constitutional Law—equal protection—rational basis

The Industrial Commission did not err by concluding that the Eugenics Asexualization and Sterilization Compensation Program, providing benefits for living claimants who were asexualized involuntarily or sterilized involuntarily, did not violate equal protection rights by limiting compensation to living victims whose rights had vested. The challenged legislation demonstrated a rational relationship between a legitimate government interest and the disparate treatment of heirs of victims who died before the vesting date and victims who were alive on that date. A living victim's knowledge that compensation would be awarded even if that claimant predeceased the payout constituted a form of restitution whereas heirs of victims who died before enactment of the program had no such expectation.

Appeal by Claimant-Appellant Hughes, by and through V.H. Ingram, Administratrix of the Estate of Hughes, from amended decision and order entered 28 April 2015 by the North Carolina Industrial Commission. Appeal by Claimant-Appellant Redmond, by and through L. Nichols, Administratrix of the Estate of Redmond, from decision and order entered 27 April 2015 by the North Carolina Industrial Commission. Appeal by Claimant-Appellant Smith from decision and order entered 7 May 2015 by the North Carolina Industrial Commission. Heard originally in the Court of Appeals 16 November 2015. Reversed and remanded by the Supreme Court of North Carolina to the Court of Appeals for consideration of the merits of Claimants' constitutional challenge to N.C. Gen. Stat. § 143B-426.50(1).

Pressly, Thomas & Conley, PA, by Edwin A. Pressly; and UNC Center for Civil Rights, by Elizabeth McLaughlin Haddix, for Claimant-Appellants.

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Attorney General Roy Cooper, by Assistant Attorney General Marc X. Sneed, for North Carolina Department of Justice, Tort Claims Section.

McGEE, Chief Judge.

I. *Facts and Procedural History*

The General Assembly enacted the Eugenics Asexualization and Sterilization Compensation Program (“the Compensation Program”), N.C. Gen. Stat. § 143B-426.50 *et seq.*, in 2013, in order to provide compensation to victims of the North Carolina Eugenics laws. 2013 N.C. Sess. Laws 360, s. 6.18(a). Ms. Hughes (“Hughes”), Ms. Redmond (“Redmond”), and Mr. Smith (“Smith”)¹ (Hughes, Redmond, and Smith together, “the Victims”) were all “sterilized involuntarily under the authority of the Eugenics Board of North Carolina [‘Eugenics Board’] in accordance with Chapter 224 of the Public Laws of 1933 or Chapter 221 of the Public Laws of 1937.” N.C. Gen. Stat. § 143B-426.50(5) (2013).² Hughes died in 1996, Redmond died in 2010, and Smith died in 2006.

Because the North Carolina Industrial Commission (“Industrial Commission”) concluded that the Victims were “asexualized involuntarily or sterilized involuntarily under the authority of the Eugenics Board of North Carolina in accordance with Chapter 224 of the Public Laws of 1933 or Chapter 221 of the Public Laws of 1937[,]” they were all “qualified recipients” pursuant to the Compensation Program. N.C. Gen. Stat. § 143B-426.50(5) (2013). However, N.C. Gen. Stat. § 143B-426.50(1) limited which qualified recipients could become successful claimants as follows: “Claimant. – An individual on whose behalf a claim is made for compensation as a qualified recipient under this Part. An individual *must be alive on June 30, 2013*, in order to be a claimant.” N.C. Gen. Stat. § 143B-426.50(1) (emphasis added). Therefore, pursuant to the plain language of N.C. Gen. Stat. § 143B-426.50(1), the Victims, all of whom died before 2013, are not considered “claimants” for the purposes

1. We avoid using the full names of these individuals in order to protect their anonymity.

2. The Compensation Program, N.C. Gen. Stat. § 143B-426.50 *et seq.*, “[e]xpired pursuant to Session Laws 2013-360, s. 6.18(g), as amended by Session Laws 2014-100, s. 6.13(e), effective June 20, 2015.” *See* N.C. Gen. Stat. § 143B-426.50 (2015). However, because these claims were timely initiated pursuant to the rules of the Compensation Program, we apply N.C. Gen. Stat. § 143B-426.50 *et seq.* (2013), as these statutes were still in effect at the time these claims were filed.

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of the Compensation Program. The Compensation Program states that only “[a] *claimant* determined to be a qualified recipient under this Part shall receive compensation[.]” N.C. Gen. Stat. § 143B-426.51(a) (2013) (emphasis added).

The estates of Hughes, Redmond, and Smith (“the Estates”) filed claims pursuant to the Compensation Program. However, because the Victims all died before 30 June 2013, they were determined not to meet the definition of “claimant” under the Compensation Program, and the Estates’ claims were denied. The Estates appealed the initial denial of their claims, and their claims were heard by deputy commissioners. Following denials by the deputy commissioners, the Estates filed appeals to the Full Commission. N.C. Gen. Stat. § 143B-426.53 (2013). Following denial of their claims by the Full Commission, the Estates filed notices of appeal with this Court, arguing that N.C. Gen. Stat. § 143B-426.50(1) was unconstitutional on its face because it arbitrarily denied compensation to the heirs of some victims while allowing compensation to others. This matter was heard originally in the Court of Appeals 16 November 2015, and this Court filed opinions on 16 February 2016, with one judge dissenting, in which we held that this Court lacked jurisdiction to address the Estates’ facial constitutional challenge to N.C. Gen. Stat. § 143B-426.50(1). *In re Hughes*, __ N.C. App. __, 785 S.E.2d 111 (2016); *In re Redmond*, __ N.C. App. __, 785 S.E.2d 111 (2016); *In re Smith*, __ N.C. App. __, 785 S.E.2d 111 (2016).

Upon review, our Supreme Court reversed and remanded to this Court for consideration of the merits of Claimants’ constitutional challenge to subsection 143B-426.50(1). *In re Hughes*, __ N.C. __, 796 S.E.2d 784 (2017); *In re Smith*, __ N.C. __, 797 S.E.2d 264, (2017); *In re Redmond*, __ N.C. __, 797 S.E.2d 275 (2017). We now address the merits of the Estates’ facial constitutional challenge to N.C. Gen. Stat. § 143B-426.50(1).

II. *Analysis*

On appeal, the Estates argue that N.C. Gen. Stat. § 143B-426.50(1) violates the North Carolina and the United States constitutions by violating their rights to equal protection under the law. We cannot agree.

A. *History of the Compensation Program*

“North Carolina’s eugenics program was unlike most in the nation, sterilizing approximately 7,600 people over 45 years.” REP. PAUL STAM AND AMY O’NEAL, *Eugenics in North Carolina*, 3 (2016), at <http://paulstam.info/wp-content/uploads/2016/10/Eugenics-in-North->

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Carolina-Updated-Oct.-2016.pdf. In light of the history of eugenics in North Carolina,

North Carolina leaders realized that, through its Eugenics Board, the State invaded the lives and bodies of thousands of its citizens and forcibly took away their ability to choose whether to have children. Commissions and task forces debated whether to compensate the victims. Many in the General Assembly, including Speaker of the House Thom Tillis and House Majority Leader Paul Stam, hoped to accomplish this through the Eugenics Compensation Program (HB 947) during the 2012 Short Session. They wished “to make restitution for injustices suffered and unreasonable hardships endured by the asexualization or sterilizations of individuals at the direction of the State between 1933 and 1974.” The bill would have offered \$50,000 in compensation to those who were sterilized under the N.C. Eugenics Board, but not to the families of victims who died before May 16, 2012. While HB 947 passed the House by a vote of 86 to 31 and funds were appropriated in the budgets of the House and Governor, the bill never made it to the Senate floor.

Id. at 4. One of the task forces mentioned above was created by executive order on 8 March 2011: “The Governor’s Task Force [‘Task Force’] to Determine the Method of Compensation for Victims of North Carolina’s Eugenics Board[.]” N.C. Executive Order No. 83 (2011). In this executive order, the Governor recognized that the General Assembly had already “established panels to explore and make recommendations for *compensating and counseling persons who were sterilized* under the . . . Eugenics Board program[.]” and that “it is now appropriate to identify persons who were sterilized by force or coercion and to explore and determine the possible methods and forms of compensation to those persons.” *Id.* The first duty assigned to the Task Force was to “[r]ecommend possible methods or forms of compensation to *those persons forcibly sterilized* under the . . . Eugenics Board program.” *Id.* (emphasis added). The Task Force submitted its “Final Report” to the Governor on 27 January 2012. THE GOVERNOR’S TASK FORCE TO DETERMINE THE METHOD OF COMPENSATION FOR VICTIMS OF NORTH CAROLINA’S EUGENICS BOARD, *Final Report to the Governor of the State of North Carolina* (2012), at <http://www.sterilizationvictims.nc.gov/documents/FinalReport-GovernorsEugenicsCompensationTaskForce.pdf>. In its “Letter of Transmittal” of the “Final Report,” the Task Force set forth its reasoning as follows:

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Compensation for these survivors serves two purposes. No amount of money can adequately pay for the harm done to these citizens, but financial compensation and other services we recommend will nonetheless provide meaningful assistance. Compensation also serves a larger purpose for all of us who live in North Carolina and rely on a government that respects our rights and leaves us free to live the lives we choose. The compensation package we recommend sends a clear message that we in North Carolina are a people who pay for our mistakes and that we do not tolerate bureaucracies that trample on basic human rights.

. . . .

We also want to clarify our thinking on whether compensation should cover the estates of all victims or be limited to living victims. We know that children of eugenics victims suffer from the hardships their parents endured, but we believe, nonetheless, that financial compensation should go only to living victims. Those who were sterilized suffered direct harm by the state and we would like the state to pay them for that pain.

Id. at 1-2.

In the conclusion of the Final Report, the Task Force acknowledged certain limitations and injustices that were a necessary byproduct of achieving a workable solution to the compensation issue:

In an effort to balance the need to compensate victims for the pain and hardships that they endured and the need to pass an overdue compensation plan this year, the Task Force made a difficult choice to limit compensation to living victims as defined in our recommendations. . . .

The Task Force recognizes that some of the descendants of deceased victims have expressed great frustration that the state could exclude them from a final compensation plan. The Task Force members hope that the descendants will recognize the difficult task faced in developing these recommendations. The final recommendation prioritized a need to provide justice before time runs out to the remaining 1,500 to 2,000 victims who endured the direct, frontline pain and humiliation of this program.

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Id. at 13. The Task Force defined “living victims,” and stated that once living victims had been properly verified, they should receive a vested interest in their compensation share:

The phrase “living victims” shall mean all living victims who have been verified by the Foundation or other state agency at the time legislation is passed as well as living victims verified by the Foundation moving forward.

Once these individuals have been properly verified as living victims, they should be *deemed to have a vested interest in any compensation. Once they have this vested interest, if they should become deceased before any monetary sum is established and paid to them, then the vested interest becomes a part of their estate, and any compensation authorized by the legislature could be payable to their estate.*

Id. at 11 (emphasis added).

Members of the General Assembly also recognized a difference between the surviving relatives of deceased sterilization victims, “those ‘who were not the subject of any clear and direct harm . . . any harm suffered [by heirs] would be vague and not individual in nature, but instead a generalized societal harm[,]’ ” and those “thousands of forced sterilizations victims [who] are still living.” *Eugenics in North Carolina* at 5 (citation omitted). Creation of the Compensation Program moved forward in 2013:

While bills creating the Eugenics Compensation Program were introduced in the House and Senate Floor, the program was ultimately included in the budget. The General Assembly appropriated \$10 million to be divided between the total number of qualified claimants. To qualify for compensation, sterilization victims must have been alive on June 30, 2013, provide adequate documentation of being involuntarily sterilized, and submit the appropriate form by June 30, 2014.

Eugenics in North Carolina at 6 (citations omitted).

The \$10 million appropriated to cover compensation for the victims would clearly not result in compensation approaching \$50,000.00 if even 1,500 victims were verified as claimants according to the method of payment established in N.C. Gen. Stat. § 143B-426.51. Put simply, once all

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claims have been processed by the Industrial Commission, and appeals from rejected claims finally decided, the \$10 million appropriation will be divided equally among each successful claimant. N.C. Gen. Stat. § 143B-426.51(a) (2014).³

We note that the Task Force estimated between 1,500 and 2,000 victims, out of an estimated 7,600 total victims, were still living in 2012. Had 2,000 surviving victims been found to be proper claimants, each claimant's share of the \$10 million would have been \$5,000.00. Had the number of claimants been 1,500, each claimant's share would have been \$6,667.00.⁴ Had all of the estimated 7,600 total victims – or their estates – been compensated, each victim or estate would have received approximately \$1,300.00. However, only 780 claims were filed by the deadline,⁵ less than 250 claims have been currently approved by the Industrial Commission, and only a handful are still awaiting final resolution on appeal. Therefore, compensation for each claimant could reach close to the \$50,000.00 goal recommended by the Task Force and originally requested in HB 947.

The General Assembly set forth its intent in creating the Compensation Program in the preambles of the enacting bills of the successful legislation (HB 7 and SB 464):

Whereas, it is the policy and intent of this State to provide compensation for certain individuals who were lawfully asexualized or sterilized under the authority of the Eugenics Board of North Carolina in accordance with Chapter 224 of the Public Laws of 1933 or Chapter 221 of the Public Laws of 1937; and

Whereas, the General Assembly recognizes that the State has no legal liability for these asexualization or sterilization procedures and that any applicable statutes of limitations have long since expired for the filing of any claims against the State for injuries caused; and

3. The General Assembly has enacted legislation allowing some compensation to be disbursed to those individuals who have already been determined to be qualified recipient claimants. The remainder of the appropriated funds will be disbursed once all appeals have been decided. N.C. Gen. Stat. § 143B-426.51(a).

4. See also *Eugenics in North Carolina* at 5, (“the cost of compensating 1,500 victims at \$50,000 per victim would be \$75 million”).

5. *Eugenics in North Carolina* at 7.

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Whereas, the General Assembly wishes to make restitution for injustices suffered and unreasonable hardships endured by the asexualization or sterilization of individuals at the direction of the State between 1933 and 1974[.]

. . . .

Now, therefore,

The General Assembly of North Carolina enacts:

SECTION 1. Article 9 of Chapter 143B of the General Statutes is amended by adding a new Part to read:

Part 30. Eugenics Asexualization and Sterilization Compensation Program.

2013 North Carolina Senate Bill 464; 2013 North Carolina House Bill 7.

Specifically, the General Assembly stated that the “policy and intent [was] to provide compensation for *certain individuals* who were *lawfully asexualized or sterilized* under the authority of the Eugenics Board of North Carolina[.]” and that “the General Assembly wishe[d] to make restitution for injustices suffered and unreasonable hardships endured *by the asexualization or sterilization of individuals* at the direction of the State between 1933 and 1974[.]” *Id.* There is nothing in this preamble indicating that the General Assembly intended to compensate the *heirs* of individuals who had been sterilized under the authority of the Eugenics Board. In fact, the Compensation Program contains both specific and inferred evidence that the General Assembly intended to provide compensation to those identified sterilization victims who were still living, and to *exclude the heirs* of those victims who had already died. In short, the Compensation Program seems to have been designed in accordance with the stated goals of certain members of the General Assembly, and the Final Report of the Task Force, to provide restitution to the *living survivors* of involuntary asexualization or sterilization by the Eugenics Board.

Much of the Compensation Program tracks the recommendations of lawmakers and the Task Force. Most relevantly for the purposes of our review, the General Assembly’s enactment of N.C. Gen. Stat. § 143B-426.50(1) explicitly limited compensation to living victims – thus excluding heirs of deceased victims – in order to maximize payment amounts to those who actually suffered involuntary sterilization: “An individual must be alive on June 30, 2013, in order to be a claimant.” N.C. Gen. Stat. § 143B-426.50(1). Further, the General Assembly mandated:”

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If any claimant shall die during the pendency of a claim, or after being determined to be a qualified recipient, any payment shall be made to the estate of the decedent.” N.C. Gen. Stat. § 143B-426.51(b).

The General Assembly provided compensation solely to living victims in order to allow greater compensation to those individuals who *personally* suffered the pain and indignity of involuntary sterilization. The General Assembly also provided that, once a living victim was determined to be a valid claimant, or a potential claimant properly initiated a claim, that claim would vest in the claimant or potential claimant. Therefore, should that claimant or potential claimant die before final resolution and/or compensation was completed, any appropriate compensation would be made to the estate of the deceased claimant.

B. *Equal Protection Law*

[1] As this Court has stated:

The Equal Protection Clause of Article I, Section 19 of the North Carolina Constitution and the Equal Protection Clause of Section 1 of the Fourteenth Amendment to the United States Constitution forbid North Carolina from denying any person the equal protection of the laws, and require that all persons similarly situated be treated alike.

Krueger v. N.C. Criminal Justice Educ. & Training Standards Comm’n, 230 N.C. App. 293, 301, 750 S.E.2d 33, 40 (2013). The Estates argue that the requirement in N.C. Gen. Stat. § 143B-426.50(1)

that a victim be alive on 30 June 2013 violates the equal protection guarantees of Article 1, § 19 of the N.C. Constitution and the Fourteenth Amendment of the U.S. Constitution. The government can show no valid state interest that is rationally served by the differential treatment of heirs of victims alive on 30 June 2013 and heirs of victims who had died by that date.

This Court has reviewed the requirements of analysis pursuant to the Equal Protection Clause:

“The Equal Protection Clause of the Fourteenth Amendment provides that no State shall ‘deny to any person within its jurisdiction the equal protection of the laws.’ The United States Supreme Court has ‘explained that the purpose of the [E]qual [P]rotection [C]lause of the Fourteenth Amendment is to secure every person within

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the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.' " Thus, while the principle of substantive due process protects citizens from arbitrary or irrational laws and government policies, the right to equal protection guards against the government's use of invidious classification schemes. "Of course, most laws differentiate in some fashion between classes of persons. The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike."

Wang v. UNC-CH Sch. of Med., 216 N.C. App. 185, 202–03, 716 S.E.2d 646, 657–58 (2011) (citations omitted). Therefore,

"[t]o establish an equal protection violation, [Petitioner] must identify a class of similarly situated persons who are treated dissimilarly." Thus, "[i]n addressing an equal protection challenge, we first identify the classes involved and determine whether they are similarly situated."

For that reason, Petitioner was required to show as an integral part of her equal protection claim that similarly situated individuals were subjected to disparate treatment. *Mandell v. County of Suffolk*, 316 F.3d 368, 379 (2d Cir. 2003) (stating that "[a] Plaintiff relying on disparate treatment evidence must show that she was similarly situated in all material respects to the individuals with whom she seeks to compare herself") [.]

Wang, 216 N.C. App. at 204, 716 S.E.2d at 658 (citations omitted).

Generally, Equal Protection claims are subject to rational basis review:

The Equal Protection Clause is not violated merely because a statute classifies similarly situated persons differently, so long as there is a reasonable basis for the distinction. When a statute is challenged on equal protection grounds, it is subjected to a two-tiered analysis. . . . If a statute does not burden the exercise of a fundamental right or operate to the peculiar disadvantage of a suspect class, the statute is analyzed under the second tier and the government need only show that the classification in the challenged statute has some rational basis. A statute survives analysis

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under this level if it bears some rational relationship to a conceivable, legitimate interest of government. Statutes subject to this level of review come before the Court with a presumption of constitutionality.

Town of Beech Mountain v. County of Watauga, 91 N.C. App. 87, 90-91, 370 S.E.2d 453, 454-55 (1988) (citations omitted). The Estates seem to acknowledge that their Equal Protection claim is subject to “rational basis” review in stating: “Generally, a law will survive the scrutiny if the distinction rationally furthers a legitimate state purpose. However, courts have repeatedly struck down arbitrary classifications such as that made by the living victim threshold in N.C.G.S. §146B-426.50 under the rational basis standard.” (Citation omitted).⁶ Therefore, we must approach the present matter presuming N.C. Gen. Stat. § 143B-426.50(1) is constitutional. *Id.* at 91, 370 S.E.2d at 455.

As the United States Supreme Court has held, it does not violate the Equal Protection Clause to provide special benefits to certain citizens based upon sacrifices they have made, voluntarily or involuntarily, in the furtherance of some governmental objective. *See Hooper v. Bernalillo Cty. Assessor*, 472 U.S. 612, 620, 86 L. Ed. 2d 487, __ (1985) (citation omitted) (special state benefits granted Vietnam veterans was constitutional as a means to “compensate in some measure for the disruption of a way of life . . . and to express gratitude[;]” however, conditioning benefits on length of residency in the state does not survive equal protection review).⁷ The General Assembly’s decision to compensate the victims of our State’s eugenics program does not run afoul of the Equal Protection Clause as a general matter. Therefore, we must consider (1) whether the Estates were *similarly situated* with other beneficiaries and, if so, (2) whether there is some rational relationship between any disparate treatment and “a conceivable, legitimate interest of government.” *Beech Mountain*, 91 N.C. App. at 90-91, 370 S.E.2d at 454-55 (citation omitted).

6. In the concluding paragraphs of the argument sections in the Estates’ briefs, they make a brief argument that “compelling state interest” review should be applied because the harm done, involuntary sterilization, was a “violation of fundamental constitutional rights[.]” We do not find the Estates’ argument for heightened review persuasive, and we apply “rational basis” review.

7. We further note that the Compensation Program is similar to the Civil Liberties Act of 1988, in which Congress established a fund to pay certain Americans who were interred during World War II. That Act limited eligibility to the American citizens of Japanese ancestry *who were still living on the effective date of the Act*. These criteria have been challenged, but have been consistently upheld. *See, e.g., Jacobs v. Barr*, 959 F.2d 313 (1992); *Shibayama v. United States*, 55 Fed. Cl. 720 (2002); *Obadele v. United States*, 52 Fed. Cl. 432 (2002).

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C. *Similarly Situated*

[2] The Estates focus on the *heirs* of victims, instead of the victims themselves, in their Equal Protection analysis when they state: “The government can show no valid state interest that is rationally served by the differential treatment of heirs of victims alive on 30 June 2013 and heirs of victims who had died by that date.” However, the “differential treatment” argued by the Estates is not between heirs of living victims and heirs of deceased victims – it is between heirs of victims and the victims themselves. Without discounting in any manner the injuries suffered by the families of the victims due to the eugenics program, the estates of the victims are not similarly situated to the actual victims themselves, who were forced to undergo involuntary sterilization.

In an effort to circumvent this distinction, the Estates argue that it is the *estates of all victims* who are similarly situated and, therefore, disparate treatment between the estates of victims must pass rational basis review. However, the intended beneficiaries of the Compensation Program are the *living victims* of the eugenics program. The Estates’ focus on the estates of *deceased victims* is inappropriate in the Equal Protection analysis before us, and we hold that the Estates are not similarly situated to the intended beneficiaries of the Compensation Program. The Estates’ Equal Protection challenge fails for this reason.

Further, assuming *arguendo* that the appropriate analysis is whether the estates of *all victims* of the eugenics program are receiving disparate treatment, we still hold that the Estates fail to pass the threshold required to show they were similarly situated to the estates of victims who died after 30 June 2013, but before receiving compensation due. There are thousands of estates of deceased victims, and it is likely that some of these victims initially began dying long ago. The General Assembly clearly intended to limit compensation to living victims, not victims long-ago, or even recently, deceased.

As we do not think it requires probing constitutional analysis to determine that deceased victims and living victims are not similarly situated for Confrontation Clause purposes, we have little difficulty in finding that the heirs of the victims who died before enactment of the Compensation Program are not similarly situated with the heirs of the victims who lived to witness the enactment of the Compensation Program, and who took the steps necessary to initiate claims for compensation.

The former had no expectation of compensation, even following the enactment of the Compensation Program, as they were specifically

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therein excluded. The latter were able to join their victim benefactors-to-be in anticipation that these living victims were finally going to receive compensation.⁸ More importantly, because the intent of the Compensation Program was to compensate the living victims themselves, both monetarily and emotionally, these living victims all received the reassurance and compensation of knowing that if their claims were ultimately successful, the compensation would be granted, even if the actual victims failed to survive the full claims process. We hold that the Estates were not similarly situated with any intended victim beneficiaries of the Compensation Program.

D. *Rational Basis*

[3] Assuming, *arguendo*, that the Estates had survived the “similarly situated” prong of an Equal Protection Clause analysis, we further hold that the challenged legislation demonstrates a “rational relationship between the disparate treatment and ‘a conceivable, legitimate interest of government.’” *Beech Mountain*, 91 N.C. App. at 90-91, 370 S.E.2d at 454-55 (citation omitted).

The *only* accommodation made by the General Assembly in which a payout pursuant to the Compensation Program would be made to the heirs of a deceased victim who was involuntary sterilized under the authority of the Eugenics Board was to the estates of those victims who were living at the time claims for compensation could be filed on their behalves. At least one governmental interest supporting this particular exception was identified in the Final Report:

The phrase “living victims” applies to those living victims who have been verified by the state at the time legislation is approved and any living victim who applies for compensation from then on. *In fairness to living victims who have already been verified, should any die before receiving compensation, the payment would go to their heirs.*

Final Report, at 2 (emphasis added). Stated differently, the purpose of the Compensation Program was to monetarily compensate *living victims* only, not the heirs of deceased victims. However, a *living claimant* would have the comfort of knowing that his or her compensation would be awarded, even if that claimant pre-deceased the payout. The comfort of that knowledge constituted a form of “restitution for injustices

8. In fact, heirs could file compensation claims on behalf of living victims. N.C. Gen. Stat. § 143B-426.50(1); N.C. Gen. Stat. § 143B-426.52(a) (2014).

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suffered and unreasonable hardships endured by the asexualization or sterilization of [those] individuals at the direction of the State between 1933 and 1974[.]” 2013 North Carolina Senate Bill 464; 2013 North Carolina House Bill 7.

Compensating heirs of victims who died before enactment of the Compensation Program could afford no such comfort or “restitution” to those sterilization victims, as they had never established any expectation of compensation. Such a scheme could *only* benefit the heirs, not the victims of involuntary sterilization themselves. This option was clearly considered and rejected by the General Assembly.

We readily identify several rational reasons for limiting compensation to living victims: (1) addition of all heirs of deceased victims to the compensation pool could have reduced the amount of compensation received by the actual victims to an inconsequential amount; (2) the difficulty and cost of determining legitimate heirs of deceased victims, some of whom had died more than eighty years earlier, would likely be prohibitive; (3) the objective of the Compensation Program was not limited to financially compensating living victims, but also included recognition of the particular wrong that had been done to them and, therefore, the Compensation Program was focused only upon those living victims who could still benefit from both the financial compensation and the emotional vindication accompanying the State’s recognition, in a concrete manner, of the wrongs it had done to them.

We entered our analysis with the presumption that N.C. Gen. Stat. § 143B-426.50(1) is constitutional. *Beech Mountain*, 91 N.C. App. at 90-91, 370 S.E.2d at 454-55. We hold the Estates have failed to rebut this presumption because we hold that the intent of the General Assembly to limit compensation to the living victims, or, in rare instances, to the heirs of victims who had been living at the time compensation through the Compensation Program became available to those victims, as codified in N.C. Gen. Stat. § 143B-426.50(1) and related statutes, “bears some rational relationship to a conceivable, legitimate interest of government.” *Beech Mountain*, 91 N.C. App. at 91, 370 S.E.2d at 455 (citation omitted).

III. Conclusion

This Court reaches this determination following thorough review, and in no manner means to suggest that the Estates in this matter, or the estates of other victims excluded by the Compensation Program, are unworthy of recognition, assistance, or compensation. We are limited to determining whether N.C. Gen. Stat. § 143B-426.50(1), on its face, violates the Equal Protection Clause rights of the Estates by limiting

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compensation to victims whose rights in the Compensation Program had vested, and denying compensation to heirs of victims whose rights in the Compensation Program never vested. We hold that the Estates have not demonstrated they were similarly situated to other beneficiaries, and have not shown that the legislation fails to bear a rational relationship to any legitimate governmental interest. Therefore, we must reject the Estates' arguments pursuant to the constitutions of the United States and North Carolina.

Pursuant to the mandates of our Supreme Court set forth in *In re Hughes*, __ N.C. __, 796 S.E.2d 784 (2017); *In re Smith*, __ N.C. __, 797 S.E.2d 264, (2017); and *In re Redmond*, __ N.C. __, 797 S.E.2d 275 (2017), we determine that N.C. Gen. Stat. § 143B-426.50(1), on its face, does not violate the Equal Protection Clause, and we therefore remand to the Industrial Commission with instruction to deny the claims of the Estates.

DECIDED AND REMANDED.

Judges DILLON and DAVIS concur.

INNOVATIVE 55, LLC AND FLS ENERGY, INC., PETITIONERS
v.
ROBESON COUNTY AND THE ROBESON COUNTY BOARD
OF COMMISSIONERS, RESPONDENTS

No. COA16-1101

Filed 6 June 2017

Zoning—conditional use permit—solar farm—prima facie showing—failure to rebut

The superior court erred by affirming the decision of respondent Board of Commissioners to deny petitioner companies' application for a conditional use permit ("CUP") to construct a solar farm where petitioner presented a prima facie showing that it was entitled to issuance of a CUP under the ordinance and the opponents failed to meet their burden to rebut it. Speculative lay opinions and vague assertions did not constitute competent evidence to overcome the applicant's prima facie showing.

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Appeal by petitioners from order entered 11 March 2016 by Judge James Gregory Bell in Robeson County Superior Court. Heard in the Court of Appeals 26 April 2017.

Smith Moore Leatherwood LLP, by Colin J. Tarrant and Elizabeth Brooks Scherer, for petitioner-appellants.

Manning Fulton & Skinner, P.A., by J. Whitfield Gibson and Robeson County Attorney Patrick A. Pait, for respondent-appellees.

TYSON, Judge.

FLS Energy, Inc. and its subsidiary, Innovative 55, LLC (collectively, “FLS Energy”) appeal from the superior court’s order affirming the decision of the Robeson County Board of Commissioners (“the Commissioners”) to deny their application for a conditional use permit (“CUP”) to construct a solar farm. We reverse and remand.

I. Background

A. Proposed Solar Farm in Robeson County

In July 2015, FLS Energy submitted an application to the Robeson County Planning and Zoning Board (“the Planning Board”) and sought a CUP to construct and operate a solar panel facility on farmland situated in Robeson County. In 2015, Charles and Randall Andrews entered into a lease with FLS Energy to permit FLS Energy to build and operate a solar panel facility on forty acres of their 54.37-acre parcel.

The proposed site is zoned Residential Agricultural (“RA”) under the Robeson County Zoning Ordinance (“the Ordinance”). Uses permitted by right in an RA zoned district include: (1) low-density, single-family and mobile home residences, and (2) all agricultural and horticultural uses. Additional specific uses are permitted on RA zoned property, if the permit applicant complies with certain additional conditions imposed by the Ordinance. “Public works and public utility facilities” are two approved conditional uses for properties zoned RA.

The site plan submitted with FLS Energy’s CUP application contained the setback and landscaping buffers required by the Ordinance. The Planning Board heard the CUP application and determined that FLS Energy had met the criteria for a CUP and that the project “would be in the best interests of the citizens of [Robeson] [C]ounty.” Subject to stated conditions, not relevant to this appeal, the Planning Board

unanimously recommended to the Commissioners that FLS Energy's CUP application be approved.

In October and November 2015, the Commissioners held two quasi-judicial hearings to determine whether to grant FLS Energy's CUP application.

B. Testimony Presented to the Commissioners by FLS Energy

Tommy Cleveland, an expert in solar farms at North Carolina State University's Clean Energy Technology Center, testified regarding the design and operation of solar energy systems. Mr. Cleveland asserted evidence shows solar farms are safe for both the short and long-term. Solar panels are constructed with glass and aluminum components, and do not contain any toxic components. Solar panels have operated in close proximity to population areas for fifty years without reported negative consequences. Mr. Cleveland opined the project would pose no danger to the surrounding community's health, safety, or general welfare.

Gregory Hoffman, a licensed professional engineer who is certified in erosion and sediment control, testified by affidavit regarding the project's design and operation. He explained solar farms generally only require weekly maintenance visits, and the project would generate "virtually no traffic." The solar panels are less than ten feet tall at their highest points, and other proposed structures on the site would not exceed twenty-five feet. A six-foot high security fence was proposed to enclose and secure the solar farm. Mr. Hoffman opined that the project would not negatively impact the character of the surrounding area, public health, safety, or traffic, and the use of the property as a solar farm would be in harmony with the surrounding area.

Landscape architect Stephen Johnson, who is certified by the American Society of Landscape Architects, testified regarding FLS Energy's extensive landscaping plans for the project. During meetings with nearby owners and community members and after receiving their comments, FLS Energy had revised its original site plan to increase landscape buffering by thirty percent. FLS Energy had committed to spend over \$65,000.00 to landscape the buffer, which included professional maintenance of the landscaping. Mr. Johnson explained how trees and vegetation would be planted to conceal the solar farm from view of adjoining properties.

Rich Kirkland, a licensed and certified appraiser, testified by affidavit regarding the project's financial impact on the surrounding neighborhood. Mr. Kirkland prepared a property impact analysis, which

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was based upon a comparative study of the property impacts of over twenty other existing solar farms.

He opined solar farms do not negatively impact the value of adjacent and nearby properties. He testified that some people in RA zoned properties regard having a solar farm on adjacent property as a positive. He noted that Realtors® and developers had stated, “A solar farm is better than a turkey farm,” because a solar farm produces no noise, odors, or traffic. Mr. Kirkland opined that the solar farm would not decrease neighborhood property values, and would not be injurious to the use and enjoyment of other neighboring properties.

Finally, Charles Andrews, one of the property owners, testified the project would cause their property taxes to increase from \$2,500 to approximately \$100,000.00 per year, if the solar farm was approved, and would benefit the surrounding community.

C. Testimony Presented by Solar Farm Opponents

Three individuals testified in opposition of the issuance of the CUP for the solar farm. Ray Oxendine lives in Maxton, North Carolina and testified that members of his extended family live adjacent to the site of the proposed project. Mr. Oxendine had seen other solar farms and considered them to be unattractive. He questioned whether solar farms would be safe to live near fifty years from now and asked the Commissioners to deny the CUP because some people in the community opposed it.

Louis Oxendine, a member of the community who owns nearby property, was concerned that the solar farm would be located across the street from an older church and the site where the Croatan Indian School, established in 1887, had once stood. He felt the property across the street was a “historical spot.” Mr. Oxendine was concerned about the CUP because other solar farms he had seen had only small bushes for landscaping and “were not beautiful at all.”

Dr. Jo Ann Lowery, a Robeson County school board member and an adjacent property owner, also appeared and testified in opposition to issuance of the CUP for the solar farm. She produced a petition, purportedly in opposition to the construction of the solar farm, signed by 116 community members. Dr. Lowery was not convinced, based upon her own research, that solar farms were safe. She recognized and admitted she was not an expert in the safety of solar farms.

On 2 November 2015, the Commissioners voted to deny FLS Energy’s CUP request. The Commissioners specifically found the solar farm: (1) would be injurious to the use and enjoyment of other property

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in the immediate vicinity; (2) would impede the normal and orderly development and improvement of the surrounding property for uses permitted; (3) would affect property values within the immediate neighborhood; and, (4) would not be “in harmony” with the surrounding neighborhood.

FLS petitioned the Robeson County Superior Court for review of the Commissioner’s decision by writ of certiorari pursuant to the provisions of N.C. Gen. Stat. § 160A-393. On 11 March 2016, the superior court entered an order, which upheld the Commissioners’ decision. FLS Energy appeals.

II. Jurisdiction

Jurisdiction lies in this Court from final order of the superior court pursuant to N.C. Gen. Stat. § 7A-27(b) (2015).

III. Issues

FLS Energy argues the superior court erred by affirming the Commissioners’ decision because: (1) competent, material, and substantial evidence does not support the Commissioners’ denial of the CUP, after FLS Energy established a *prima facie* case that the permit should have been granted; (2) the opponents of the solar farm presented only speculative, generalized, non-expert testimony in opposition to the project; and, (3) the Commissioners improperly denied FLS Energy’s permit request based upon grounds not expressly stated in or allowed by the Ordinance.

IV. Standard of Review

“‘A legislative body such as the Board [of Commissioners], when granting or denying a conditional use permit, sits as a quasi-judicial body.’” *Sun Suites Holdings, LLC v. Bd. of Alderman of Town of Garner*, 139 N.C. App. 269, 271, 533 S.E.2d 525, 527, *disc. review denied*, 353 N.C. 280, 546 S.E.2d 397 (2000); *see also Dellinger v. Lincoln Cty.*, ___ N.C. App. ___, ___, 789 S.E.2d 21, 26, *disc. review denied*, ___ N.C. ___, ___ S.E.2d ___ (2016).

The Commissioners’ decision on the issuance of the CUP “shall be subject to review of the superior court in the nature of certiorari.” N.C. Gen. Stat. § 160A-381(c) (2015). In reviewing the Commissioners’ decision, “the superior court sits as an appellate court, and not as a trier of facts.” *Tate Terrace Realty Inv’rs, Inc. v. Currituck Cty.*, 127 N.C. App. 212, 217, 488 S.E.2d 845, 848 (citation omitted), *disc. review denied*, 347 N.C. 409, 496 S.E.2d 394 (1997).

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The role of the superior court in reviewing the decision of a Board of Commissioners, sitting as a quasi-judicial body, is as follows:

- (1) Reviewing the record for errors in law,
- (2) Insuring that procedures specified by law in both statute and ordinance are followed,
- (3) Insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents,
- (4) Insuring that decisions of town boards are supported by competent, material and substantial evidence in the whole record, and
- (5) Insuring that decisions are not arbitrary and capricious.

Coastal Ready-Mix Concrete Co., Inc. v. Bd. of Comm'rs of Town of Nags Head, 299 N.C. 620, 626, 265 S.E.2d 379, 383, *reh'g denied*, 300 N.C. 562, 270 S.E.2d 106 (1980).

“This Court’s task on review of the superior court’s order is twofold: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly.” *SBA, Inc. v. City of Asheville City Council*, 141 N.C. App. 19, 23, 539 S.E.2d 18, 20 (2000) (citations and internal quotation marks omitted).

Here, FLS Energy raises issues which require concurrent application of both the *de novo* and “whole record” review. “Whether competent, material and substantial evidence is present in the record is a conclusion of law,” which is reviewed *de novo*. *Am. Towers, Inc. v. Town of Morrisville*, 222 N.C. App. 638, 641, 731 S.E.2d 698, 701 (2012), *disc. review denied*, 366 N.C. 603, 743 S.E.2d 189 (2013) (citation omitted). Whether the Commissioners’ decision was based upon procedures and standards set out in the Ordinance is a question of law, which is also reviewed *de novo*. *Ayers v. Bd. of Adjustment*, 113 N.C. App. 528, 531, 439 S.E.2d 199, 201, *disc. review denied*, 336 N.C. 71, 445 S.E.2d 28 (1994).

“When a party challenges the sufficiency of the evidence or when the [Commissioners’] decision is alleged to have been arbitrary and capricious, this Court employs the whole record test.” *Dellinger*, __ N.C. App. at __, 789 S.E.2d at 26. “The whole record test requires the reviewing court to examine all competent evidence (the whole record) in order to determine whether the agency decision is supported by substantial evidence.” *Id.* at __, 789 S.E.2d at 26 (quoting *SBA, Inc.*, 141 N.C. App. at 26, 539 S.E.2d at 22).

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V. Commissioners' Denial of CUP

FLS Energy argues the Commissioners improperly denied its CUP to construct the solar farm. FLS Energy asserts it presented a *prima facie* showing it was entitled to issuance of a CUP under the standards and conditions of the Ordinance, and the opponents of the solar farm failed to present competent and material evidence to overcome FLS Energy's *prima facie* showing to allow the denial of its application. We agree.

"The general rule is that a zoning ordinance, being in derogation of common law property rights, should be construed in favor of the free use of property." *Dobo v. Zoning Bd. of Adjustment of Wilmington*, 149 N.C. App. 701, 712, 562 S.E.2d 108, 115 (2002) (Tyson, J., dissenting), *rev'd per curiam*, 356 N.C. 656, 576 S.E.2d 324 (2003); *see also City of Sanford v. Dandy Signs, Inc.*, 62 N.C. App. 568, 569, 303 S.E.2d 228, 230 (1983). "Zoning regulations are not a substitute for private restrictive covenants." *Dobo*, 149 N.C. App. at 712, 562 S.E.2d at 115.

A. FLS Energy's Prima Facie Showing of Entitlement to Permit

A solar farm is a conditional use expressly contemplated and listed for property zoned RA under the Ordinance as a "public utility facility." "When an applicant for a conditional use permit 'produces competent, material, and substantial evidence of compliance with all ordinance requirements, the applicant has made a *prima facie* showing of entitlement to a permit.'" *Howard v. City of Kinston*, 148 N.C. App. 238, 246, 558 S.E.2d 221, 227 (2002) (quoting *SBA, Inc.*, 141 N.C. App. at 27, 539 S.E.2d at 22 (2000)).

"Material evidence is "[e]vidence having some logical connection with the facts of consequence or the issues." Black's Law Dictionary 638 (9th ed. 2009). "Substantial evidence is evidence a reasonable mind might accept as adequate to support a conclusion." *Humane Soc'y of Moore Cty. v. Town of Southern Pines*, 161 N.C. App. 625, 629, 589 S.E.2d 162, 165 (citation and quotation marks omitted). "[The evidence] must do more than create the suspicion of the existence of the fact to be established. It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." *Humble Oil & Ref. Co. v. Bd. of Aldermen*, 284 N.C. 458, 471, 202 S.E.2d 129, 137 (1974) (citation, internal quotation marks, and alterations omitted).

FLS Energy's burden to show its *prima facie* compliance with all requirements and conditions of the Ordinance is a burden of *production*, and not a burden of proof. *Dellinger*, __ N.C. App. at __, 789 S.E.2d

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at 30. “To hold that an applicant must first anticipate and then prove or disprove each and every general consideration would impose an intolerable, if not impossible, burden on an applicant for a conditional use permit. An applicant need not negate every possible objection to the proposed use.” *Woodhouse v. Bd. of Comm’rs of Nags Head*, 299 N.C. 211, 219, 261 S.E.2d 882, 887-88 (1980).

Section 17.3 of the Ordinance at issue is titled, CONDITIONAL USES, and states:

The following *uses are permitted* subject to any additional conditions imposed:

(C) *Public works and public utility facilities*, such as transformer stations, water towers, and telephone exchanges, provided: 1) such *facilities are essential* to the severs [sic] of the community and no vehicles or materials shall be stored on the premises; 2) all buildings and apparatus shall be set back at least twenty (20) feet from all property lines and shall be designated and landscaped in such a way as to blend with the surrounding area. (emphasis supplied).

Section 30 of the Ordinance provides:

No conditional use permit shall be recommended by the Planning and Zoning Board unless such Board shall find:

A. That . . . the conditional use will not be detrimental to or endanger the public health, safety, morals, comfort, or general welfare;

B. That the conditional use will no[t] be injurious to the use and enjoyment of other property in the immediate vicinity for the purposes already permitted nor substantially diminish and impair property values within the neighborhood;

C. That . . . the conditional use will not impede the normal and orderly development and improvement of the surrounding property for uses permitted in the district;

D. That the exterior architectural appeal and functional plan of any proposed structure will not be so at variance with the exterior architectural appeal and functional plan of the structures . . . in the immediate neighborhood or with the character of the application district as to cause

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a substantial depreciation in the property values with[in] the neighborhood;

E. That adequate utilities, access roads, drainage and/or other necessary facilities have been or are being provided;

F. That adequate measures have been or will be taken to provide ingress and egress to minimize traffic in the public streets;

G. That the conditional use shall, in all other respects, conform to the applicable regulations of the district in which it is located

The Planning Board unanimously found that FLS Energy had clearly met its burden of production under Section 17.3 of the Ordinance. It produced a site plan and competent testimony which complied with all of the specific CUP requirements set forth in that section. FLS Energy presented a *prima facie* entitlement to issue the CUP before the Commissioners.

FLS Energy also met its burden of production by presenting competent, material, and substantial evidence before the Commissioners to show compliance with the more general requirements set forth in Section 30 of the Ordinance. *See Howard*, 148 N.C. App. at 246, 558 S.E.2d at 227.

FLS Energy presented material and substantial expert testimony from three witnesses to show: (1) solar farms are safe in both the short and long-term for the environment and surrounding community; (2) the project would generate “virtually no traffic;” (3) due to the proposed set-backs and landscaping, the project would not impact the character of the surrounding area; and, (4) the project would not negatively affect the value of adjacent and nearby properties or be injurious to the use and enjoyment of other neighboring properties.

B. Burden Shifts to Opponents to Rebut FLS Energy’s
Prima Facie Showing

Once an applicant has produced competent, material, and substantial evidence tending to establish compliance with all applicable ordinance requirements for the issuance of a CUP, “[t]he burden of establishing that the approval of a [CUP] would endanger the public health, safety, and welfare falls upon those who oppose the issuance of the permit.” *Id.* After a *prima facie* showing, “[d]enial of a [CUP] must [also] be based upon findings which are supported by *competent, material, and substantial evidence* appearing in the record.” *Id.* (emphasis supplied).

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The Commissioners' denial of the CUP appears to have been wholly based upon the three witnesses' testimonies and a signed petition in opposition to the CUP. Based upon their testimonies, the Commissioners concluded:

1. That the conditional use permit request would be injurious to the use and enjoyment of other property in the immediate vicinity for the purpose already permitted.
2. That the conditional use permit would impede the normal and orderly development and improvement of the surrounding property for uses permitted in the district.
3. The Board was concerned that the conditional use permit would affect property values within the immediate neighborhood.
4. That the conditional use permit would not be in harmony with the area in which it is to be located.

Speculative and general lay opinions and bare or vague assertions do not constitute competent evidence before the Commissioners to overcome the applicant's *prima facie* entitlement to the CUP. *MCC Outdoor, LLC v. Town of Franklinton Bd. of Comm'rs*, 169 N.C. App. 809, 815, 610 S.E.2d 794, 798, *disc. review denied*, 359 N.C. 634, 616 S.E.2d 540 (2005).

[The] denial of a conditional use permit based solely upon the generalized objections and concerns of neighboring community members is impermissible. Speculative assertions, mere expression of opinion, and generalized fears about the possible effects of granting a permit are insufficient to support the findings of a quasi-judicial body. In other words, the denial of a conditional use permit may not be based on conclusions which are speculative, sentimental, personal, vague, or merely an excuse to prohibit the requested use.

Howard, 148 N.C. App. at 246, 558 S.E.2d at 227 (citation and internal quotation marks omitted).

The Board found that it "heard testimony from several neighbors who argued that the requested use would substantially diminish or impair property values within the neighborhood" and "would increase traffic congestion in the public streets." The record does not show any of the three witnesses in opposition to the CUP presented any competent evidence pertaining to these two issues.

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Substantial and material evidence in the record pertaining to these issues was presented by FLS Energy's experts and lay witnesses, who testified the solar farm would not negatively impact property values of other properties within the neighborhood, and would produce "virtually no traffic." Furthermore, our statutes specifically provide that lay witness testimony is not considered "competent evidence" to show either "the use of property in a particular way would affect the value of other property," or "the increase in vehicular traffic resulting from a proposed development would pose a danger to the public safety." N.C. Gen. Stat. § 160A-393(k)(3)(a)-(b) (2015); N.C. Gen. Stat. § 153A-349(a) (2015).

Opponents to the solar farm testified to unsupported and highly speculative claims about their unsubstantiated fears of solar farms and their possible dangers. Opposing contentions included assertions that the solar panels contain "poison," might be connected to "dead birds in California," might produce harmful radiation, and might be hit by hurricanes or tornadoes. The opponents produced no expert testimony or other material and substantial evidence in support of their claims.

A lay witness's testimony regarding "[m]atters about which only expert testimony would generally be admissible under the rules of evidence" is not competent evidence. N.C. Gen. Stat. § 160A-393(k)(3)(c) (2015); N.C. Gen. Stat. § 153A-349(a). The lay testimony regarding the purported safety of solar farms is a matter requiring scientific, technical or other specialized or personal knowledge, normally outside the experience of an ordinary person. The opponents' testimonies on this topic did not constitute "competent evidence" to rebut FLS Energy's *prima facie* showing to deny the CUP.

FLS Energy presented testimony from multiple expert witnesses tending to show solar farms do not materially endanger the environment or the public's health or safety. The opponents' testimony about health and safety concerns of solar farms is an example of the "generalized and speculative fears," which cannot rebut a *prima facie* showing to support denial of a CUP. *Howard*, 148 N.C. App. at 246, 558 S.E.2d at 227.

The testimony of solar farm opponents that the final project as constructed would be an "eyesore," based upon other solar farms they have seen, is also not competent evidence to support the denial of the solar farm. See *Blair Invs., LLC v. Roanoke Rapids City Council*, 231 N.C. App. 318, 324-25, 752 S.E.2d 524, 529-30 (2013) (statements that a cellphone tower was an "eyesore" and general opposition to the project were rejected as incompetent opinion testimony and did not support denial of the CUP).

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Furthermore, “[t]he inclusion of the particular use in the ordinance as one which is permitted under certain conditions, is equivalent to a legislative finding that the prescribed use is *one which is in harmony with the other uses permitted in the district.*” *Woodhouse*, 299 N.C. at 216, 261 S.E.2d at 886 (citation omitted) (emphasis supplied). The Ordinance specifically permits “public works and public utility facilities” as conditional uses in the RA zoning district.

Mr. Oxendine’s concern that the proposed solar farm is near a “historical spot” also does not support denial of the CUP. Mr. Oxendine was primarily concerned that children visiting these historical church and former school sites would see the solar farm. Whether a proposed use can “be seen from a particular location is simply irrelevant” to whether it is compatible with the neighborhood. *MCC Outdoor*, 169 N.C. App. at 814, 610 S.E.2d at 798.

Our Legislature has determined the public policy of our State encourages solar equipment and facilities and the use of solar energy. *See, e.g.*, N.C. Gen. Stat. § 105-277(g) (2015) (providing reduced tax rates for buildings equipped with solar energy heating and/or cooling systems). The public policy of our State supports children learning about clean, renewable energy, which is beneficial to all North Carolina citizens.

Finally, the petition that was presented to the Board, purportedly signed by citizens of the surrounding community is not competent evidence to overcome FLS Energy’s *prima facie* showing to entitlement to the CUP. *See Humane Soc’y of Moore Cty., Inc.*, 161 N.C. App. at 631-32, 589 S.E.2d at 167 (recognizing a public poll or “survey cannot be used as competent, material evidence as the answers are simply speculative comments from neighborhood residents”). The preamble to the petition merely states, “We, the undersigned, petition Commissioners to deny the request for a Conditional Use Permit to allow for the establishment of a Solar Farm in a Residential Agricultural District owned by Randal [sic] and Charles D. Andrews”

The record before us demonstrates FLS Energy’s CUP was impermissibly denied “based solely upon the generalized objections and concerns of neighboring community members.” *Blair Investments*, 231 N.C. App. at 324, 752 S.E.2d at 529. The opposition was not based upon any specific or supported testimony, or substantial and material evidence, facts, or data. The Board’s denial of FLS Energy’s *prima facie* entitlement to the CUP was clearly based upon testimonies and a non-specific signed petition “which are speculative, sentimental, personal, vague, or merely an excuse to prohibit the requested use.” *Howard*, 148 N.C. App. at 246, 558 S.E.2d at 227.

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VI. Conclusion

Based upon all the evidence and testimony presented, FLS Energy produced a *prima facie* showing of entitlement to support issuing the CUP the Planning Board had unanimously recommended for approval.

After the quasi-judicial hearing, the Commissioners' denial of FLS Energy's application for a CUP is not supported by substantial, competent, and material evidence. "When a Board [of Commissioners'] action is unsupported by competent substantial evidence, such action must be set aside for it is arbitrary." *MCC Outdoor*, 169 N.C. App. at 811, 610 S.E.2d at 796 (citation omitted). The trial court's order affirming the denial of FLS Energy's CUP application, when the Board's denial was not based on sufficient evidence, is reversed. *See id.* at 815, 610 S.E.2d at 798.

This matter is remanded to the superior court for further remand to the Commissioners with instructions to grant FLS Energy's application and issue a CUP to construct and operate a solar farm on their proposed site. *It is so ordered.*

REVERSED AND REMANDED.

Chief Judge McGEE and Judge CALABRIA concur.

KINGS HARBOR HOMEOWNERS ASSOCIATION, INC., PLAINTIFF
v.
ROY T. GOLDMAN AND WIFE, DIANA H. GOLDMAN, DEFENDANTS

No. COA16-1189

Filed 6 June 2017

1. Appeal and Error—interlocutory orders and appeals—Rule 54(b) certification

In a declaratory judgment action involving a dispute over ownership of a community pier and walkway, defendant lot owners' appeal from the trial court's interlocutory order (on the parties' cross-motions for summary judgment with a remaining punitive damages claim) was subject to immediate appellate review based on the trial court's N.C.G.S. § 1A-1, Rule 54(b) certification.

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2. Declaratory Judgments—ownership of community pier and walkway

The trial court erred in a declaratory judgment action involving a dispute over ownership of a community pier and walkway by denying defendant lot owners' motion for summary judgment and granting summary judgment in favor of plaintiff homeowners association. The homeowners association's reliance on the parties' intent was misplaced. The grantor's intent must be understood as expressed in the language on the deed, and the deed here was clear and unambiguous.

3. Easements—riparian rights—no extension by implication

The trial court erred in a declaratory judgment action involving a dispute over ownership of a community pier and walkway by denying defendant lot owners' motion for summary judgment and granting summary judgment in favor of plaintiff homeowners association. The ten-foot access easement relied upon by the homeowners association ended at the boundary of the lot adjacent to the pier and could not be extended into the creek by implication, including riparian rights or structures located on the creek.

Appeal by defendants from order entered 18 July 2016 by Judge Jay D. Hockenbury in Onslow County Superior Court. Heard in the Court of Appeals 20 April 2017.

Cranfill Sumner & Hartzog, LLP, by Regan S. Toups and Elizabeth King, and Marshall Williams & Gorham, LLP, by Charles D. Meier, for plaintiff-appellee.

Robert W. Detwiler for defendant-appellants.

TYSON, Judge.

Defendants, Roy and Diana Goldman (“the Goldmans”), appeal from the trial court’s denial of their motion for summary judgment and grant of the Kings Harbor Homeowners Association, Inc.’s (“the HOA”) motion for summary judgment. We reverse and remand.

I. Background

Kings Harbor is a planned residential community located in Onslow County North Carolina, developed by Industrial Homes, Inc. (“the Developer”). Evidence tends to show the Developer intended to provide

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access to Kings Creek as an amenity for the Kings Harbor lot owners. On 12 August 2005, the Developer recorded a map entitled “Final Plat for King’s Harbor II.” The map identifies a “10’ Pedestrian Walkway Easement” located on Lot 37, running from the HOA maintained street to the creek boundary of Lot 37. The maps do not show any easement or pier extending into the creek. The pier and deck at issue was built years after the map was recorded. The Developer recorded a revised map five years later, for the purpose of showing removal of off-site septic systems. Otherwise, the original and revised maps are identical.

The same day the original map was recorded, 12 August 2005, the Developer also recorded the “Declaration of Restrictive Covenants Kings Harbor II” (“the Declaration”). Paragraph 11 of the Declaration, entitled “Common Area,” states:

All lot owners shall have use of the walkway on Lot 37 as shown on the recorded plat. Repairs and maintenance of said walkway shall be the responsibility of the Homeowners’ Association. Hours of walkway use shall be limited to 9:00 a.m. through 9:00 p.m. daily.

The Declaration contains no reference to a pier or any improvements built beyond the walkway.

After the original map and Declaration were recorded, the Developer began construction of a wooden pier and walkway on Lot 37 of the subdivision, with the apparent intention that the pier would eventually be conveyed to the HOA. The Developer filed an application in January 2006 with the North Carolina Department of Environmental and Natural Resources, which sought a permit to construct the pier under the North Carolina Coastal Area Management Act (“CAMA”). The plans submitted in support of the permit application depicts the pier connecting with the walkway easement. The Division of Coastal Management issued the permit to the Developer on 5 April 2006. The permit refers to the pier as a “community access facility.”

Construction of the pier was completed in August 2007. Since that time, the pier has been in continual use by the Kings Harbor lot owners. The pier was constructed on Kings Creek and can be accessed via the ten-foot pedestrian walkway easement over Lot 37. Shortly after construction of the pier was completed, a sign was erected at the walkway’s entrance, which read, “Kings Harbor Pier.”

On 28 March 2006, the Developer conveyed Lot 38 via general warranty deed to Mrs. Goldman’s mother, Willa Mae Hartley. Ms. Hartley

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began living in the home constructed on Lot 38 in 2007. Lot 38 is located adjacent to Lot 37. When Mrs. Goldman visited her mother, she would see neighbors openly using the walkway and pier.

In March 2011, the Developer conveyed Lot 37 to Ms. Hartley via general warranty deed for the purchase price of \$100,000.00. On 16 October 2014, the Developer purported to convey all of its title, rights, and interests in the community pier and walkway easement to the HOA. Ms. Hartley never took any action to discourage or prevent the HOA lot owners from using the walkway or pier, nor acted in a way to suggest she asserted exclusive ownership to either. The pier is the sole structure on Lot 37.

Ms. Hartley died in August 2011, and the Goldmans inherited Lots 37 and 38. They began living in the house on Lot 38 in 2012. The Goldmans observed other lot owners continued to use and enjoy the walkway and pier after they moved into the house. Prior to September 2014, the Goldmans took no action to prevent members of the HOA community from using the walkway and pier.

Mr. Goldman became an officer and director of the HOA's board in January 2013. He participated in multiple board meetings where the pier was discussed. For example, at the meeting in April 2013, Mr. Goldman proposed a new sign at the pier addressing times the pier was open, swimming, and boat launchings. Minutes from the HOA board meetings in 2013 show Mr. Goldman repeatedly participated in discussions about the HOA's control and maintenance of the walkway and pier. On 22 April 2014, the minutes reflect the Board discussed purchasing insurance coverage on behalf of the HOA for the walkway and pier.

Mr. Goldman drafted a letter in July 2014, which proposed the HOA agree for him to move the ten-foot easement on Lot 37 from the side closest to his house to the "far side" of Lot 37, to "give the community a more direct access as well as allowing maximum usage of our combined lots."

During the summer of 2014, the Goldmans began to assert exclusive ownership of the pier. On 30 August 2014, the Goldmans placed a chain across the entrance to the pier. The chain was removed by HOA representatives. The Goldmans replaced the chain within a week, which was also removed by the HOA. On 21 October 2014, the Goldmans erected a locked wooden gate across the entrance to the pier.

On 27 October 2014, the HOA filed suit against the Goldmans for a declaratory judgment to determine the parties' ownership rights of the

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pier. The HOA also claimed trespass against the Goldmans, and sought punitive damages and injunctive relief. The Goldmans counterclaimed and asserted exclusive ownership of the pier. The parties filed cross-motions for summary judgment.

By written order dated 18 July 2016, the trial court: (1) denied the Goldmans' motion for summary judgment; (2) dismissed the Goldmans' counterclaim; (3) granted the HOA's motion for summary judgment on its claim for declaratory relief; (4) granted the HOA's motion for summary judgment on its claim for trespass and awarded nominal damages; and (5) entered a permanent injunction, which enjoined Defendants from blocking or obstructing the walkway or community pier.

The trial court declared the ten-foot walkway easement and pier were dedicated and constructed for the use and enjoyment of the HOA lot owners, the HOA holds *all rights and title* to the easement and pier as common property, and the Goldmans do not possess exclusive rights to the easement and community pier. The Goldmans appeal.

II. Jurisdiction

[1] The Goldmans appeal from the trial court's final judgment on the parties' cross-motions for summary judgment pursuant to N.C. Gen. Stat. § 7A-27(a) (2015). Although this appeal is interlocutory because the HOA's claim for punitive damages remains for trial, the trial court entered an order pursuant to Rule 54(b), which certifies no just reason exists to delay an appeal from the claims resolved in the trial court's 18 July 2016 Summary Judgment and Order for Permanent Injunction. N.C. Gen. Stat. § 1A-1, Rule 54(b) (2015). The Goldmans' appeal is properly before this Court.

III. Issues

The Goldmans argue the trial court erred by: (1) considering certain portions of affidavits submitted by the HOA in support of the HOA's partial motion for summary judgment, and (2) granting summary judgment in favor of the HOA and denying the Goldmans' motion for summary judgment and dismissing their counterclaim, where a genuine issue of material fact exists regarding lawful ownership of the pier.

IV. 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.

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Gen. Stat. § 1A-1, Rule 56(c) (2015); see *Draughon v. Harnett Cty. Bd. of Educ.*, 158 N.C. App. 208, 212, 580 S.E.2d 732, 737 (2003) (citation omitted), *aff'd per curiam*, 358 N.C. 131, 591 S.E.2d 521 (2004). “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.” *Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982) (citations and internal quotation marks omitted).

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). 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).

V. Ownership of the Pier

[2] The Goldmans argue the trial court erred by denying their motion for summary judgment and dismissing their counterclaim and by granting summary judgment in favor of the HOA. We agree.

The HOA’s claims for relief are based upon its allegation that “(t)he association owns the Community Pier as common property.” The Goldmans also seek relief based upon their claim of exclusive ownership of the pier.

Lot 37 and the pier constructed upon it were originally owned by the Developer. “Riparian rights are vested property rights that arise out of ownership of land bounded or traversed by navigable water.” *Pine Knoll Ass’n v. Cardon*, 126 N.C. App. 155, 159, 484 S.E.2d 446, 448, *disc. review denied*, 347 N.C. 138, 492 S.E.2d 26 (1997) (citation omitted).

A riparian owner has “a qualified property in the water frontage belonging, by nature, to their land, the chief advantage growing out of the appurtenant estate in the submerged land being the right of access over an extension of their waterfronts to navigable water, and the right to construct wharfs, piers, or landings”

Id. (quoting *Bond v. Wool*, 107 N.C. 139, 148, 12 S.E. 281, 284 (1890)).

At the time of permitting and construction of the pier, the Developer owned Lot 37, including the riparian rights appurtenant to that lot. The Developer remained the owner of Lot 37 and its riparian rights until Lot

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37 was conveyed to Ms. Hartley in March 2011. The legal description of the property contained in the general warranty deed to Ms. Hartley states, “all of Lot 37, as shown on that plat entitled, ‘Revised Final Plat for Kings Harbor, II’, dated August 6, 2010, . . . and recorded in Map Book 60, Page 182, Slide M-1736, Onslow County Registry.” The plat map does not show any easement extended beyond the boundary or pier located on Lot 37.

The legal description of Lot 37 contained in the deed to Ms. Hartley further states the conveyance is “[s]ubject to restrictive covenants recorded in Book [2501], Page 745, Onslow County Registry.” The Kings Harbor restrictive covenants provide that “(a)ll lot owners shall have use of the walkway on Lot 37 as shown on the recorded plat.” The pier is not mentioned in the restrictive covenants.

“The law favors creation of a fee simple estate unless it is clearly shown a lesser estate was intended.” *Vestal v. Vestal*, 49 N.C. App. 263, 267, 271 S.E.2d 306, 309 (1980). Neither the pier nor any other riparian rights were excepted or conditioned from the 25 March 2011 conveyance from the Developer to Ms. Hartley.

“An exception means that some part of the estate is not granted at all or is withdrawn from the effect of the grant.” *Amerson v. Lancaster*, 106 N.C. App. 51, 54 415 S.E.2d 93, 95 (1992) (citation omitted). Title to all of the riparian rights, including the pier located thereon, passed to Ms. Hartley on 25 March 2011, and then to the Goldmans upon Ms. Hartley’s death.

The HOA argues the map, Declaration, deeds, CAMA permit, and the Goldmans’ own conduct show the walkway easement and pier was intended by the Developer to provide water access to the HOA’s lot owners. It is undisputed the ten-foot walkway easement and servitude across Lot 37 was created and reserved for the benefit of the lot owners, and granted to the HOA. This easement is clearly shown on the recorded plat map, and is referenced in the legal description of the deed to Ms. Hartley.

The HOA’s reliance upon the purported intent of the parties is misplaced. “The grantor’s intent must be understood as that expressed in the language of the deed[.]” *Simmons v. Waddell*, __ N.C. App. __, __ 775 S.E.2d 661, 671 (2015) (citing *Cty. of Moore v. Humane Soc’y of Moore Cty., Inc.*, 157 N.C. App. 293, 298, 578 S.E.2d 682, 685 (2003)). “However, if the language is uncertain or ambiguous, the court may consider all the surrounding circumstances, including those existing when the document

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was drawn, . . . and the construction which the parties have placed on the language, so that the intention of the parties may be ascertained and given effect.” *Id.* (citing *Century Commc’ns, Inc. v. Hous. Auth. of City of Wilson*, 313 N.C. 143, 146, 326 S.E.2d 261, 264 (1985)). “We must, if possible without resorting to parol evidence, determine the grantors’ intent based on the four corners of the deed.” *Id.* at ___, 578 S.E.2d at 674. (citing *Cty. of Moore*, 157 N.C. App. at 298, 578 S.E.2d at 685).

Here, the language of the deed to Lot 37 is clear and unambiguous, contains no exceptions, and is subject only to restrictive covenants that do not mention either the pier or the riparian rights. “[A] map or plat, referred to in a deed, becomes a part of the deed, as if it were written therein.” *Stines v. Willying, Inc.*, 81 N.C. App. 98, 101, 344 S.E.2d 546, 548 (1986). The recorded plat likewise does not show the pier or any structure extending from the boundary and shoreline of Lot 37.

[3] Furthermore, “the scope of an express easement is controlled by the terms of the conveyance if the conveyance is precise as to this issue.” *Swaim v. Simpson*, 120 N.C. App. 863, 864, 463 S.E.2d 785, 786 (1995), *aff’d per curiam*, 343 N.C. 298, 469 S.E.2d 553 (1996). When the instrument creating an express easement precisely describes the extent of the easement, the plain language and terms of the easement control. *Williams v. Abernethy*, 102 N.C. App. 462, 464-65, 402 S.E.2d 438, 440 (1991).

Easements are “granted for the benefit of the particular land, and its use is limited to such land. Its use cannot be extended to other land, nor can the way be converted into a public way without the consent of the owner of the servient estate.” *Wood v. Woodley*, 160 N.C. 14, 16, 75 S.E. 719, 720 (1912) (citation and quotation marks omitted). Here, the ten-foot access easement shown on the recorded plat ends at the boundary of Lot 37. Without permission from the Goldmans, the easement cannot be extended by implication into the creek, to include riparian rights or structures located thereon. *See id.*

VI. Conclusion

The Developer conveyed all property rights he owned in Lot 37, including the appurtenant riparian rights and the pier located thereon, to Ms. Hartley in 2011. His general warranty deed is subject only to the ten-foot walkway easement from the HOA maintained street to the boundary line as shown on the plat and referenced in the restrictive covenants. Having conveyed all of the riparian property rights of Lot 37 to Ms. Hartley in 2011, the Developer thereafter owned no portion of or any

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rights appurtenant to Lot 37 and owned no interest to convey the pier to the HOA in October 2014. *See Lovette v. Stone*, 239 N.C. 206, 214, 79 S.E.2d 479, 485 (1954) (“A grantor cannot convey to his grantee an estate of greater dignity than the one he has.”).

The Goldmans inherited the riparian rights appurtenant to Lot 37 from Ms. Hartley, including the pier built thereon. The trial court erred by determining the HOA holds any, much less all, rights, title, or extended easement onto the pier. The trial court erred by granting partial summary judgment in favor of the HOA, and denying the Goldmans’ motion for summary judgment and by dismissing their counterclaim. In light of our holding, we do not address the Goldmans’ remaining argument.

Under *de novo* review, we reverse the order of the trial court granting summary judgment in favor of Plaintiff and remand for entry of an order granting Defendant’s motion for summary judgment. *It is so ordered.*

REVERSED AND REMANDED.

Chief Judge McGEE and Judge DILLON concur.

CECIL KENT LEE, JR., AND CHRISTY LEE, PLAINTIFFS
v.
MARTHA COOPER, DEFENDANT

No. COA16-845

Filed 6 June 2017

1. Equity—lease and option to purchase agreement—ambiguous relationship of parties

The trial court erred by granting summary judgment in favor of defendant property owner on plaintiff tenants’ claim to recover their “equity” that they accrued during the term of the parties’ lease and option to purchase agreement where the agreement was ambiguous and there was a genuine issue of material fact regarding whether the relationship of the parties was landlord/tenant or mortgagor/mortgagee.

2. Landlord and Tenant—counterclaims—failure to repair property—ambiguous agreement—unpaid rent

The trial court erred by granting summary judgment in favor of plaintiff tenants on defendant property owner’s counterclaim for

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damages based on tenants' failure to repair the pertinent property where the nature of the parties' agreement regarding repairs was unclear. Although the owner also had a counterclaim for unpaid rent, that argument was dismissed where the owner made no argument in her brief regarding this counterclaim.

Appeal by Defendant and cross-appeal by Plaintiffs from order entered 1 June 2016 by Judge David L. Hall in Guilford County Superior Court. Heard in the Court of Appeals 20 February 2017.

Sharpless & Stavola, by Eugene E. Lester, III, for the Plaintiffs-Appellees.

Benson, Brown & Faucher, PLLC, by James R. Faucher, for the Defendant-Appellant.

DILLON, Judge.

Plaintiffs appeal from an order granting Defendant's motion for summary judgment on Plaintiffs' claims. Defendant cross-appeals from the same order which also granted Plaintiffs' motion for summary judgment on Defendant's counterclaim. For the following reasons, we affirm in part, reverse in part, and remand for further proceedings.

I. Background

Defendant Martha Cooper ("Owner") owns legal title to a certain single-family home (the "Property") that was secured by an adjustable rate mortgage. In 2011, Owner desired to sell the Property for a little over her mortgage balance, which was then approximately \$366,000; however, the Property was in some disrepair, making it hard to sell.

Plaintiffs Kent and Christy Lee ("Tenants") desired to purchase the Property, but their credit did not allow them to qualify for a loan in 2011.

The parties, therefore, entered into an agreement styled "Lease and Option to Purchase Agreement" (the "Agreement") to allow Tenants to lease the Property for a term of four years (through June 2015), during which time Tenants could qualify for a loan and purchase the Property for a price equal to Owner's mortgage balance. The Agreement called for Tenants to make monthly rental payments equal to the Owner's mortgage payment, which would reduce Owner's mortgage balance. The rental payments would adjust as Owner's mortgage payment adjusted. The Agreement also called for Tenants to make an initial \$31,500 payment as

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an “option fee.” According to Tenants’ deposition testimony, this “option fee” was applied to Owner’s mortgage balance in order to reduce the monthly mortgage payment, and thereby reduce Tenants’ rental payment to a more manageable level.

Tenants remained in the Property past June 2015 without exercising their option to purchase the Property. Tenants also allegedly defaulted on their rental payments.

In October 2015, Owner obtained an order of summary ejectment, which returned possession of the Property to her. Tenants did not appeal that order.

Shortly thereafter, Tenants commenced this action, alleging various claims including a claim to recover “equity” that they accrued in the Property during the four years they made payments pursuant to the Agreement. Owner counterclaimed for unpaid rent and for damage to the Property.

The parties filed cross motions for summary judgment. The trial court essentially dismissed all claims and counterclaims, entering summary judgment for Owner on Tenants’ claims and entering summary judgment for Tenants on Owner’s counterclaims. All parties appealed.

II. Analysis

A. Tenants’ Appeal

[1] Tenants argue that the trial court erred in granting summary judgment for Owner on Tenants’ claim to recover their “equity” in the Property that they accrued during the term of the Agreement. Specifically, Tenants argue that their Agreement with Owner entitled them to recoup “equity” they accrued in the Property in the event they did not exercise their option. We have reviewed the terms of the Agreement on this point and find them to be ambiguous. Therefore, we conclude that there is a genuine issue of fact. Accordingly, for the reasons stated below, we reverse the order granting summary judgment for Owner and remand for further proceedings.

The Agreement involves both a lease and an option to purchase. An “option” is a contract where the owner of property gives the optionee a continuing offer to sell the property for a fixed period of time. Time is generally of the essence in an option contract such that the option expires if not exercised by the agreed upon date. *Wachovia Bank v. Medford*, 258 N.C. 146, 150, 128 S.E.2d 141, 144 (1962).

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Where an option to purchase is combined with a residential lease, the agreement is subject to the provisions of Chapter 47G of our General Statutes, which was part of the General Assembly's Homeowner and Homebuyer Protection Act enacted in 2010. *See* N.C. Gen. Stat. § 47G (2015).

In a typical lease/option agreement covered under Chapter 47G, a tenant has the right to purchase the property until the expiration of the option period. If the tenant otherwise defaults under the agreement *during* the term, the tenant does not lose his "equity of redemption" – that is, his option, unless the landlord follows the procedures contained in Chapter 47G. *See* N.C. Gen. Stat. § 47G-2(e). Typically, if the tenant fails to exercise the option within the time provided in the agreement, the tenant is not allowed to recover any money at the end of the term.

The Agreement here, though, contains atypical language that suggests that Tenants could recover "equity" if they did not exercise their option during the term. There is other language, however, that is either conflicting or vague on Tenants' right to recoup "equity" in the event they did not exercise their option to purchase. The pertinent language in the Agreement is as follows:

If the [Tenants] elect not to exercise the Option to Purchase or cannot exercise the Option to purchase after the four year term of the lease[,] the parties agree to the following:

A) At the end of the lease, if [Tenants] cannot purchase the Property[,] the [Owner] may put the property up for sale and [Tenants] will remain as tenants [until the property is sold and continue to pay rent equal to Owner's mortgage payment].

B) If the [Tenants] cannot complete the purchase of the property[,] the [Tenants] will have equity in the property (represented by the option fee) and [Owner] agrees to refund to the [Tenants] that equity which will be the sales price of \$371,100.00 minus the loan payoff to [Owner's mortgage lender] less any seller fees associated with the sale.

C) . . . [Tenants] shall provide a \$31,500 OPTION FEE to the [Owner] in consideration of executing said Option to Purchase Agreement contained herein. In the event that [Tenants] elect not to exercise the option to purchase the real property, the OPTION FEE will not be returned to the [Tenants] but will be treated in accordance with paragraph 3 below.

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(3) OPTION TO PURCHASE: It is agreed that . . . [Tenants] may at any time during the term of this lease elect to purchase said property “as is” for the purchase price of \$371,100.00 In the event of such purchase, the purchase price shall be the then current first mortgage balance on the property plus any seller fees associated with the sale.

These paragraphs can be interpreted in a variety of ways. In their deposition testimony, Tenants stated their understanding was that they had the option to purchase the property for Owner’s mortgage balance and if they did not exercise their option, the Property would be sold and Tenants would be entitled to any sale proceeds (after paying off Owner’s mortgage) up to \$371,100 and that Owner would receive the remainder. Subparagraph A) appears to support this understanding, at least in part, in that it anticipates the Property being sold, but with Tenants to remain in the Property and continue to be responsible to pay Owner’s mortgage until the Property was sold. Subparagraph A) is ambiguous, though, in that it does not state definitively what happens to the proceeds upon any sale. Do Tenants get any net amount up to \$371,100? Who is responsible to bring money to closing should the sale price be less than Owner’s outstanding mortgage balance?

Subparagraph B) suggests that Owner could simply pay Tenants their equity without putting the Property on the market. However, some language suggests that the equity required to be paid by Owner is limited to the \$31,500 “option fee,” while other language suggests that the “equity” is any amount over the mortgage balance up to \$371,100.

But Subparagraph C) conflicts with Subparagraph B) by suggesting that Tenants are not entitled to recoup their \$31,500 should they fail to exercise their option, but in such case the \$31,500 option fee will be treated as set forth in Paragraph 3. Not surprisingly, though, Paragraph 3 does not contain any language to indicate what happens to the \$31,500 option fee if Tenants *fail* to exercise their option. Rather, Paragraph 3 speaks to how the option would be exercised, but then gives two conflicting ways to calculate the purchase price under the option – stating the purchase price to be \$371,100 and then stating the purchase price to be the then current balance on Owner’s mortgage.

In sum, there is language that supports Tenants’ understanding of parts of their agreement with Owner. At the same time, though, the Agreement is silent on some aspects of Tenants’ understanding; and there is other language which contradicts Tenants’ understanding.

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Accordingly, assuming that the parties intended the relationship to be in the nature of a landlord-optioner/tenant-optionee relationship, then Tenants have no interest in the Property (as the option period has expired) but may be entitled to recoup money under the terms of the Agreement.

We note that there is some evidence that the relationship between the parties was *not* that of a landlord-optioner/tenant-optionee, but rather that of a mortgagor/mortgagee, notwithstanding certain language in the Agreement that suggests otherwise. *See Szabo Food v. Balentine's*, 285 N.C. 452, 461, 206 S.E.2d 242, 249 (1974) (“It has long been the rule with us that in determining whether a contract is one of . . . a lease with an option to purchase, or one of sale with an attempt to retain a lien for the purchase price, the courts ‘do not consider what description the parties have given to it, but what is its essential character.’”) That is, there is evidence that the parties intended for the Agreement to work as a contract for deed. In other words, the agreement could be construed as a straightforward “purchase agreement,” rather than an option to purchase. There is evidence that Tenants would, in fact, become equitable owners of the Property and *indebted* to Owner to make Owner’s mortgage payments even beyond the four-year term of the Agreement, (see Subparagraph A) of Agreement), and that the indebtedness to Owner would be secured by the Owner’s retention of legal title in the Property until Owner’s mortgage was paid in full. Indeed, Tenants allege in their complaint that the Agreement provides them with “equity in the Property” and that Owner “holds the property in trust for [Tenants] to the extent of [Tenants]’ interest[.]” Tenants testified in their deposition that they were, in effect, the owners because they were responsible for the Property in all respects and Owner had no interest in being a true landlord. The Agreement states that Tenants were responsible for all repairs, whereas in a true landlord/tenant relationship, the landlord would have obligations to maintain the dwelling. *See* N.C. Gen. Stat. § 42-42 (providing that a residential landlord shall “[m]ake repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition”). Further, there is evidence that Owner received her desired sale price when the Agreement was signed, which was \$5,000 over her mortgage balance.

If the relationship here is determined to be that of a mortgagor/mortgagee, then Tenants, in fact, continue to have an equitable interest in the Property itself: the right to redeem the Property for the amount of their “debt” to Owner. And any provision in the Agreement which requires Tenants to sell the Property to Owner or anyone else (e.g., Subparagraphs A) and B)) *may* be viewed as an unenforceable clog on

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their equity of redemption. *See Wilson v. Fisher*, 148 N.C. 535, 540, 62 S.E. 622, 624 (1908) (equity of redemption cannot be “clogged” by some contemporaneous agreement); *Thorpe v. Ricks*, 21 N.C. 613, 616 (1837) (disavowing any attempt to “clog” the equity of redemption). That is, these provisions may be viewed as a means by which Owner can strip Tenants’ of their equitable interest in the Property outside the foreclosure process. Of course, if a mortgagor/mortgagee relationship exists, Tenants are now free to enter into any agreement regarding their equitable interest.

We express no opinion as to the nature of the relationship between the parties. We merely hold that there is a genuine issue of material fact as to Tenants’ claims.

B. Owner’s Appeal

[2] Owner argues that the trial court erred in granting summary judgment for Tenants on Owner’s counterclaim for damages based on Tenants’ failure to repair the Property. We agree. Specifically, there was some evidence that Tenants had the responsibility to make repairs to the Property and that certain repairs were not made. The nature of the parties’ agreement on this point is unclear; and, therefore, summary judgment was inappropriate. Therefore, we reverse the trial court’s grant of summary judgment on Owner’s counterclaim for damages based on Tenants’ alleged failure to repair the Property; and we remand the matter for further proceedings.

We note that Owner also had a counterclaim for unpaid rent. However, Owner makes no argument in her brief regarding this counterclaim. As such, we affirm the trial court’s order granting summary judgment as to Owner’s counterclaim for unpaid rent.

III. Conclusion

We reverse the trial court’s grant of summary judgment for Owner on Tenants’ claims and remand for further proceedings not inconsistent with this opinion.

We reverse the trial court’s grant of summary judgment for Tenants on Owner’s counterclaim for damages based on Tenants’ alleged failure to repair the Property and remand for further proceedings not inconsistent with this opinion. And we also affirm the trial court’s grant of summary judgment for Tenants on Owner’s counterclaim for unpaid rent.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

Chief Judge McGEE and Judge DAVIS concur.

PARMLEY v. BARROW

[253 N.C. App. 741 (2017)]

GWENDOLYN PARMLEY, INDIVIDUALLY AND AS ADMINISTRATRIX, ESTATE OF JOHN PARMLEY, JR., DECEASED, PLAINTIFF

v.

EVERETT BARROW, JOHNATHAN BRENT FULCHER, B&J SEAFOOD CO., INC., B&J CONTRACTING, LLC, B&J SEAFOOD, LLC, B&J CONTRACTING, AND B&J CONTRACTING, INC., DEFENDANTS

No. COA16-1258

Filed 6 June 2017

Appeal and Error—interlocutory orders and appeals—partial summary judgment—voluntary dismissal without prejudice—filing of new action

An appeal in a wrongful death case from an interlocutory order granting partial summary judgment was dismissed where plaintiff commenced a new action by refiling its claims against the remaining defendant companies in a new action. The trial court did not include certification under N.C.G.S. § 1A-1, Rule 54(b) in the summary judgment order and plaintiff presented no argument that the dismissal of this appeal would deprive her of a substantial right.

Appeal by Plaintiff from order entered 30 June 2016 by Judge Benjamin G. Alford in Pamlico County Superior Court. Heard in the Court of Appeals 1 May 2017.

Couch & Associates, PC, by C. Destine A. Couch and Finesse G. Couch, for Plaintiff-Appellant.

Teague, Rotenstreich, Stanaland, Fox & Holt, PLLC, by Kara V. Bordman, for Defendant-Appellees B&J Contracting, Inc. and B&J Contracting.

Teague, Rotenstreich, Stanaland, Fox & Holt, PLLC, by Kenneth B. Rotenstreich, for Defendant-Appellees B&J Seafood, LLC, B&J Contracting, LLC, B&J Contracting, Inc. and B&J Contracting.

Midkiff, Muncie & Ross, P.C., by William T. Kesler, Jr., for Defendant-Appellees Everett Barrow, Johnathan B. Fulcher, and B&J Seafood Co., Inc.

Wheatly, Wheatly, Weeks, Lupton & Massie, P.A., by Stevenson L. Weeks, for Defendant-Appellees B&J Seafood, LLC, and B&J Contracting, LLC.

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HUNTER, JR., Robert N., Judge.

Gwendolyn Parmley, individually and as Administratrix of the Estate of John Parmley, Jr., (“Plaintiff”) appeals from the trial court’s 30 June 2016 order granting partial summary judgment in favor of Defendants Johnathan Brent Fulcher, B&J Contracting, LLC, B&J Seafood, LLC, B&J Contracting and B&J Contracting, Inc. Subsequently Plaintiff voluntarily dismissed without prejudice her claims against remaining Defendants Everett Barrow and B&J Seafood, Inc., creating a final judgment and jurisdiction for her appeal. However, Plaintiff then filed a second lawsuit against the Defendants whom she dismissed voluntarily. In doing so, Plaintiff’s appeal of the original lawsuit became interlocutory. We dismiss Plaintiff’s appeal without prejudice, so should she decide to do so, Plaintiff may refile her appeal at the conclusion of her second lawsuit.

I. Factual and Procedural Background

The Plaintiff’s forecast of evidence tends to show on 29 August 2014, John Parmley, Jr. (“Parmley”) drove a “roll-back” commercial truck from Craven County, North Carolina, to Newport News, Virginia. Defendant B&J Contracting, Inc. owned the commercial truck. Parmley delivered a propeller to Wildcat Propellers in Chesapeake, Virginia, on his way to Newport News. On the same day, Defendant Everett Barrow (“Defendant Barrow”), an employee of Defendant B&J Seafood Co., Inc., drove a pickup truck for Defendant B&J Seafood Co., Inc., from New Bern, North Carolina to Newport News. Defendant Barrow met Parmley in Newport News where their job was to take possession of a scallop dredge,¹ and have a crane load it onto the commercial truck. Neither Defendant Barrow nor Parmley operated the crane.² After the crane lifted the dredge and placed it on the commercial truck, Parmley and Defendant Barrow strapped down the dredge. Parmley and Defendant Barrow decided Parmley would drive the pickup truck back to New Bern, and Defendant Barrow would drive the commercial truck with the dredge.

Approximately five minutes after securing the dredge, Defendant Barrow began backing the commercial truck out of a gate. Defendant Barrow then “felt the [dredge] shift” and pulled over. Defendant Barrow

1. In his deposition, Defendant Barrow states “B&J” owned the scallop dredge. Plaintiff’s complaint alleges the “remaining Defendants” (Defendants other than Barrow) owned the scallop dredge.

2. The record does not indicate who owned or operated the crane.

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waved for Parmley to also pull over. Parmley then exited the pickup truck and walked over to Defendant Barrow's truck. Defendant Barrow and Parmley walked around the truck to make sure all the straps were intact. Just as Defendant Barrow came around the truck and got beside Parmley, the dredge fell off the truck and pinned Parmley to the ground. The dredge crushed Parmley, and he died.

On 30 April 2015, Parmley's wife, Gwendolyn Parmley, individually and as Administratrix of Parmley's Estate, filed a wrongful death action and a survival claim against Defendants Barrow, Johnathan Brent Fulcher ("Defendant Fulcher"),³ B&J Seafood Co., Inc., B&J Contracting, LLC, and B&J Seafood, LLC in Durham County Superior Court. On 28 September 2015, the parties, through a consent order, changed the venue to Pamlico County. On 18 November 2015, Plaintiff filed an amended complaint naming two additional Defendants, B&J Contracting and B&J Contracting, Inc. On 17 May 2016, Defendants Fulcher, B&J Contracting, LLC, B&J Seafood, LLC, B&J Contracting, and B&J Contracting, Inc. moved for partial summary judgment on the grounds they are not necessary and proper parties to this litigation and there is no genuine issue of material fact or law as to liability.

On 27 June 2016, the trial court heard arguments for partial summary judgment. Defendants' counsel contended B&J Contracting and B&J Contracting, LLC are non-existing entities. Specifically, Defendants' counsel presented affidavits alleging B&J Contracting is not "an unincorporated association or partnership to the knowledge of the parties," and B&J Contracting, Inc. is not an existing corporation. Defendants' counsel also presented evidence showing Defendant Fulcher dissolved B&J Seafood, LLC on 2 September 2010. Defendants' counsel asserted B&J Seafood Co., Inc., employed Barrow. Finally, Defendants' counsel argued Defendant Fulcher was in New Bern, North Carolina, at the time of the accident and corporate officers and owners are not necessary or proper parties to a suit against a corporation.

Plaintiff responded there was a genuine issue of material fact as to whether any of the Defendant corporations employed Parmley on the day of the accident. Plaintiff also made various arguments stating there was conflicting evidence as to the involvement of Defendants B&J Contracting, B&J Contracting, Inc. and B&J Seafood, LLC.⁴ The Court

3. Fulcher is the president of B&J Seafood Co., Inc., and the "managing member" of B&J Contracting, LLC.

4. Plaintiff contended Defendant B&J Contracting, Inc. was the only registered owner of the commercial truck and Defendant B&J Contracting and Defendant Fulcher

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asked if Plaintiff inquired with the Secretary of State's office as to the existence of Defendant corporate entities, and Plaintiff responded, "Yes, sir. We checked to find out whether or not there was really an Inc., and there was not an Inc."

On 30 June 2016, the trial court entered an order granting partial summary judgment in favor of Defendants Fulcher, B&J Contracting, LLC, B&J Seafood, LLC, B&J Contracting and B&J Contracting, Inc. The trial court found there was no genuine issue of material fact and those Defendants were not necessary and proper parties to the action. Plaintiff appealed the trial court's order on 19 July 2016. On 25 July 2016, Plaintiff voluntarily dismissed without prejudice the actions against Defendants Barrow and B&J Seafood Co., Inc.

On 1 March 2017, Defendants collectively filed a Rule 9(b)(5) supplement to the record on appeal. This supplement contains a copy of a complaint filed by Parmley's estate in Durham County and names Defendants Barrow and B&J Seafood Co., Inc. as Defendants.⁵ This new complaint, filed one month after Plaintiff's voluntary dismissal, contains allegations which are substantially similar to the allegations contained in this action's original complaint.⁶ In a motion filed on 16 March 2017, Plaintiff requested this Court to strike Defendants' Rule 9(b)(5) supplement to the record which references Plaintiff's new cause of action. We deny Plaintiff's motion to strike.⁷

owned the pickup truck. Plaintiff also contended Defendant Fulcher's answer to an interrogatory indicated Defendant B&J Contracting was the insurer of the commercial truck. Plaintiff asserted Defendant Fulcher told Plaintiff that Defendant B&J Seafood, LLC drove the pickup truck, even though a LLC cannot actually drive a vehicle.

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6. Both complaints allege wrongful death under N.C. Gen. Stat. § 28A-18-2 (2016) and a survival claim under N.C. Gen. Stat. § 28A-18-1 (2016) as well as negligence, imputed negligence, and willful and wanton negligence. Both complaints allege the same facts in support of their claims.

7. Plaintiff argues Defendants' 9(b)(5) supplement violates our Rules of Appellate Procedure since it contains evidence not originally before the trial court. However, because Plaintiff's estate filed a new law suit after the trial court entered its order granting summary judgment, and because the existence of this new action is a determinative fact in our analysis as to whether this Court has jurisdiction over Plaintiff's appeal, we take judicial notice of Plaintiff's current suit in Durham County pursuant to N.C. Gen. Stat. § 8C-1, Rule 201 (2016).

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II. Jurisdiction

An order is interlocutory if it does not fully dispose of a case and “leaves it for further action by the trial court in order to settle and determine the entire controversy.” *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). “A grant of partial summary judgment, because it does not completely dispose of the case, is an interlocutory order from which there is ordinarily no right of appeal.” *Curl v. American Multimedia, Inc.*, 187 N.C. App. 649, 652, 654 S.E.2d 76, 78-79 (2007) (quoting *Liggett Group v. Sunas*, 113 N.C. App. 19, 23, 437 S.E.2d 674, 677 (1993)).

When a trial court grants partial summary judgment in favor of a defendant, and the plaintiff thereafter voluntarily dismisses its remaining claims, the trial court’s order serves as a final judgment. *Combs & Assocs. v. Kennedy*, 147 N.C. App. 362, 367, 555 S.E.2d 634, 638 (2001). This Court held:

Ordinarily, an appeal from an order granting summary judgment to fewer than all of a plaintiff’s claim[s] is premature and subject to dismissal. However, since the plaintiff here voluntarily dismissed the claim which survived summary judgment, any rationale for dismissing the appeal fails. Plaintiff’s voluntary dismissal of this remaining claim does not make the appeal premature but rather has the effect of making the trial court’s grant of partial summary judgment a final order.

Curl at 652-53, 654 S.E.2d at 79 (quoting *Combs* at 367, 555 S.E.2d at 638). In such an instance, there is nothing left for the trial court to determine or resolve until Plaintiff commences a new action against Defendants.⁸

Here Parmley’s estate has commenced a new action by re-filing its claims against the remaining Defendants in a new action in Durham County. The rights of Parmley’s Estate, Defendant Barrow and Defendant B&J Seafood Co., Inc., are still pending in the trial division. In these circumstances the trial court’s order granting partial summary judgment in favor of Defendants is no longer a final judgment.

8. See *Noblot v. Timmons*, 177 N.C. App. 258 (2006), where this Court decided the merits of an appeal from an order granting summary judgment dismissing claims against some, but not all, defendants to an action after the plaintiff voluntarily dismissed claims against remaining defendants without prejudice.

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Because the appeal is interlocutory we must dismiss the appeal unless it falls within one of the two exceptions allowing a party to appeal from interlocutory order. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994). First, a party may appeal from an interlocutory order when the order is final as to some claims or parties and the trial court has certified pursuant to Rule 54(b) of the Rules of Civil Procedure there is no just reason to delay the appeal. *Currin & Currin Constr., Inc. v. Lingerfelt*, 158 N.C. App. 711, 713, 582 S.E.2d 321, 323 (2003). Second, a party may appeal from an interlocutory order when “the order deprives the appellant of a substantial right that would be lost” in the absence of an immediate appeal. *Id.* at 713, 582 S.E.2d at 323.

Here, the trial court did not include a Rule 54(b) certification in the summary judgment order. Plaintiff is therefore only entitled to pursue this appeal if the trial court’s order deprives her of a substantial right that would be lost if this Court dismissed her interlocutory appeal. The appellant bears the burden to establish the existence of a substantial right. *Embler v. Embler*, 143 N.C. App. 162, 166, 545 S.E.2d 259, 262 (2001). Plaintiff presents no argument the dismissal of this appeal would deprive her of a substantial right. Plaintiff fails to meet her burden.

Since this interlocutory appeal does not qualify for an exception to our rules prohibiting interlocutory appeals, we must dismiss it.

DISMISSED.

Chief Judge McGEE and Judge ZACHARY concur.

RASH v. WATERWAY LANDING HOMEOWNERS ASS'N INC.

[253 N.C. App. 747 (2017)]

VANESSA RASH, PLAINTIFF

v.

WATERWAY LANDING HOMEOWNERS ASSOCIATION, INC., DEFENDANT

No. COA16-1158

Filed 6 June 2017

Premises Liability—slip and fall—wet moldy walkway—contributory negligence—ordinary care

The trial court erred in a premises liability case by granting summary judgment in favor of defendant homeowners association on the issue of negligence where plaintiff tenant slipped and fell on mold growth on a walkway in her condominium complex after an overnight rainfall. There was a genuine issue of material fact as to whether plaintiff exercised ordinary care to protect herself from injury despite her admission that she was not looking down at the walkway when she fell.

Appeal by plaintiff from order entered 17 August 2016 by Judge Jerry Cash Martin in Brunswick County Superior Court. Heard in the Court of Appeals 19 April 2017.

The Regan Law Firm, PLLC, by Conor P. Regan, for plaintiff-appellant.

Marshall, Williams & Gorham, L.L.P., by William Robert Cherry, Jr., for defendant-appellee.

ELMORE, Judge.

Vanessa Rash (plaintiff) filed a negligence action against Waterway Landing Homeowners Association, Inc. (defendant) after she slipped and fell on a molded walkway in her condominium complex. The trial court granted summary judgment for defendant, concluding that plaintiff's admission that she was not looking down at the walkway established her contributory negligence as a matter of law. Because the evidence, viewed in the light most favorable to plaintiff, presents a genuine issue of material fact as to whether plaintiff exercised ordinary care to protect herself from injury, we reverse.

I. Background

Prior to her fall, plaintiff had been a tenant of the Waterway Landing Condominiums for about six years. Plaintiff alleged that she always

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accessed her unit by a stairway located on the side of the building. That changed in August 2012, when plaintiff began using the elevator while she recovered from a rotator cuff surgery.

Plaintiff could reach the parking lot from the elevator via one of two wooden walkways located on either side of the building. Each walkway contains a ninety-degree turn around a white column. As plaintiff's exhibits demonstrate, tenants would exit the building, proceed down the walkway to the white column, make the turn around the column, and continue a few more feet on the walkway before reaching the parking lot.

During 2012 and 2013, defendant contracted with Community Association Management Specialists (CAMS) to maintain its common areas, including the wooden walkways. Darlene Greene was one of two CAMS employees assigned to the condominiums. In November 2012, Greene notified defendant that the walkways were hazardous due to a mold growth which caused them to become slick when wet. She submitted an estimate to power wash the walkways but never received a response from defendant.

On 3 January 2013, plaintiff arrived at Waterway Landing after visiting her mother in South Carolina. Tired from the drive, plaintiff left her suitcase in the car and went directly to her unit. An overnight rainfall moistened the mold growth on the walkway and caused it to become slick.

The next morning, plaintiff took the elevator to the ground floor to retrieve her suitcase. She testified in her deposition that she left her unit unaware that it had rained overnight. When she reached the ground floor, plaintiff exited the building and proceeded down the walkway. She made the ninety-degree turn around the white column and, as she approached the parking lot only a few feet away, plaintiff slipped on the slimy walkway and fell—breaking her femur.

On 9 February 2015, plaintiff filed a negligence action against defendant. Defendant raised contributory negligence as an affirmative defense and moved for summary judgment. At the hearing on defendant's motion, the trial court concluded that the evidence was sufficient to establish defendant's negligence, but plaintiff was contributorily negligent because she failed to look down at the walkway:

Looking at the counterclaim that the plaintiff, Vanessa Rash, was contributorily negligent, the law doesn't place a responsibility on a person who has two feet to walk and look where you're going. It's a matter of common sense. Here on this occasion, Ms. Rash has indicated [in] her

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deposition, “I didn’t pay any attention” and . . . “I did not look down.” That is showing, in the Court’s view, a person is not exercising reasonable care and a person who is not complying with that common sense duty to keep a proper lookout; that is, when you walk, you must not only look but you must see what you ought to see. And if it’s raining on the sidewalk or wet on the sidewalk, or whatever the condition of the sidewalk is, look before you go there and see what you ought to see and here, this is a person who was not being careful. I think, as a matter of law, it does show that she was contributorily negligent.

The trial court granted summary judgment in favor of defendant. Plaintiff timely appeals.

II. Discussion

Plaintiff argues that the trial court erred in granting summary judgment for defendant because the evidence raises genuine issues of material fact as to plaintiff’s contributory negligence—specifically, whether plaintiff exercised ordinary care to protect herself from injury.

We review a trial court’s order of summary judgment *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). Summary judgment is appropriate only “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2015). In determining whether such judgment is proper, the evidence and all reasonable inferences drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 662, 488 S.E.2d 215, 221 (1997). To survive a motion for summary judgment, the nonmoving party must offer “substantial evidence that creates a genuine issue of material fact.” *United Cmty. Bank v. Wolfe*, No. 289PA15, slip op. at 5 (N.C. May 5, 2017) (citing *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000)). “Substantial evidence” is that which “a reasonable mind might accept as adequate to support a conclusion.” *Thompson v. Wake Cnty. Bd. of Educ.*, 292 N.C. 406, 414, 233 S.E.2d 538, 544 (1977) (citations omitted) (internal quotation marks omitted).

The defendant has the burden of proving contributory negligence. *Martishius v. Carolco Studios, Inc.*, 355 N.C. 465, 479, 562 S.E.2d 887, 896 (2002) (citing *Nicholson v. Am. Safety Util. Corp.*, 346 N.C. 767, 774,

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488 S.E.2d 240, 244 (1997)). Whether contributory negligence exists “is ordinarily a question for the jury.” *Id.* The issue may be decided on summary judgment “only where the evidence establishes a plaintiff’s negligence so clearly that no other reasonable conclusion may be reached.” *Id.* (citing *Nicholson*, 346 N.C. at 774, 488 S.E.2d at 244).

Contributory negligence arises from a breach of the plaintiff’s duty to exercise ordinary care for his own safety. *Clark v. Roberts*, 263 N.C. 336, 343, 139 S.E.2d 593, 597 (1965); *Holderfield v. Rummage Bros. Trucking Co.*, 232 N.C. 623, 625, 61 S.E.2d 904, 906 (1950). “Ordinary care” means that degree of care which “a reasonable and prudent person would exercise” under the same or similar circumstances. *Martishius*, 355 N.C. at 473, 562 S.E.2d at 892 (citing *Hart v. Ivey*, 332 N.C. 299, 420 S.E.2d 174 (1992)); see also *Alford v. Washington*, 244 N.C. 132, 140, 92 S.E.2d 788, 794 (1956) (“Ordinarily the law imposes upon a person *sui juris* the obligation to use ordinary care for his own protection, and the degree of such care should be commensurate with the danger to be avoided.” (citations omitted)). If the plaintiff’s “failure to exercise due care for his own safety is one of the proximate contributing causes of his injury,” his contributory negligence “will bar recovery.” *Holderfield*, 232 N.C. at 625, 61 S.E.2d at 906.

A plaintiff may be found negligent when he “ignores unreasonable risks or dangers which would have been apparent to a prudent person exercising ordinary care for his own safety.” *Smith v. Fiber Controls Corp.*, 300 N.C. 669, 673, 268 S.E.2d 504, 507 (1980) (citations omitted); see also *Chaffin v. Brame*, 233 N.C. 377, 380, 64 S.E.2d 276, 279 (1951) (“[A] plaintiff [cannot] be guilty of contributory negligence unless he acts or fails to act with knowledge and appreciation, either actual or constructive, of the danger of injury which his conduct involves.” (citation omitted)). As our Supreme Court has explained in more concise terms, “a person has a legal duty to avoid open and obvious dangers.” *Martishius*, 355 N.C. at 479, 562 S.E.2d at 896 (citing *Gibbs v. Carolina Power & Light Co.*, 268 N.C. 186, 150 S.E.2d 207 (1966)). Accordingly, “a plaintiff may not recover in a negligence action where the hazard in question should have been obvious to a person using reasonable care under the circumstances.” *Dowless v. Kroger Co.*, 148 N.C. App. 168, 171, 557 S.E.2d 607, 609 (2001).

Still, a person may be excused from failing to recognize “an existing dangerous condition” that “he ordinarily would or should have seen” if there is “some fact, condition, or circumstance which would or might divert the attention of an ordinarily prudent person from” discovering

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the same. *Walker v. Cnty. of Randolph*, 251 N.C. 805, 810, 112 S.E.2d 551, 554 (1960). When contributory negligence is alleged in a slip-and-fall case, “[t]he question is not whether a reasonably prudent person would have seen the [hazard] had he or she looked but whether a person using ordinary care for his or her own safety under similar circumstances would have looked down at the floor.” *Norwood v. Sherwin-Williams Co.*, 303 N.C. 462, 468, 279 S.E.2d 559, 563 (1981), *abrogated on other grounds by Nelson v. Freeland*, 349 N.C. 615, 507 S.E.2d 882 (1998).

In *Pulley v. Rex Hospital*, 326 N.C. 701, 392 S.E.2d 380 (1990), *abrogated on other grounds by Nelson*, 349 N.C. 615, 507 S.E.2d 882, for example, the plaintiff was injured after tripping on an uneven sidewalk outside of a hospital. *Id.* at 703, 392 S.E.2d at 382. The plaintiff’s forecast of evidence tended to show that the sidewalk was poorly lit, she had to duck to avoid overhanging tree branches, and she had to divert her path on the sidewalk to accommodate other pedestrians. *Id.* The trial court awarded summary judgment for the defendant. *Id.* The Court of Appeals affirmed, concluding that the evidence established the plaintiff’s contributory negligence as a matter of law because she “admitted that she was not looking at the sidewalk as she walked, and that ‘had she been focusing her full attention on the sidewalk, she would have seen the unevenness.’” *Pulley v. Rex Hosp.*, 95 N.C. App. 89, 92, 381 S.E.2d 892, 894 (1989) (alterations omitted), *rev’d*, 326 N.C. 701, 392 S.E.2d 380. The Supreme Court disagreed: “While the plaintiff had a duty to look where she was walking, that duty did not require her to walk along with her eyes constantly focused at her feet.” *Pulley*, 326 N.C. at 708, 392 S.E.2d at 385. Reversing the decision of this Court, the Supreme Court explained that “the facts must be viewed *in their totality* to determine if there are factors which make the existence of a defect in a sidewalk, in light of the surrounding conditions, . . . less than ‘obvious’ to the plaintiff.” *Id.* at 706, 392 S.E.2d at 384. Because there were genuine issues of material fact “as to whether the combination of the lighting, the tree branches, and oncoming pedestrians made it reasonable for the plaintiff to turn her attention away from the sidewalk,” the defendant was not entitled to summary judgment. *Id.* at 708–09, 392 S.E.2d at 385.

Similarly, in *Dowless* the plaintiff was injured after she inadvertently steered her shopping cart into a hole in the parking lot asphalt. 148 N.C. App. at 169–70, 557 S.E.2d at 608. The trial court granted summary judgment for the defendants, who claimed that the plaintiff was contributorily negligent because “the hole was an obvious hazard.” *Id.* at 172, 557 S.E.2d at 610. Reversing the trial court’s order in part, this Court concluded that the “facts do not establish as a matter of law that the hole

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in the asphalt would have been obvious to a person employing reasonable care.” *Id.* Although the plaintiff admitted that she would have seen the hole had she looked down, she swore in her affidavit that “her view of the ground was obstructed by the merchandise in her shopping cart, and [] her attention was focused on the heavy traffic in the parking lot in order to ensure that she would reach her car safely.” *Id.* at 172–73, 557 S.E.2d at 610; *see also Yates v. Haley*, 103 N.C. App. 604, 607–09, 406 S.E.2d 659, 661–62 (1991) (reversing summary judgment for the defendant where the plaintiff’s evidence tended to show that his view of a puddle was partially obstructed and his attention was focused on the bathroom door); *cf. Swinson v. Lejeune Motor Co., Inc.*, 147 N.C. App. 610, 615–19, 557 S.E.2d 112, 117–19 (2001) (McCullough, J., dissenting) (concluding that evidence established contributory negligence as a matter of law where the plaintiff claimed she fell while looking for her car in the parking lot but a large defect in the asphalt was in her unobstructed plain view and there were no cars in area), *rev’d per curiam for the reasons stated in the dissent*, 356 N.C. 286–87, 569 S.E.2d 646 (2002).

Finally, in *Crane v. Caldwell*, 113 N.C. App. 362, 438 S.E.2d 449 (1994), the plaintiff broke his leg while descending an irregular staircase leading to a lake. *Id.* at 363–64, 438 S.E.2d at 450–51. The plaintiff testified at trial that the area “on the steps where he slipped was poorly lit, wet, and covered with slippery moss.” *Id.* at 364, 438 S.E.2d at 450. He had navigated the steps before and conceded that he had to “use caution” because of their irregular lengths. *Id.* at 364, 438 S.E.2d at 450–51. At the close of the plaintiff’s evidence, the trial court granted the defendant’s motion for directed verdict on the basis that the plaintiff was contributorily negligent as a matter of law. *Id.* at 364, 438 S.E.2d at 451. This Court disagreed because the evidence showed, *inter alia*, that the “plaintiff was not fully aware of the wet, slippery condition of the stairway which caused him to fall.” *Id.* at 368, 438 S.E.2d at 453. The Court explained:

[P]laintiff testified that he did not know that the steps were wet and slippery. Although there was evidence that it had rained earlier in the day, there was also evidence that this rainfall had evaporated and that the steps were wet due to defendant’s prior use of a lawn sprinkler. Plaintiff was unaware of the stairway’s wet condition which, according to his testimony, was not discernable upon visual inspection. Plaintiff testified that he had used the steps on several prior occasions, yet there was no evidence that he had used the steps at night or when they were wet.

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Id. at 367, 438 S.E.2d at 452. Because the evidence did not establish the plaintiff's contributory negligence as a matter of law, this Court reversed the order for directed verdict. *Id.* at 368, 438 S.E.2d at 453.

In this case, we agree with plaintiff that there are genuine issues of material fact as to whether plaintiff exercised ordinary care to protect herself from injury. Plaintiff's affidavit and deposition testimony show that she had no knowledge of the dangerous condition created by the mold growth on the walkway. She testified that she never observed mold on the stairway she used regularly, or on the walkway itself she had used five or six times since August 2012. On those occasions when she had used the walkway, it was dry. Plaintiff had never used any of the molded walkways during wet conditions and she "was unaware that the mold would form a slippery slime when it had been exposed to water." She was not made aware of the hazardous condition and was not advised to avoid the walkways under wet conditions. Although plaintiff did concede that she "never paid attention" to the walkway prior to, or at the time of, her fall, Greene did not notify defendant of the mold until November 2012, indicating that plaintiff could have traversed a clean walkway—sans mold—for two months.

In addition, a jury could find that plaintiff acted as a reasonable and prudent person even though she was not looking directly down at the walkway when she slipped. Plaintiff had just completed her turn around the white column before she proceeded on the shorter portion of the walkway. She fell within only a few feet of completing her turn. A reasonable juror could assume that it would take a few steps for plaintiff to re-direct her attention from the column, *see, e.g., Price v. Jack Eckerd Corp.*, 100 N.C. App. 732, 736, 398 S.E.2d 49, 52 (1990) (rejecting conclusion that failure to look down at the floor established the plaintiff's negligence as a matter of law where, after making a turn, she tripped over a box that "was so close to her that she had barely taken two steps before tripping over it"), or that plaintiff justly focused her attention on the parking lot which she was about to enter, rather than looking out for hazards on the short walkway spanning only a few feet, *see Alford*, 244 N.C. at 140, 92 S.E.2d at 794 ("[T]he degree of [] care should be commensurate with the danger to be avoided.").

Even if plaintiff had looked down at the walkway, the evidence does not conclusively establish that she would have recognized the dangerous condition presented by the mold. Plaintiff's photographic exhibits only show a discoloration on the walkway. In her affidavit, she asserts: "Without actually testing the slipperiness of the substance

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where the mold had grown, the appearance of the walkway in a wet or dry condition appear[s] no different to the naked eye.” Plaintiff testified in her deposition that she was unaware that it had rained the night before she fell on the walkway. And because she “had never utilized the walkway in question or any [of the other] walkways containing mold during wet conditions,” plaintiff was not aware that the mold would become slippery when wet. Based on the foregoing, we conclude that plaintiff presented substantial evidence to create a genuine issue of material fact as to her contributory negligence.

III. Conclusion

When viewed in the light most favorable to plaintiff, the evidence fails to establish that she was negligent as a matter of law. Despite plaintiff’s admission that she was not looking down at the walkway when she fell, a jury could still find that plaintiff exercised ordinary care to protect herself from injury. The trial court’s order granting summary judgment for defendant is reversed.

REVERSED.

Judges INMAN and BERGER concur.

STATE OF NORTH CAROLINA
v.
JUSTIN DEANDRE BASS

No. COA16-421

Filed 6 June 2017

1. Criminal Law—self-defense—instructions—duty to retreat

The trial court erred in a prosecution for assault with a deadly weapon inflicting serious injury by not instructing the jury that defendant had no duty to retreat. Defendant was standing outside his home with friends when an altercation erupted, during which defendant shot the victim. It appeared that the trial court was under the erroneous impression that the “no duty to retreat” language only applied when defendant acted in defense of his home, workplace, or vehicle.

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2. Criminal Law—self-defense—instructions—duty to retreat—jury question

The trial court erred in a prosecution for assault with a deadly weapon inflicting serious injury by instructing the jury, in response to a question, that the duty to retreat statute did not apply to this case.

3. Criminal Law—self-defense—duty to retreat—erroneous instruction—prejudicial

Omitting language that defendant did not have a duty to retreat from a place he had a legal right to be was prejudicial in an assault prosecution in which defendant claimed self-defense. The trial court omitted a key and required phrase from the pattern jury instructions and then similarly confused the jury in response to a question by stating that the duty to retreat did not apply to that case.

4. Criminal Law—instructions—self-defense—duty to retreat—confusion in jury room

In an assault prosecution in which defendant raised self-defense, a letter from a juror to the trial judge expressing concern about the jury discussion of the duty to retreat demonstrated the prejudice defendant suffered from an erroneous instruction on the subject.

5. Criminal Law—self-defense—instructions—duty to retreat

In an assault prosecution involving self-defense and the duty to retreat, the Court of Appeals was not bound by a prior opinion where, in the prior case, defendant did not object to the jury instruction and did not argue to the trial court that defendant had no duty to retreat. In this case, defendant was clearly entitled to the self-defense instruction, defense counsel specifically requested a duty to retreat instruction, the trial court initially gave an incomplete instruction, and a question from the jury clearly indicated concern with whether defendant had a duty to retreat. After the question, the trial court improperly instructed the jury on duty to retreat.

6. Criminal Law—self-defense—prior violence by victim

The trial court abused its discretion in an assault prosecution in which self-defense was claimed by excluding testimony about prior violence by the victim. Defendant was entitled to present evidence of specific acts of violent conduct to show that the victim was the aggressor in the assault, whether or not those acts of violence were known to defendant at the time of the assault.

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7. Criminal Law—continuance denied—new evidence—no prejudice

There was no prejudice in an assault prosecution involving self-defense where the trial judge denied defendant a continuance to deal with evidence recently provided by the State. The trial court had already committed prejudicial error by limiting other evidence of violence by the victim and it appeared that the trial court would have improperly excluded any such testimony.

Judge BRYANT dissenting.

Appeal by defendant from judgment entered 19 December 2014 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 4 October 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General Harriet F. Worley, for the State.

Lisa Miles for defendant-appellant.

TYSON, Judge.

Justin Deandre Bass (“Defendant”) appeals from his jury conviction of assault with a deadly weapon inflicting serious injury. We find reversible errors in the trial and grant Defendant a new trial.

I. Background

A. Previous Altercation

1. Fogg’s Version

Defendant and Jerome Fogg engaged in an altercation on the evening of 23 June 2014, at the Bay Tree Apartments in Raleigh, where Defendant lived with his mother. Fogg claimed Defendant had kept “running his mouth,” looking at Fogg, who weighed 240 pounds at the time, and saying “that big s**t don’t matter.” According to Fogg, Defendant claimed to a member of the Piru gang, as was Fogg, but Defendant was unable to replicate the gang’s handshake.

Fogg testified Defendant continued to be “disrespectful to [Fogg].” Fogg told him to stop talking, at which point Defendant “pulled his pants up, had his hands up.” Fogg believed this action meant Defendant was going to hit him or was getting ready to fight. Fogg threw the first punch and hit Defendant several times.

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2. Defendant's Version

Defendant also testified about the 23 June 2014 altercation. He testified Fogg approached and asked whether Defendant knew the Piru handshake. Fogg became aggressive and left when Defendant told him that he did not know the handshake. Fogg returned and was "ready to do that handshake." Fogg began punching Defendant repeatedly, after Defendant did not perform the handshake to Fogg's satisfaction.

A video of this assault was recorded on Fogg's cellphone, and was played for the jury. Fogg first punched Defendant in the nose. Fogg then dealt a blow to Defendant's left jaw from behind, which knocked Defendant to the ground. Defendant stood and tried to walk away. Fogg dealt a third blow to Defendant's right jaw, which caused Defendant, who weighed 165 pounds, to "fly through the air and roll." The video shows Defendant walking in circles with Fogg following behind him. Defendant did not swing at Fogg or say anything to provoke him. Fogg broke Defendant's jaw in three places, which required surgery and the placement of screws to repair. Defendant's jaw was wired shut.

Defendant did not contact police after this incident because he was afraid Fogg would return and beat him again. He testified he began carrying a 9mm handgun out of fear of further bodily injury or death by Fogg.

B. Defendant Shoots Fogg1. Fogg's Version

Fogg testified he encountered Defendant at the Bay Tree apartment complex two weeks after the first altercation, on 3 July 2014. Fogg testified Defendant stated to Fogg, "he was going to pop [Fogg's] motherf***ing ass." Defendant was walking away from Fogg, and then stopped and said something else. Fogg could see something in Defendant's pocket, but he "[had never] ran from anyone," and was "not going to start running." Fogg testified Defendant pulled a gun from his pocket and shot him. Fogg stated, "You shot me motherf***er." Defendant shot Fogg again twice.

2. Defendant's Version

Defendant testified he was watching fireworks with friends outside of his home at the Bay Tree apartment complex. His jaw remained wired shut from the beatings and injuries dealt by Fogg two weeks earlier. Defendant returned to building 114, where he lived on the second floor with his mother, and stood outside that building with friends for a couple of hours. Defendant was standing on the sidewalk between buildings 114

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and 118, when he saw a car pull into the parking lot. He saw Fogg was seated in the passenger's seat. Defendant stated he crossed the street and walked toward building 109 in order to put as much distance as possible between Fogg and himself. Defendant remained in the breezeway of building 109, pacing back and forth and "praying and hoping" that Fogg would not approach him.

Defendant saw Fogg speaking with a group of people at building 110. Fogg then began walking towards Defendant. Fogg approached Defendant in an aggressive manner, and stated, "I heard you been talking junk . . . I hope you enjoy drinking the Ensure for six weeks." Defendant observed Fogg carrying a "large knife with a big handle" in a sheath attached to his pants. Defendant believed Fogg "either was going [t]o beat me up or try to cut me with the knife."

Defendant moved to the grassy area outside the breezeway because he did not want to get trapped with Fogg inside the breezeway. Fogg stated, "I said get on the concrete." Defendant did not move. Fogg questioned, "oh you ain't going to move?" Defendant pulled his gun and pointed it at Fogg. He testified he intended to scare Fogg and hoped he would leave. Fogg stated, "oh . . . you wanna shoot me?" Fogg approached Defendant, while reaching for his knife. Defendant shot Fogg, panicked, and ran. Defendant testified he shot Fogg because he was "scared for [his] life."

The large knife Fogg carried that evening is included in the record on appeal. It resembles a short machete, with a wide and curved blade that is approximately ten inches long. The knife was found in its sheath located on Fogg's hip when a police officer arrived to assist Fogg.

After shooting Fogg, Defendant ran from the apartment complex and left town for Virginia for two weeks. Defendant was arrested upon his return home.

Dr. Matthew Alleman, a general surgeon who treated Fogg at the hospital, was initially concerned that Fogg might die due to the severity of his injuries. Fogg underwent multiple surgeries. He remained in the intensive care unit for approximately a month and spent an additional one or two weeks as an inpatient.

On 24 October 2014, Defendant gave the State notice that he intended to assert self-defense. On 18 November 2014, Defendant was indicted in a superseding indictment for attempted murder and assault with a deadly weapon with intent to kill inflicting serious injury. Defendant's trial commenced on 10 December 2014.

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On 19 December 2014, the jury found Defendant was not guilty of attempted first-degree murder or assault with a deadly weapon with intent to kill inflicting serious injury, but found Defendant was guilty of assault with a deadly weapon inflicting serious injury. Defendant was sentenced to a minimum term of thirty months and a maximum term of forty-eight months in prison. Defendant appeals.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2015).

III. Issues

Defendant argues the trial court erred by: (1) failing to instruct the jury that Defendant had no duty to retreat before using deadly force in self-defense, and committed further error by instructing the jury that the law pertaining to whether Defendant had a duty to retreat “does not apply to this case;” (2) sustaining the State’s objections to evidence of specific acts of violence committed by Fogg upon other individuals; and (3) denying Defendant’s motion to continue prior to the start of trial.

IV. Jury Instructions

[1] Defendant argues the trial court erred failing to instruct the jury that he had no duty to retreat before using deadly force in self-defense, and later instructing the jury that the law pertaining to whether Defendant had no duty to retreat “does not apply to this case.” We agree.

A. Standard of Review

The question of whether a trial court erred in instructing the jury is a question of law reviewed *de novo*. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009).

B. Statutory Circumstances which Justify Use of Deadly Force

“Our courts have recognized that a defendant may use either deadly force or nondeadly force to defend himself, depending on the circumstances of each case.” *State v. Whetstone*, 212 N.C. App. 551, 558, 711 S.E.2d 778, 783 (2011). “Deadly force is ‘force intended or likely to cause death or great bodily harm[,]’ and nondeadly force is ‘force neither intended nor likely to do so[.]’ ” *Id.* (quoting *State v. Pearson*, 288 N.C. 34, 39, 215 S.E.2d 598, 602 (1975)). Defendant does not dispute he used deadly force against Fogg.

Our statutes set forth the two circumstances in which a person is justified in using deadly force to be excused from criminal liability. N.C.

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Gen. Stat. § 14-51.3 is titled, “Use of force in defense of person; relief from criminal or civil liability,” and provides:

(a) . . . [A] person is justified in the use of deadly force and *does not have a duty to retreat* in any place he or she has the lawful right to be if *either* of the following applies:

(1) He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another.

(2) Under the circumstances permitted pursuant to G.S. 14-51.2.

N.C. Gen. Stat. § 14-51.3(a) (2015) (emphasis supplied).

N.C. Gen. Stat. § 14-51.2 provides:

(b) The lawful occupant of a home, motor vehicle, or workplace is *presumed* to have held a reasonable fear of imminent death or serious bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or serious bodily harm to another if both of the following apply:

(1) The person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a home, motor vehicle, or workplace, or if that person had removed or was attempting to remove another against that person’s will from the home, motor vehicle, or workplace.

(2) The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.

. . . .

(f) A lawful occupant within his or her home, motor vehicle, or workplace *does not have a duty to retreat* from an intruder in the circumstances described in this section.

N.C. Gen. Stat. § 14-51.2(b) and (f) (2015) (emphasis supplied).

A person who claims self-defense clearly does not have a duty to retreat *under either* of the two circumstances set forth in § 14-51.3(a)(1)

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or § 14-51.2(b). In both circumstances, the person who uses defensive deadly force must have held a reasonable belief that the force used was necessary to prevent imminent death or great bodily harm to himself or another.

The pertinent distinction between the two statutes is that a *rebuttable presumption* arises that the lawful occupant of a home, motor vehicle, or workplace holds a *reasonable* fear of imminent death or serious bodily harm to himself or another when using defensive force at those locations under the circumstances set forth in N.C. Gen. Stat. § 14-51.2(b). *Id.* This rebuttable presumption does not arise in N.C. Gen. Stat. § 14-51.3(a)(1).

C. Charge Conference and Preservation of Error

At the charge conference with counsel, the trial court listed the pattern jury instructions the court intended to give the jury. Included in this list was North Carolina Pattern Jury Instruction (“N.C.P.I.”) 308.45. That instruction states, in pertinent part:

If the State has satisfied you beyond a reasonable doubt that the defendant assaulted the victim with deadly force (insert other lesser included assault offenses), then you would consider whether the defendant’s actions are excused and the defendant is not guilty because the defendant acted in self-defense. The State has the burden of proving from the evidence beyond a reasonable doubt that the defendant’s action was not in self-defense.

If the circumstances would have created a reasonable belief in the mind of a person of ordinary firmness that the assault was necessary or appeared to be necessary to protect that person from imminent death or great bodily harm, and the circumstances did create such belief in the defendant’s mind at the time the defendant acted, such assault would be justified by self-defense. You, the jury, determine the reasonableness of the defendant’s belief from the circumstances appearing to the defendant at the time. Furthermore, *the defendant has no duty to retreat in a place where the defendant has a lawful right to be.* (The defendant would have a lawful right to be in the defendant’s [home] [own premises] [place of residence] [workplace] [motor vehicle].)

NOTE WELL: The preceding *parenthetical* should only be given where the place involved was the defendant’s

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[home] [own premises] [place of residence] [workplace]
[motor vehicle].

N.C.P.I. Crim. 308.45 (2016) (emphases supplied).

N.C.P.I. 308.45 encompasses *both* of the circumstances set forth in N.C. Gen. Stat. § 14-51.3(a), where the defendant is justified in using deadly force and has no duty to retreat. N.C.P.I. 308.45 contains a separate “Note Well” instruction, which directs the trial court to use N.C.P.I. 308.80 (“Defense of Habitation”), if the assault occurred in the defendant’s home, workplace or motor vehicle under N.C. Gen. Stat. § 14-51.2(b). N.C.P.I. 308.80 sets forth the statutory and rebuttable presumption that the lawful occupant of a home, motor vehicle, or workplace holds a reasonable fear of imminent death or serious bodily harm to himself or another when using defensive force at any of those listed places. N.C.P.I. Crim. 308.80 (2016); *see* N.C. Gen. Stat. § 14-51.2(b).

Defense counsel later requested the court “add the language from the pattern 308.45 which reads furthermore, the Defendant has no duty to retreat in a place where the Defendant has a lawful right to be. And the Defendant would have a lawful right to be in his place of residence.” Counsel then argues whether Defendant was standing within the curtilage of his home when he shot Fogg. The trial court determined Defendant was not within the curtilage of his home, and told defense counsel, “I will not include that sentence that you asked for. I don’t think that it applies in this case.”

The trial court instructed the jury:

If the State has satisfied you beyond a reasonable doubt that the Defendant assaulted the victim with deadly force, then you would consider whether the Defendant’s actions are excused and the Defendant is not guilty because the Defendant acted in self defense. The State has the burden of proving from the evidence beyond a reasonable doubt that the Defendant’s action was not in self defense.

If the circumstances would have created a reasonable belief in the mind of a person of ordinary firmness that the assault was necessary or appeared to be necessary to protect that person from imminent death or great bodily harm, and the circumstances did create such a belief in the Defendant’s mind at the time the Defendant acted, such an assault would be justified by self defense. You, the jury, determine the reasonableness of the Defendant’s belief

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from the circumstances appearing to the Defendant at the time.

These instructions fail to include the following sentence from N.C.P.I. 308.45, which is required under *both* circumstances set forth in §§ 14-51.3(a)(1)-(2) and 14-51.2(b), and states: “Furthermore, the defendant has no duty to retreat in a place where the defendant has a lawful right to be.” N.C.P.I. Crim. 308.45. It appears the trial court was under the erroneous impression that the “no duty to retreat” language only applies when the defendant acts in and asserts self-defense while in his home, workplace or motor vehicle pursuant to N.C. Gen. Stat. § 14-51.2(b). While ample evidence was presented to warrant the instruction that Defendant acted in self-defense when he shot Fogg, the jury was not instructed that Defendant was under no duty to retreat under the circumstances presented here.

D. Jury’s Confusion over Duty to Retreat

[2] During deliberations, the jury sent a note to the court, which asked for “further explanation on NC law with regard to ‘duty to retreat.’” The trial court instructed the jury:

The second question is you asked for further explanation on North Carolina law with regard to quote, duty to retreat. The answer I can give you is that by North Carolina statute, a person has no duty to retreat in one’s home, one’s own premises, one’s place of residence, one’s workplace, or one’s motor vehicle. *This law does not apply in this case.* (emphasis supplied)

This instruction was clearly contrary to law. Not only did the initial instructions fail to inform the jury that Defendant statutorily had no duty to retreat under the circumstances set forth in N.C. Gen. Stat. § 14-51.3(a)(1), the further instruction stated the “no duty to retreat” statute “does not apply,” and may have required the jury to conclude Defendant would have had a duty to retreat under the circumstances to avoid criminal liability.

E. Prejudice

[3] Defendant argues this error was prejudicial because he was entitled to an instruction that he had no duty to retreat because he was in a “place he . . . ha[d] the lawful right to be,” *see* N.C. Gen. Stat. § 14-51.3(a), namely, the grounds of the apartment complex where he lived. Defendant further asserts the record shows it is readily apparent that the jury was confused.

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When determining whether a defendant is entitled to an instruction on self-defense, courts must “consider the evidence in the light most favorable to [the] defendant.” *State v. Withers*, 179 N.C. App. 249, 257, 633 S.E.2d 863, 868 (2006) (citation omitted). “It is the duty of the trial court to instruct the jury on all substantial features of a case raised by the evidence.” *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988).

This Court has held in many cases that where competent evidence of *self-defense* is presented at trial, the defendant is entitled to an instruction on this defense, as it is a substantial and essential feature of the case, and *the trial judge must give the instruction even absent any specific request by the defendant*. It has also been held that where supported by the evidence in a claim of self-defense, an instruction *negating defendant’s duty to retreat in his home or premises* must be given even in the absence of a request by defendant.

State v. Morgan, 315 N.C. 626, 643, 340 S.E.2d 84, 95 (1986) (internal citations omitted) (second and third emphases supplied); *see also State v. Davis*, 177 N.C. App. 98, 102, 627 S.E.2d 474, 477 (2006) (“A comprehensive self-defense instruction requires instructions that a defendant is under no duty to retreat if the facts warrant it[.]”).

In *State v. Holloman*, __ N.C. App. __, 786 S.E.2d 334, *disc. review allowed*, __ N.C. __, 794 S.E.2d 317 (2016), the trial court, *inter alia*, “omitt[ed] a key phrase” and further “compounded its error in reordering a significant portion of the self-defense instruction” in a manner which led this Court to hold that “there [was] a reasonable possibility that, had the jury been properly instructed on self-defense, jurors would not have convicted Defendant of assault.” *Id.* at __, 786 S.E.2d at 333-34.

Here, the trial court also omitted a key and required phrase from the pattern instructions regarding self-defense, that “the defendant has no duty to retreat in a place where the defendant has a lawful right to be.” N.C.P.I. 308.45; N.C. Gen. Stat. § 14-51.3(a)(1). The trial court similarly confused the jury by responding to the jury’s inquiry and instructing: “[B]y North Carolina statute, a person has no duty to retreat in one’s home, one’s own premises, one’s place of residence, one’s workplace, or one’s motor vehicle. *This law does not apply in this case.*” (emphasis supplied).

The court erroneously instructed the jury on both occasions. Under N.C. Gen. Stat. § 14-51.3, “[t]he right not to retreat applies *anywhere a person has a lawful right to be*, such as a public place; the statute

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does not require that the person be within a home, workplace, or motor vehicle.” John Rubin, *The New Law of Self-Defense? The Impact of Statutory Changes in 2011* (School of Government, University of North Carolina at Chapel Hill § V(B) (rev. May 30, 2012)) (emphasis supplied).

[4] Furthermore, the record on appeal contains an unsigned letter written by one of the jurors. The juror wrote to the trial judge after deliberations had begun and expressed his or her concern that Defendant would not receive a fair verdict due to the “bullying and bias that was present in the jury deliberation room.” The juror explained that other jurors were discussing the “stand your ground laws” in other states “as examples of reasons we should think one way or another.” The juror’s letter also described the bargaining that was occurring in the jury room. Statements were made in the jury room that “they are all thugs . . . so we will HAVE to convict on something,” and “we don’t have to agree but will need to compromise on a guilty verdict of some kind.” This letter serves to further demonstrate the erroneous jury instruction prejudiced Defendant.

The trial court’s jury instructions on Defendant’s duty to retreat were an inaccurate and misleading statement of the statutes and case law. Defendant has shown “a reasonable possibility that, had the error in question not been committed, a different result would have been reached.” N.C. Gen. Stat. § 15A-1443(a) (2015); *see, e.g., State v. Ramos*, 363 N.C. 352, 355-56, 678 S.E.2d 224, 227 (2009) (“reasonable possibility” of “different result” standard applied to determine that jury instruction was prejudicial and thus reversible). Defendant is entitled to a new trial with proper instructions on self-defense and no duty to retreat.

F. *State v. Lee* not Precedent

[5] The dissenting opinion recognizes that the trial court misapprehended the law pertaining to the duty to retreat and that the instruction to the jury was contrary to law, but holds this Court is bound by this Court’s opinion in *State v. Lee*, __ N.C. App. __, 789 S.E.2d 679 (2016), *disc. review allowed*, __ N.C. __, 797 S.E.2d 301 (2017).

In *Lee*, the jury was instructed pursuant to N.C.P.I. 206.10, as agreed upon by the parties, that the defendant “would be not guilty of any murder or manslaughter if [he] acted in self-defense and . . . was not the aggressor in provoking the fight and did not use excessive force under the circumstances.” *Id.* at __, 797 S.E.2d at 685. Like in this case, the court omitted the sentence from the N.C.P.I., which states, “[f]urthermore, the defendant has no duty to retreat in a place where the defendant has a lawful right to be.” *Id.* at __, 789 S.E.2d at __.

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Unlike the present case, the defendant in *Lee* did not object to the jury instruction and failed to argue to the trial court that the defendant had no duty to retreat. On appeal, the defendant argued the trial court committed *plain error* by omitting the sentence that the defendant “has no duty to retreat in a place where the defendant has a lawful right to be,” and also argued the trial court was required to give N.C.P.I. 380.10 (defense of home, workplace, motor vehicle).

The Court in *Lee* recognized N.C. Gen. Stat. § 14-51.3(a)(1), and explained “the right to stand one’s ground in ‘any public place’ [under § 14-51.3(a)(1)], is conditioned as an initial matter upon whether the defender was justified in the use of self-defense without regard to the physical setting in which the confrontation occurred.” *Id.* at ___, 789 S.E.2d at 686. The Court recognized that the “statutory presumption of reasonableness remains limited to the use of defensive (including deadly) force in defending one’s home, motor vehicle, or workplace.” *Id.* at ___, 789 S.E.2d at 686.

This Court held, “[b]ecause Defendant was not within his home or premises, motor vehicle, or workplace, any right to ‘stand his ground’ stemmed from the two above-described elements of self-defense, and Defendant received instructions to that effect.” *Id.* at ___, 789 S.E.2d at 686. The Court further stated, “Where the evidence is such that a jury could reasonably find a defender was justified in the use of self-defense in any other setting, a no duty to retreat instruction does not change the analysis.” *Id.* at ___, 789 S.E.2d at 687.

Here, unlike in *Lee*, the record shows Defendant was entitled to the self-defense instruction and the jury was clearly concerned with whether Defendant had a duty to retreat from Fogg prior to using deadly force. Defense counsel specifically requested a no duty to retreat instruction. The trial court initially gave an incomplete instruction under both N.C. Gen. Stat. §§ 14-51.3(a)(1) and 14-51.2(b).

When the jury sought clarification on any duty to retreat by Defendant, the trial court improperly instructed the jury that the law regarding no duty to retreat “does not apply in this case.” The erroneous omission from the initial instruction followed by the misstatement of the law in the later instruction could have unfairly required the jury to conclude Defendant had a duty to retreat from Fogg. *State v. Lee* does not control the outcome of this case and Defendant’s right to a new trial is not circumscribed by its holding.

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V. Evidence of Fogg's Violent Conduct

[6] Defendant also argues he is entitled to a new trial, because the trial court erred by excluding the testimonies of three character witnesses pertaining to Fogg's past specific instances of violent conduct, and denied his motion to continue when the State produced character evidence pertaining to Fogg's violence the night before trial. We agree.

A. Standard of Review

This Court reviews the trial court's rulings on evidentiary issues for an abuse of discretion. *State v. Gettys*, __ N.C. App. __, __, 777 S.E.2d 351, 355 (2015).

"[I]n criminal cases, . . . [w]here a motion to continue is based on a right guaranteed by the federal or state constitutions, . . . the ruling of the court is one of law and not of discretion and is reviewable [*de novo*] on appeal." *State v. Moore*, 39 N.C. App. 642, 643, 251 S.E.2d 647, 649 (1979) (citation omitted).

B. Exclusion of Fogg's Specific Acts of Violence

One of several witnesses was prepared to testify to Fogg's specific acts of violence, that Fogg had put a gun to her head, choked her, and threatened to kill her in front of her three-year-old daughter. Fogg also beat her so badly she had blood in her hair, could not stand, and her eyes were swollen shut. Fogg's violence also left his shoe print in the flesh of her back.

Another witness, who was a complete stranger to Fogg, was prepared to testify Fogg encountered him on the street and beat him unconscious. A third witness was prepared to testify Fogg punched Fogg's dog in the face repeatedly when the dog paid attention to the witness. Fogg later threatened that witness's wife and punched the witness when he questioned Fogg about the threat.

The trial court excluded these specific instances of violent conduct, and allowed testimony from the above witnesses that each witness had the "opinion" that Fogg was an aggressive and violent person, and that Fogg had a "reputation" for being aggressive and violent.

"A defendant claiming self-defense may present evidence of the victim's character which tends to show (1) the victim was the aggressor, or (2) the defendant had a reasonable apprehension of death or bodily harm, or both." *State v. Brown*, 120 N.C. App. 276, 277, 462 S.E.2d 655, 656 (1995) (citing *State v. Corn*, 307 N.C. 79, 85, 296 S.E.2d 261, 266

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(1982)), *disc. review denied*, 342 N.C. 896, 467 S.E.2d 906 (1996). “In cases in which character or a trait of character of a person is an *essential element* of a charge, claim, or defense, proof may also be made of *specific instances of his conduct*.” N.C. Gen. Stat. § 8C-1, Rule 405(b) (2015) (emphasis supplied). “[E]vidence of specific instances of a victim’s character, *known or unknown* to the defendant at the time of the crime, may be relevant in establishing that the victim *was the aggressor* when defendant claims self-defense.” *State v. Ray*, 125 N.C. App. 721, 726, 482 S.E.2d 755, 758 (1997) (citation and quotation marks omitted) (emphasis supplied).

Whether Defendant was the aggressor is an element of self-defense. See *State v. Norris*, 303 N.C. 526, 530, 279 S.E.2d 570, 572 (1981) (setting forth the elements of self-defense, which includes the element that “defendant was not the aggressor in bringing on the affray, *i.e.*, he did not aggressively and willingly enter into the fight without legal excuse or provocation”).

Under the plain language of Rule 405(b), Defendant was entitled to present evidence of specific acts of Fogg’s violent conduct to show that Fogg, not Defendant, was the aggressor at the time of the assault. N.C. Gen. Stat. § 8C-1, Rule 405(b). This right applies whether Fogg’s specific instances of conduct were known or unknown to Defendant at the time of the assault, because the evidence pertains and applies to whether Fogg was the aggressor. *State v. Watson*, 338 N.C. 168, 187, 449 S.E.2d 694, 706 (1994) (overruled on other grounds by *State v. Richardson*, 341 N.C. 585, 461 S.E.2d 724 (1995)).

The excluded testimonies of these three witnesses tends to show Fogg had a history not only of violence, but of explosive, unprovoked, and irrational violence, even with strangers. The jury’s verdict concluded Defendant had no intent to kill Fogg under two separate charges when he shot him several times.

As shown by the unsigned letter provided to the court during deliberations, the jury heard a juror’s impression that there was little difference in the aggressiveness of Fogg and Defendant: “they are all thugs...we will HAVE to convict on something.” The trial court erred by limiting the witnesses’ testimonies to exclude specific instances of Fogg’s violent conduct, where this evidence was admissible under Rule 405(b) and offered by Defendant to show Fogg was the aggressor in the second altercation at issue here.

The exclusion of evidence of the specific acts of violence by Fogg was prejudicial under N.C. Gen. Stat. § 15A-1443(a), which states in pertinent part:

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A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a *reasonable possibility* that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant.

(emphasis supplied). Defendant was denied his Constitutional right to present a complete defense. U.S. Const. Amend. VI; Const. of N.C. Art. I, §§ 18, 23; *see Holmes v. South Carolina*, 547 U.S. 319, 164 L.E.2d 503 (2006).

The State has not shown the error was harmless beyond a reasonable doubt. N.C. Gen. Stat. § 15A-1443(b) (2015) (“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.”) Defendant is entitled to a new trial based upon the suppression and prohibition of this testimony before the jury.

B. Denial of Defendant’s Motion to Continue

[7] In a related argument, Defendant asserts the trial court erroneously denied his motion to continue, after the prosecutor provided defense counsel with other reports of Fogg’s assaultive behavior on the evening prior to trial. Even if defense counsel had been provided ample opportunity to investigate these reports, in light of the rulings above, it appears the trial court would have improperly excluded any testimony about specific instances of Fogg’s aggressive and assaultive conduct to show he was the aggressor.

The trial court committed prejudicial error by limiting the character witnesses’ testimonies solely to opinion and reputation evidence. Defendant should have been permitted adequate time to investigate these additional instances of Fogg’s violent and explosive conduct in order to adequately prepare his defense.

Defendant was deprived of an opportunity to “make effective use of the evidence” by the trial court’s exclusion of the testimony about Fogg’s specific acts of violence, and the trial court’s denial of his motion to continue. *State v. Canady*, 355 N.C. 242, 252, 559 S.E.2d 762, 767 (2002).

Evidence of Fogg’s aggressive, explosive, and violent nature was crucial substantive evidence to support Defendant’s claim of self-defense.

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Failure to allow counsel any time to investigate after the State's disclosures, provided the night before trial, further violated Defendant's rights to effective assistance of counsel and to present a complete defense. U.S. Const. Amend. VI; Const. of N.C. Art. I, §§ 18, 23.

VI. Conclusion

Whether or not Defendant was within the curtilage of his home where the shooting occurred, he was certainly within the common areas of the apartment complex where he lived. It is undisputed that Defendant was in a place where he had a lawful right to be when he shot Fogg. It is also undisputed Defendant made reasonable efforts to avoid further confrontation with the armed Fogg. Evidence was introduced to show Defendant was in imminent fear of his life, based upon the merciless beating Fogg had inflicted upon him two weeks prior.

To be entitled to a "no duty to retreat" instruction, Defendant need only present evidence that he "reasonably believe[d] that such force [was] necessary to prevent imminent death or great bodily harm to himself" under N.C. Gen. Stat. § 14-51.3(a)(1). The initial jury instructions failed to include the statutory and required "no duty to retreat" instruction. The jury requested further instruction on the law pertaining to "no duty to retreat," and was erroneously instructed that the law pertaining to " 'no duty to retreat' does not apply in this case." The prejudice to Defendant is clear from the record.

The excluded instances of Fogg's violent conduct were also crucial to Defendant's claim of self-defense and are admissible under Rule 405(b). The trial court committed prejudicial error by excluding this evidence, and hindered Defendant's right to present a complete defense. Defendant was further prejudiced by the denial of his motion to continue, where the State presented defense counsel on the eve of trial with additional information regarding specific instances of Fogg's violent conduct.

Defendant is entitled to a new trial with the opportunity conduct a complete investigation and present evidence of specific instances of Fogg's violent and aggressive nature, and proper instructions to the jury on self-defense and no duty to retreat. *It is so ordered.*

NEW TRIAL.

Judge CALABRIA concurs.

Judge BRYANT dissents by separate opinion.

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BRYANT, Judge, dissenting.

Because *In re Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989), requires that we follow *State v. Lee*, ___ N.C. App. ___, 789 S.E.2d 679 (2016), *review allowed*, ___ N.C. ___, 796 S.E.2d 790 (2017), I believe that we are foreclosed from finding error in (I) the trial court's denial of defendant's request for a no duty to retreat instruction. While, candidly, I tend to agree with the majority's opinion that a new trial is necessary, I see no way in which to distinguish the facts in the instant case from those in *Lee* and, therefore, disagree with the majority's reasoning that *Lee* "is not precedent here," whether we agree with *Lee*'s legal soundness or not. See *Petition for Discretionary Review* at 6, *State v. Lee*, ___ N.C. ___, 796 S.E.2d 790 (2017) (No. 335PA16) ("The opinion below is the first to construe N.C. Gen. Stat. § 14-51.3 ('Use of force in defense of person'), but it violates basic rules of statutory construction, and relies heavily upon completely inapplicable provisions of § 14-51.2 ('Home, workplace, and motor vehicle protection'), which were not cited or argued by either party. All branches of defensive force jurisprudence will be affected by this flawed Court of Appeals opinion . . .").

Furthermore, where (II) the trial court sustained the State's objections to evidence of specific instances of the victim's violent conduct, but allowed ample evidence of the victim's reputation for violence, and where (III) the trial court's denial of defendant's motion to continue does not rise to the level of a constitutional violation of defendant's right to present a defense, I would find no error in the judgment of the trial court and respectfully dissent.

I

Defendant first argues the trial court erred by denying defendant's request for a pattern jury instruction that defendant could "stand his ground" and had no duty to retreat before using deadly force in self-defense in a place defendant had a lawful right to be. While the statute upon which defendant relies—N.C. Gen. Stat. 14-51.3 (2015)—states that "a person is justified in the use of deadly force and does not have a duty to retreat in any place he or she has the lawful right to be," I believe that we are bound by this Court's analysis in *State v. Lee* and its holding that "the statutory presumption favoring a no duty to retreat instruction remains limited to one's home, motor vehicle, or workplace." ___ N.C. App. at ___, 789 S.E.2d at 686.

The question of whether a trial court erred in instructing the jury is a question of law reviewed *de novo*. *State v. Osorio*, 196 N.C. App.

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458, 466, 675 S.E.2d 144, 149 (2009). “It is the duty of the trial court to instruct the jury on all substantial features of a case raised by the evidence.” *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988) (citation omitted).

“Where there is evidence that defendant acted in self-defense, the court must charge on this aspect even though there is contradictory evidence by the State or discrepancies in defendant’s evidence.” *State v. Whetstone*, 212 N.C. App. 551, 555, 711 S.E.2d 778, 781 (2011) (citation omitted). Further, “where supported by the evidence in a claim of self-defense, an instruction negating [a] defendant’s *duty to retreat* in his home or premises must be given even in the absence of a request by [the] defendant.” *State v. Morgan*, 315 N.C. 626, 643, 340 S.E.2d 84, 95 (1986) (citations omitted); *see also State v. Davis*, 177 N.C. App. 98, 102, 627 S.E.2d 474, 477 (2006) (noting that “[a] comprehensive self-defense instruction requires instructions that a defendant is under no duty to retreat if the facts warrant it”). “When determining whether the evidence is sufficient to entitle a defendant to jury instructions on a defense or mitigating factor, courts must consider the evidence in the light most favorable to [the] defendant.” *State v. Withers*, 179 N.C. App. 249, 257, 633 S.E.2d 863, 868 (2006) (alteration in original) (quoting *State v. Mash*, 323 N.C. 339, 348, 372 S.E.2d 532, 537 (1988)).

“Our courts have recognized that a defendant may use either deadly force or nondeadly force to defend himself, depending on the circumstances of each case.” *Whetstone*, 212 N.C. App. at 558, 711 S.E.2d at 783 (citation omitted). Where an assault is made without the use of deadly force, “the person assaulted may not stand his ground and kill his adversary, if there is any way of escape open to him, although he is permitted to repel force by force and give blow for blow.” *State v. Pearson*, 288 N.C. 34, 39, 215 S.E.2d 598, 602–03 (975) (citations omitted).

“[H]owever, where the attack is made with murderous intent (i.e., deadly force), the person attacked is under no obligation to retreat, but may stand his ground and kill his adversary, if need be.” *Id.* at 39–40, 215 S.E.2d at 603 (citation omitted). An assault is deadly or “felonious” if “it is done with the intent to kill or at least to inflict serious bodily injuries” *State v. Frizzelle*, 243 N.C. 49, 50, 89 S.E.2d 725, 726 (1955). Thus, “deadly force is not privileged against nondeadly force” unless “there is a great disparity in strength between the defendant and his assailant” *Pearson*, 288 N.C. at 40, 215 S.E.2d at 603 (citations omitted). These common law principles have been codified as follows:

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[A] person is justified in the use of deadly force and does not have a duty to retreat in any place he or she *has the lawful right to be* if either of the following applies:

- (1) He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another.
- (2) Under the circumstances permitted pursuant to G.S. 14-51.2.

N.C.G.S. § 14-51.3(a) (emphasis added). Additionally, “[a] lawful occupant within his or her home, motor vehicle, or workplace does not have a duty to retreat . . .” N.C. Gen. Stat. § 14-51.2(f) (2015). It is important to note, however, that when confronted with an intruder, “[the] lawful occupant of a home, motor vehicle, or workplace is *presumed* to have held a reasonable fear of imminent death or serious bodily harm . . . when using defensive force . . .” *Id.* § 14-51.2(b)(1)–(2). “[T]he determination by the trial court of which jury instruction is appropriate depends on the evidence in each case.” *Whetstone*, 212 N.C. App. at 558, 711 S.E.2d at 783.

Although this Court reviewed the defendant’s arguments for plain error in *State v. Lee*, ___ N.C. App. at ___, 789 S.E.2d at 684, I believe that its analysis of whether a no duty to retreat instruction was required controls our analysis in this case. *See generally In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37 (“Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent unless it has been overturned by a higher court.” (citations omitted)).

In *Lee*, the defendant’s friend (Walker) and the victim (Epps) engaged in an argument near the defendant’s home. ___ N.C. App. at ___, 789 S.E.2d at 682. Epps, who had a reputation as a troublemaker, left, but promised to return later and in fact did, *see Petition for Discretionary Review* at 2, arriving in a car which parked two or three houses down from the defendant’s home, *id.* at ___, 789 S.E.2d at 683. Epps and several others got out of the car and approached the defendant and Walker, who had seen Epps arrive in the car and had come out of the defendant’s house. *Id.* Following a second argument, which quickly escalated, Epps shot Walker in the street outside the defendant’s home and continued to shoot at him as Walker attempted to flee. *Id.* Then, Epps turned his gun on the defendant, at which point the defendant shot Epps several times before Epps could fire. *Id.* Both Epps and Walker died as a result of gunshot wounds. *Id.*

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The defendant in *Lee* was indicted for first-degree murder and was found guilty of second-degree murder. *Id.* Although the defendant did not object at trial to the self-defense jury instructions as given by the trial court, on appeal, the defendant argued that a no duty to retreat instruction should have been given as he “was where he had a right to be—the street by his home—when he was confronted by Epps, who had a pistol in his hand and had just fatally wounded [Walker].” *Id.* at ___, 789 S.E.2d at 685 (alteration in original). Specifically, the defendant in *Lee*

argue[d] that, having undertaken to instruct the jury according to N.C.P.I.—Crim. 206.10, the trial court erroneously omitted the disputed sentence of the pattern jury instruction [(“Furthermore, the defendant has no duty to retreat in a place where the defendant has a lawful right to be.”)], and was further required to read N.C.P.I.—Crim. 308.10 in its entirety.

*Id.*¹ While it would seem that basic rules of statutory construction indicate that a no duty to retreat instruction should have been given in *Lee*, see N.C.G.S. § 14-51.3; N.C.P.I.—Crim. 308.10, in reviewing for plain error, this Court nevertheless disagreed:

[The] Defendant’s argument, that a different verdict probably would have been reached but for the omission of a no

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1. N.C.P.I. 308.10 reads as follows:

308.10 SELF-DEFENSE, RETREAT—INCLUDING HOMICIDE (TO BE USED FOLLOWING THE SELF-DEFENSE INSTRUCTIONS WHERE RETREAT IS IN ISSUE).

NOTE WELL: *This instruction is to be used if the evidence shows that the defendant was at a place where the defendant had a lawful right to be, including the defendant’s own home or premises, the defendant’s place of residence, the defendant’s workplace, or in the defendant’s motor vehicle, when the assault on the defendant occurred.*

If the defendant was not the aggressor and the defendant was [in the defendant’s own home] [on the defendant’s own premises] [in the defendant’s place of residence] [at the defendant’s workplace] [in the defendant’s motor vehicle] [at a place the defendant had a lawful right to be], the defendant could stand his ground and repel force with force regardless of the character of the assault being made upon the defendant. However, the defendant would not be excused if the defendant used excessive force.

N.C.P.I.—Crim. 308.10 (June 2012) (second emphasis added) (footnote omitted).

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duty to retreat jury instruction, *presumes [the] Defendant was in a place where he had a lawful right to be, for purposes of a no duty to retreat defense, when he shot [the victim].*

Id. (emphasis added).² Indeed, this Court in *Lee* goes on to quote *State v. Pearson*, 288 N.C. 34, 215 S.E.2d 598 (1975), stating that “where the person attacked is not in *his own dwelling, home, place of business, or on his own premises*, then the degree of force he may employ in self-defense is conditioned by the type of force used by his assailant.” ___ N.C. App. at ___, 789 S.E.2d at 685 (emphasis added in *Lee*) (quoting *Pearson*, 288 N.C. at 43, 215 S.E.2d at 605).³

Ultimately, the Court in *Lee* concluded as follows:

[T]o the extent [the] language [of N.C.G.S. § 14-51.3(a)(1)] can be characterized as extending the no duty to retreat defense to any public place, it is conditioned upon the reasonableness of a person’s belief that the use of deadly force was necessary under the circumstances. In other words, the right to stand one’s ground in “any public place” is conditioned as an initial matter upon whether the defender was justified in the use of self-defense without regard to the physical setting in which the confrontation occurred. This is consistent with case law predating N.C.G.S. § 14-51.3(a)(1), which the General Assembly enacted in 2011.

....

The statutory reference to “any place [one] has a lawful right to be” does not change our essential analysis

2. Incidentally, if the defendant in *Lee* was somehow *not* in a place where he had a lawful right to be—the public street outside his home—I struggle to think of a place where he *would* have the lawful right to be.

3. Notably, however, *Lee* omits highly relevant language which immediately follows the passage it quotes from *Pearson*:

If the assailant uses nondeadly force, then generally deadly force cannot be used by the person attacked; provided there is no great disparity in strength, size, numbers, etc., between the person attacked and his assailant. *However, if the assailant uses deadly force, then the person attacked may stand his ground and kill his attacker if he believes it to be necessary and he has a reasonable ground for such belief.*

Pearson, 288 N.C. at 43, 215 S.E.2d at 605 (emphasis added).

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regarding Defendant's duty to retreat, since the right to use self-defense is not limited spatially, and *the statutory presumption favoring a no duty to retreat instruction remains limited to one's home, motor vehicle, or workplace.*

....

Defendant was not entitled to a presumption that his use of deadly force was reasonable under the circumstances. There was no evidence that [the victim] ever entered Defendant's home or yard. It is undisputed that when Defendant shot [the victim], Defendant was standing in the intersection of a public street several houses down from his residence, not within his home, motor vehicle, or workplace. Where the evidence is such that a jury could reasonably find a defender was justified in the use of self-defense in any other setting, a no duty to retreat instruction does not change the analysis. Accordingly, even considering the evidence in the light most favorable to Defendant, we are unable to conclude that, if the trial court's instruction on self-defense had included a no duty to retreat instruction, Defendant "probably would not have been convicted of second-degree murder."

Id. at ___, 789 S.E.2d at 686–87 (emphasis added) (citations omitted).

Defendant in the instant case, similar to the defendant in *Lee*, contends that N.C. Gen. Stat. § 14-51.3 applies to the facts of this case and that defendant is entitled to an instruction that he had no duty to retreat because he was in a "place he . . . ha[d] the lawful right to be," see N.C.G.S. § 14-51.3(a), namely, the grounds of the Bay Street Apartment complex where he lived with his mother. Further, defendant contends the trial court improperly relied on N.C. Gen. Stat. § 14-51.2, and argues this case is controlled by N.C. Gen. Stat. § 14-51.3.

The evidence at trial tended to show as follows: About ten days prior to the shooting, Fogg assaulted defendant in a parking area of the Bay Tree Apartments, breaking defendant's jaw, which required surgery and was thereafter wired shut. Fogg had a large knife on him the night of the assault. Following this assault, the security guard for the apartment complex began trespass proceedings against Fogg based on Fogg's beating of defendant and another incident in which Fogg cut off a cat's head. Defendant also testified that after the assault he began carrying

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a gun because he feared for his life and, further, that he became even more afraid of Fogg when he learned that Fogg was a mixed martial arts fighter and boxer.

The night of the shooting, defendant was heading to the breezeway of Building 114 where he lived with his mother. However, upon seeing Fogg arrive at the apartment complex, defendant left the breezeway of his building, and started running towards Building 109. Defendant testified he did so because he was afraid and wanted to avoid encountering Fogg.

But Fogg spotted defendant at Building 109 and started approaching him using a loud aggressive voice and making hand motions. Defendant saw that Fogg was again armed with a knife, and defendant testified he thought Fogg was going to either beat him or cut him with the knife. Fogg threatened defendant, telling him he had five minutes to get away, at which point defendant pulled his gun out and pointed it at Fogg, hoping to scare Fogg into leaving. Defendant testified on direct as follows:

Q. What did [Fogg] do after you pointed your gun at him?

A. He said, excuse my language, he said, oh, n****r, you wanna shoot me?

Q. Then what did he do?

A. He started reaching for his knife. He started trying to come towards me, that's when I cocked my gun back and I just started shooting.

Q. How many times did you shoot him?

A. I don't know, because Mr. Fogg still coming towards me. So I didn't know if he was shot or not.

Q. When -- did there come a time in the shooting process that you stopped?

A. Yes, sir it was.

Q. Why?

A. Because I seen Mr. Fogg grab his chest like that and he started stumbling.

Q. And what did you do?

A. I panicked and ran.

Q. Before Mr. Fogg grabbed his chest, did you know if you hit him in any of those prior shots?

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A. No, sir, I did not.

Q. Did you ever see him fall?

A. No, sir, I did not.

Q. Why did you run from him?

A. Because I felt like it was – that was the time for me that I can get away from him.

Q. Before you pulled your gun, why didn't you turn tail and run?

A. Because I felt like if I would have turn my back against him, he would have came up from behind me and hit me in the jaw again.

Q. Had he done that before?

A. Yes, sir, he did.

Defendant's location on the grounds of the apartment complex where he lived at the time of the shooting is not materially different from that of the defendant in *Lee*, who was on a public street by his home. *See* ___ N.C. App. at ___, 789 S.E.2d at 687. Furthermore, at trial, defense counsel requested (but the trial court rejected⁴) pattern jury instruction 308.10,⁵ which this Court in *Lee* concluded was not erroneously omitted

-
4. The following colloquy took place during the charge conference:

[Defense Counsel]: Your Honor, I would object to the part of the charge where you say under North Carolina law and statutory definition, [the no duty to retreat rule] doesn't apply to this case. Instead, I would ask this Court to give the pattern 308.10, that includes the parenthetical in a place the Defendant had a lawful right to be. Because I think that must be based on common law, state – or state of the general common law. Otherwise it would make no sense to put it at the end of a parenthetical. If a pattern exists, I think [the] Court should just go with the pattern.

THE COURT: But then I would still need to explain to them that I have determined as a matter of law none of those places apply in this case.

[Defense Counsel]: Well, except the last one, at a place the Defendant had a lawful right to be.

THE COURT: No, I've determined as a matter of law that that does not apply to this case.

5. *See supra* note 1 and accompanying text.

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from the jury instructions, despite the fact that the defendant in *Lee* was in a place he had the lawful right to be (the street outside his home) when he met deadly force with deadly force, *see id.*, which is precisely what happened in the instant case.

However, even if the facts in the instant case would have supported a no duty to retreat instruction based on N.C.G.S. § 14-51.3(1), defendant's argument that the trial court improperly relied on N.C.G.S. § 14-51.2 by determining that the no duty to retreat presumption applies solely to circumstances where a person is attacked in his own home, business, or vehicle, must fail based on *Lee*.

Accordingly, pursuant to this Court's analysis and holding in *Lee* and the requirement of *In re Civil Penalty* that "[w]here a panel of the Court of Appeals has decided the same issue, . . . a subsequent panel of the same court is bound by that precedent," 324 N.C. at 384, 379 S.E.2d at 37, and I am unable to see a way to distinguish this case from *Lee*, I would hold that this Court's opinion in *Lee* forecloses us from finding error in the trial court's failure to instruct the jury that defendant had no duty to retreat before using deadly force where he was in a place he had a lawful right to be. I reluctantly dissent from this portion of the majority opinion.⁶

II

The majority also agrees with defendant's argument that the trial court erred in sustaining the State's objections to evidence of specific acts of violence committed by the victim on other individuals and this constitutes reversible error as defendant was prevented from exercising his constitutional right to present a complete defense. According to the majority, defendant was entitled to present testimony of three character witnesses regarding both defendant's reputation for violence and also specific acts of violent conduct committed by Fogg in order to show that Fogg, not defendant, was the aggressor. I respectfully disagree.

The majority otherwise sets forth the law regarding when a defendant claiming self-defense can present evidence of the victim's character. However, I would also add that "[i]n self-defense cases, the character of the victim for violence is relevant only as it bears upon the reasonableness of defendant's apprehension and use of force, which are essential

6. I would note that I write this dissent with the awareness that the N.C. Supreme Court has allowed the defendant's petition for discretionary review in *State v. Lee*, ___ N.C. App. ___, 789 S.E.2d 679 (2016), *review allowed*, ___ N.C. ___, 796 S.E.2d 790 (N.C. Mar. 16, 2017), and, assuming it reverses the Court of Appeals' opinion in *Lee*, I acknowledge that this portion of the dissent would be moot.

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[253 N.C. App. 754 (2017)]

elements of the defense of self-defense.” *State v. Shoemaker*, 80 N.C. App. 95, 101, 341 S.E.2d 603, 607 (1986) (citation omitted).

In the instant case, defendant was allowed to present three witnesses who testified that they knew Fogg and understood him to be violent and have a reputation for violence and aggression. The witnesses, however, were prohibited from testifying about specific prior acts of aggression committed by Fogg. Before allowing defendant’s character witnesses to testify, the trial court ruled as follows: “[P]rior acts of aggression are not an essential element of self defense. Aggressiveness on this occasion is an essential element, *but prior acts of aggressiveness is* [sic] *circumstantial evidence of aggressiveness on this occasion, it is not an essential element.* And therefore, it does not fall under 405[(b)].” Thus, where the trial court allowed the jury to hear evidence of Fogg’s reputation for aggressiveness and violence from three separate witnesses, I can discern no abuse of discretion in the trial court’s ruling that the witnesses could not also testify about specific instances of Fogg’s violent or aggressive conduct.

Even assuming *arguendo* the trial court erred in this respect, defendant cannot show that “had the error in question not been committed, a different result would have been reached at the trial[.]” N.C. Gen. Stat. § 15A-1443(a) (2015), nor that the error was not harmless beyond a reasonable doubt where, as here, a defendant claims his constitutional rights have been violated, *id.* § 15A-1443(b) (“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.”).

During the trial, considerable evidence of Fogg’s aggressive and violent behavior was heard by the jury, including the following: (1) the jury viewed a video a total of three times which showed part of the incident on 23 June 2014 where Fogg hit defendant several times, breaking his jaw in three places; (2) defendant testified in detail about the violent nature of the fight he had with Fogg on 23 June 2014 and the injuries he sustained as a result; (3) defendant’s counsel questioned Fogg at length on cross-examination about his criminal background, including Fogg’s convictions for assault on a female, assault inflicting serious injury with a minor present, felonious assault inflicting serious bodily injury, two counts of simple assault, and assault inflicting serious injury; (4) defendant’s counsel questioned Fogg about his training as a mixed martial arts fighter and boxer who sometimes fought for money; (5) defendant was allowed to testify that he had heard Fogg had beaten up other people;

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and (6) defendant presented testimony from three witnesses regarding Fogg's reputation for violence and aggression.

Defendant was able to present ample evidence of Fogg's reputation for violence from which the jury could infer that Fogg was the aggressor on 4 July 2014. Therefore, any error committed by the trial court in refusing to allow defendant's three witnesses to testify to specific instances of Fogg's violent behavior in addition to their testimony about his general reputation for violence, was not an abuse of discretion. Furthermore, it did not negatively impact defendant's ability to present a complete defense and, as such, I believe it was harmless beyond a reasonable doubt.

III

The majority also holds that the trial court committed prejudicial error in denying defendant's motion to continue after defendant's counsel received additional information regarding Fogg's violent and assaultive behavior the night before trial, and that such error violated defendant's constitutional rights to effective assistance of counsel and to present a defense. Again, I respectfully disagree.

"Ordinarily, a motion to continue is addressed to the sound discretion of the trial court, and absent a gross abuse of that discretion, the trial court's ruling is not subject to review." *State v. Taylor*, 354 N.C. 28, 33, 550 S.E.2d 141, 146 (2001) (citing *State v. Searles*, 304 N.C. 149, 153, 282 S.E.2d 430, 433 (1981)). However, "[a] significant limitation on that discretion occurs where denial of a continuance results in the violation of a defendant's right to due process . . ." *State v. Roper*, 328 N.C. 337, 349, 402 S.E.2d 600, 606 (1991). "When a motion to continue raises a constitutional issue, the trial court's ruling is fully reviewable on appeal." *Taylor*, 354 N.C. at 33, 550 S.E.2d at 146 (citation omitted); see *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009) ("The standard of review for alleged violations of constitutional rights is *de novo*." (citation omitted)).

On 24 October 2014, defendant's counsel filed a notice of self-defense and served it on the State. On 4 December 2014, defendant's counsel sent an email to the Assistant District Attorney handling the case indicating defendant's counsel had information regarding prior incidents of assaultive behavior involving Fogg. On 10 December 2014, the night before the trial was to start, the Assistant District Attorney emailed defendant's counsel some other reports involving Fogg, including some where charges were not filed.

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After receiving this information, defendant's counsel moved for a continuance, stating he needed additional time to "attempt to develop additional character evidence of the victim . . . for aggressive violent behavior," but admitted he had not specifically requested information about uncharged, acquitted, or dismissed conduct. The trial court denied the motion.

The next day, defendant's counsel asked to renew his motion on the ground that defendant's due process rights were being violated in that counsel was being prevented from presenting a defense and he was providing ineffective assistance of counsel. The trial court denied the motion.

To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense. . . . [T]o establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. Allen, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006) (internal citations omitted).

Here, defendant's counsel did not neglect to move for a continuance; he did so, but the trial court denied the motion. That the motion was denied is not indicative that counsel's performance was deficient; defendant's counsel properly made the motion, and he cannot be accused of providing ineffective assistance to his client on this basis. Defendant's argument to the contrary should be overruled.

With regard to defendant's constitutional argument, which we review *de novo*, see *Graham*, 200 N.C. App. at 214, 683 S.E.2d at 444, I would find no error in the trial court's denial of defendant's motion to continue. Defendant's counsel reported to the trial court that defendant's investigator was able to locate two witnesses from the list provided to him by the State the night before trial, one of whom testified about his opinion of Fogg's violent and aggressive behavior as well as Fogg's reputation in the community for violence and aggression. In addition, two other witnesses testified for defendant regarding Fogg's reputation for violence and aggression. Here, where defendant presented three witnesses to testify that Fogg was an aggressive and violent individual and had such a reputation in the community, defendant was able to properly present his claim of self-defense. Therefore, the trial court's denial of his motion to continue did not deprive him of his constitutional right to present a defense.

STATE v. BUCHANAN

[253 N.C. App. 783 (2017)]

In conclusion, for the reasons stated herein and as especially emphasized by *In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37, I am constrained to find no error in the judgment of the trial court and therefore respectfully dissent.

STATE OF NORTH CAROLINA

v.

WILLIAM JESSE BUCHANAN, DEFENDANT

No. COA16-697

Filed 6 June 2017

1. False Pretense—obtaining property by—thing of value

The trial court did not err in a prosecution for obtaining property by false pretenses by denying defendant's motion to dismiss for insufficient evidence on the contention that he had not obtained something of value. A \$600 provisional credit was placed in defendant's bank account after he completed a "Check Fraud/Forgery Affidavit" at his bank, although there was no evidence that defendant accessed the provisional credit. The provisional credit was the equivalent of money being placed in his account to which he had access, at least temporarily. There was evidence which a reasonable mind could accept as sufficient to support the conclusion that defendant lied to the bank in order to obtain the provisional credit.

2. Appeal and Error—preservation of issue—failure to object at trial

Defendant did not preserve for appellate review a double jeopardy issue that was not objected to at trial in a prosecution for obtaining property by false pretenses. Defendant made a false complaint for fraud involving the cashing of three checks meant for his children and then attempted to use a false affidavit to obtain the value of the three checks in a single transaction from his bank, but was only partly successful. Although defendant argued that the trial court violated the single taking rule by not instructing the jury that it could not convict defendant of both obtaining property by false pretenses and attempting to obtain property by false pretenses, the error was constitutional in nature.

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[253 N.C. App. 783 (2017)]

Appeal by Defendant from judgment entered 15 March 2016 by Judge Alan Z. Thornburg in Yancey County Superior Court. Heard in the Court of Appeals 31 January 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Ronald D. Williams, II, for the State.

The Epstein Law Firm PLLC, by Drew Nelson, for the Defendant.

DILLON, Judge.

William Jesse Buchanan (“Defendant”) appeals from his convictions on two counts of obtaining property by false pretenses.

I. Background

In 2015, Defendant filed a criminal complaint with the sheriff’s office against his girlfriend for check fraud, alleging that his girlfriend had fraudulently signed and cashed three checks drawn on his account without his knowledge or permission. The checks were in the amounts of \$600, \$200 and \$100.

After filing the charges, Defendant went to his bank and completed a “Check Fraud/Forgery Affidavit,” listing all three disputed checks. Following Defendant’s completion of the affidavit, the bank informed Defendant that it would place a six-hundred dollar (\$600) provisional credit in his bank account based on the \$600 check. The bank, though, informed Defendant that it would not provide a provisional credit for the \$200 or \$100 checks at that time. There is no evidence that Defendant ever attempted to withdraw, spend, or otherwise access the \$600 provisional credit placed in his account by the bank.

During the course of a criminal investigation of Defendant’s girlfriend, officers discovered evidence that Defendant had lied in his criminal complaint. Specifically, officers discovered that Defendant had sent his girlfriend a series of text messages authorizing her to use the checks, which he had pre-signed, for the care of their daughter. These text messages clearly showed that Defendant’s girlfriend obtained Defendant’s permission to cash each check before doing so.

Defendant was subsequently indicted for two counts of obtaining property by false pretenses. Specifically, one indictment alleged that Defendant obtained \$600 from his bank by means of a false pretense when he signed the affidavit of forgery of the checks “as stolen and forged when in fact he authorized and signed the check to be used by

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[his girlfriend].” The indictment further alleged that he *attempted* to obtain \$300 by false pretenses when he signed the affidavit of forgery regarding the other two checks.

Defendant was tried by a jury and convicted of obtaining property by false pretenses for the \$600 provisional credit placed in his account and convicted of attempting to obtain property by false pretenses for the \$100 and \$200 checks. Following the jury’s verdict, Defendant pleaded guilty to the charge of attaining habitual felon status. Defendant was sentenced accordingly and gave oral notice of appeal in open court.

II. Analysis

On appeal, Defendant argues that the trial court erred by failing to dismiss the charges against Defendant based on insufficiency of the evidence. Defendant further argues that the trial court committed plain error when it failed to instruct the jury that it could not convict Defendant of obtaining property by false pretenses (for the \$600 check) *and* of attempting to obtain property by false pretenses (for the \$200 and \$100 checks) based on the “single taking rule.”

We find no error in Defendant’s convictions.¹

A. Sufficiency of the Evidence

[1] On appeal, we consider the trial court’s denial of a motion to dismiss for insufficient evidence *de novo*. *State v. Privette*, 218 N.C. App. 459, 471, 721 S.E.2d 299, 308-09 (2012). To withstand a motion to dismiss for insufficient evidence, “the State must present substantial evidence of (1) each essential element of the charged offense and (2) [that defendant was] the perpetrator of such offense.” *Id.* at 470-71, 721 S.E.2d at 308.

An essential element of the crime of obtaining property by false pretenses is that the defendant “obtains or attempts to obtain value from another.” *State v. Cronin*, 299 N.C. 229, 242, 262 S.E.2d 277, 286 (1980); *see also* N.C. Gen. Stat. § 14-100 (2015). N.C. Gen. Stat. § 14-100 defines the offense as complete if a defendant either “obtains” or “*attempts to obtain* value from another” by way of a false representation. N.C. Gen. Stat. § 14-100(a) (emphasis added).

On appeal, Defendant argues that the State’s evidence was not sufficient to support his conviction because the State failed to show that Defendant obtained anything of “value.” Specifically, Defendant

1. Defendant does not challenge the judgment convicting him of attaining the status of a habitual felon.

STATE v. BUCHANAN

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contends that the \$600 provisional credit placed in his bank account was not a “thing of value.” We disagree.

Our Supreme Court has held that a loan is a “thing of value” for the purpose of the offense. *See Cronin*, 299 N.C. at 242, 262 S.E.2d at 285 (stating that “the crime of obtaining property by false pretense is committed when one obtains a loan of money”).

Based in part on the reasoning in *Cronin*, we hold that the provisional credit placed in Defendant’s account was a “thing of value” sufficient to sustain his conviction. The provisional credit was the equivalent of money being placed in his account, to which he had access, at least temporarily. Access to money for a period of time, even if it eventually has to be paid back, is a “thing of value.” *Id.*

Defendant argues that the State’s evidence was insufficient to show that he *intended to obtain* the provisional credit placed in his account by the bank. We hold that the evidence, viewed in the light most favorable to the State, was sufficient to allow a jury to conclude that Defendant intended to obtain the credit to his account when he executed the bank’s fraud affidavit. *See State v. Patterson*, 335 N.C. 437, 449-50, 439 S.E.2d 578, 585 (1994).

On this point, Defendant argues that he only completed the bank’s affidavit of forgery “because the police directed him to do so” as part of his criminal complaint against his girlfriend and that he never withdrew or spent the provisional credit, and that the bank eventually removed the provisional credit from Defendant’s account.

It could be inferred from the evidence, viewed in the light most favorable to Defendant, that Defendant did not intend to obtain the provisional credit. However, viewed in the light most favorable to the State, the evidence demonstrated that Defendant lied about his girlfriend’s “fraud,” in part, for the purpose of obtaining a credit to his bank account. The affidavit that Defendant signed clearly stated that “a provisional credit may . . . be issued for the transaction(s) in dispute[.]” Further, there was evidence that Defendant told his girlfriend that he wanted his money returned. This evidence constitutes “relevant evidence which a reasonable mind would accept as sufficient to support [the] conclusion” that Defendant lied to the bank in order to obtain the provisional credit. *Id.* at 449, 439 S.E.2d at 585. Accordingly, this argument is overruled.

B. Jury Instruction/Single Taking Rule

[2] Finally, Defendant alleges that the trial court’s instructions to the jury violated the “single taking rule.” Essentially, Defendant contends

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that the State's evidence only supported a *single* conviction of obtaining property by false pretenses, and thus, the trial court committed plain error when it failed to instruct the jury that it could not convict Defendant of both obtaining property by false pretenses and attempting to obtain property by false pretenses. Because the trial court did not do so, Defendant contends that his ultimate convictions for both offenses violate the "single taking rule." We hold that the trial court did not commit plain error in its instructions.

When viewed in the light most favorable to the State, the evidence showed that (1) Defendant attempted to obtain \$900 from his bank by making a false representation in the affidavit and (2) Defendant was successful in obtaining the temporary use of \$600 of the \$900 he had attempted to obtain.

Our Supreme Court has explained in the context of larceny that when "a perpetrator steals several items at the same time and place," and as part of "one continuous act or transaction," only a single larceny offense is committed. *State v. Adams*, 331 N.C. 317, 333, 416 S.E.2d 380, 389 (1992); *see also State v. Marr*, 342 N.C. 607, 613, 467 S.E.2d 236, 239 (1996); *State v. Jaynes*, 342 N.C. 249, 275-76, 464 S.E.2d 448, 464 (1995). In so stating, the Supreme Court examined the larceny statutes and discerned that the intent of the General Assembly was that a defendant who steals several items in a single theft be guilty of a single count.

[T]he purpose of G.S. 14-72 is to establish levels of punishment for larceny based on the value of the goods stolen, the nature of the goods stolen or the method by which stolen, not to create new offenses. Nothing in the statutory language suggests that to charge a person with a separate offense for each firearm stolen in a single criminal incident was intended.

Adams, 331 N.C. at 332, 416 S.E.2d at 388 (citation omitted).

We have reviewed the language of N.C. Gen. Stat. § 14-100 and conclude that the General Assembly did not intend to subject a defendant to multiple counts of obtaining property by false pretenses where he obtains multiple items in a single transaction. Rather, the statute provides for an increase in punishment if the value of the property taken exceeds \$100,000. *See* N.C. Gen. Stat. § 14-100 (providing that the offense constitutes a Class C felony if the property value exceeds \$100,000, but otherwise constitutes a Class H felony). Although our Court has considered the application of the "single taking rule" to the crime of obtaining property by false pretenses, we have done so only in the context

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of indictments. *State v. Rawlins*, 166 N.C. App. 160, 601 S.E.2d 267 (2004). In *Rawlins*, our Court held that the single taking rule did not apply where the defendant used stolen credit cards on three separate occasions within a 20 minute period, stating: “In this case, there were three distinct transactions separated by several minutes in which different credit cards were used. Thus, we conclude that the indictments were not duplicative.” *Id.* at 166, 601 S.E.2d at 272.

Applying the reasoning in *Rawlings* and the Supreme Court opinions in the larceny cases cited above, by way of example, if a defendant purchased three items with one swipe of a stolen credit card, the act would constitute a single offense under N.C. Gen. Stat. § 14-100. And if the value of each item was \$50,000, the defendant would be guilty of a Class C felony (as opposed to three Class H felonies) since the total value of the items exceeded \$100,000. However, if the defendant purchased each item with a separate credit card swipe separated by some amount of time, the defendant would be guilty of three Class H felonies, and not the single Class C felony because his actions would not constitute a “single taking.”

The wrinkle in the present case is that Defendant attempted to collect the value of three checks in a single transaction, but was only successful in obtaining a credit for one of the checks. However, the fact that Defendant was not successful in obtaining all of the property he attempted to obtain in the single transaction does not change the analysis. Indeed, if a defendant in the example above attempted to purchase three items with a stolen credit card, but was informed by the clerk that the card limit only allowed for the purchase of two of the items, the defendant would only be guilty of a single crime.

Notwithstanding, we conclude that the trial court did not err in its jury instructions. Rather, the error appears to be constitutional in nature, as a double jeopardy issue. Therefore, because Defendant failed to make any objection at trial, any argument is waived on appeal. *See State v. Gopal*, 186 N.C. App. 308, 320-21, 186 S.E.2d 279, 287 (2007), *aff’d per curiam*, 362 N.C. 342, 661 S.E.2d 732 (2008).² In *Gopal*, the defendant argued that he should not have been sentenced for two separate crimes where his two acts constituted one offense. *Id.* at 320, 186 S.E.2d at 287. We held that the defendant had failed to make the appropriate argument and that the argument was waived:

2. Nor has Defendant argued on appeal that the trial court’s error violated his constitutional rights.

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[253 N.C. App. 789 (2017)]

Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal, not even for plain error. A double jeopardy argument need not use those exact words to be preserved for appeal if the substance of the argument was sufficiently presented and, *more importantly, addressed by the trial court in finalizing its instructions to the jury.*

Id. at 320-21, 186 S.E.2d at 287 (internal citations and marks omitted) (emphasis in original). In the present case, Defendant failed to make such an argument before the trial court and has therefore failed to preserve this issue on appeal.

Accordingly, we find no error in Defendant's convictions.

NO ERROR.

Judges DAVIS and INMAN concur.

STATE OF NORTH CAROLINA, PLAINTIFF

v.

ANGELO LINDOVIS JONES, DEFENDANT

No. COA16-1280

Filed 6 June 2017

1. Appeal and Error—certiorari—jurisdiction to grant

The Court of Appeals had the authority to grant defendant's petition for a writ of certiorari, and defendant's petition was granted. N.C.G.S. § 15A-1444(e) granted defendant the right to petition the appellate division for review by certiorari, and N.C.G.S. § 7A-32(c) granted the Court of Appeals jurisdiction to issue a writ of certiorari. Although defendant's petition was not based upon the criteria specified in Appellate Rule 21, the Rules of Appellate Procedure cannot remove jurisdiction given by the General Assembly in accordance with the North Carolina Constitution. Although there are two cases from the Court of Appeals holding that the Court of Appeals was without authority to issue a writ of certiorari following defendant's guilty plea, the Court of Appeals had no authority to reverse existing precedent from the North Carolina Supreme Court, *State v. Stubbs*, 368 N.C. 40.

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[253 N.C. App. 789 (2017)]

2. Criminal Law—right to allocute—sentencing hearing—denied

A defendant was denied his right to speak on his own behalf at sentencing and was entitled to a new sentencing hearing. The trial court was informed that defendant wished to address the court and the trial court acknowledged the request, but, without giving defendant the chance to speak, the trial court indicated that it had already decided how to sentence defendant, became impatient, and pronounced judgment.

Appeal by defendant from judgment entered 23 August 2016 by Judge Milton F. Fitch, Jr. in Wilson County Superior Court. Heard in the Court of Appeals 1 May 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Tracy Nayer, for the State.

Cheshire Parker Schneider & Bryan, PLLC, by John Keating Wiles, for defendant-appellant.

ZACHARY, Judge.

Angelo Lindovis Jones (defendant) appeals from a judgment entered upon his plea of guilty to attempted robbery with a dangerous weapon. Defendant has filed a petition for issuance of a writ of certiorari to obtain review of the sentencing proceeding, and we elect to grant his petition. On appeal, defendant argues that he is entitled to a new sentencing hearing, on the grounds that his counsel informed the trial court that defendant wanted to address the court before it imposed judgment, but the trial court denied him the opportunity to speak. We agree, and conclude that the judgment must be vacated and remanded for a new sentencing hearing.

I. Factual and Procedural Background

On 27 November 2013, a warrant was issued for defendant's arrest, charging him with having committed the offenses of first-degree murder, first-degree burglary, and armed robbery almost three years earlier, on 4 January 2011. Defendant was indicted for these offenses on 7 July 2014. On 30 March 2016, defendant pleaded guilty to attempted armed robbery, pursuant to a plea agreement. The terms of the plea arrangement were that defendant would plead guilty to the charge of attempted armed robbery and would provide truthful testimony against his codefendants if requested to do so by the State; in exchange, the State would

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dismiss the charges of first-degree murder and first-degree burglary. The plea bargain did not include any agreement on the sentence that defendant would receive. Defendant's sentencing was continued until 22 August 2016.

On 23 August 2016, defendant appeared before the trial court for sentencing. The sentencing hearing is discussed in greater detail below. Briefly, at the outset of the hearing, defendant's counsel informed the court that counsel would argue on defendant's behalf and that defendant wished to "address the Court at the appropriate time," to which the trial court agreed. Thereafter, defendant's counsel advised the court of aspects of defendant's personal history that might be pertinent to the court's sentencing decision. Defense counsel also presented testimony from a lead investigator of the underlying offenses, who spoke on defendant's behalf about the assistance that defendant had provided, which had enabled law enforcement officers to solve the case. After the detective finished, the trial court announced that it was "ready to give the judgment" and entered judgment without allowing defendant to address the court. Defendant was sentenced to a term of 128 to 163 months' imprisonment and was given credit for 1001 days that he had spent in confinement awaiting trial.

On 24 August 2016, defendant sent the following handwritten letter to the Clerk of Court:

August 24, 2016

To the Clerk of Court, Superior

I was sentence[d] August 23 2016 in Superior Court by [the trial court], to serve 128 months to 163.

I would like to put the court on notice that I am appealing the sentencing part of the sentence, not the guilty plea. I would like to site [sic] that [the court] was rude, bias, and personal in his rulings.

My lawyer Anna Kirby, the Assist. D.A. Joel Stadiem, and lead Detective Kearney, all wanted to speak on my behalf. But [the judge] did not allow anyone to be heard to where it wouldn't make a differen[ce].

I also wanted to address the courts but wasn't given a chance. I really feel like my constitutional rights [were] violated for not allowing my attorney or myself, or people on my behalf to stand and address the court.

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I feel that I should have been sentenced in the mitigated range instead of the presumptive. Angelo Jones

Appellate counsel was appointed for defendant on 2 September 2016. On 19 January 2017, defendant's appellate counsel filed a petition in which counsel (1) acknowledged that defendant's *pro se* letter to the Clerk of Court stating his intention to "put the Court on notice" of his appeal did not comply with the relevant rules of appellate procedure, and (2) sought issuance of a writ of certiorari in order to obtain review. On 15 February 2017, the State filed a response opposing the issuance of the writ, and a motion to dismiss defendant's appeal. Defendant filed a reply to the State's motions on 24 February 2017.

II. Defendant's Right to Seek Review by Writ of Certiorari

[1] Preliminarily, we address defendant's right to seek the issuance of a writ of certiorari in order to obtain appellate review of the sentencing proceeding conducted upon his entry of a plea of guilty to the charge of attempted armed robbery. We conclude that this Court has the authority to grant defendant's petition asking us to issue a writ of certiorari, and we grant his petition.

A criminal defendant's right to appeal following his plea of guilty is limited by N.C. Gen. Stat. § 15A-1444 (2015), which provides in relevant part that:

(a1) A defendant who has . . . entered a plea of guilty or no contest to a felony, is entitled to appeal as a matter of right the issue of whether his or her sentence is supported by evidence introduced at the . . . sentencing hearing only if the minimum sentence of imprisonment does not fall within the presumptive range[.] . . . Otherwise, the defendant is not entitled to appeal this issue as a matter of right but may petition the appellate division for review of this issue by writ of certiorari.

(a2) A defendant who has entered a plea of guilty or no contest to a felony or misdemeanor in superior court is entitled to appeal as a matter of right the issue of whether the sentence imposed: (1) Results from an incorrect finding of the defendant's prior record level[.] . . .; (2) Contains a type of sentence disposition that is not authorized . . . or; (3) Contains a term of imprisonment that is for a duration not authorized[.] . . .

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...

(e) Except as provided in subsections (a1) and (a2) of this section . . . the defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court, but he may petition the appellate division for review by writ of certiorari. . . .

...

(g) Review by writ of certiorari is available when provided for by this Chapter, by other rules of law, or by rule of the appellate division.

Thus, Gen. Stat. § 15A-1444(e) explicitly grants defendant the right to “petition the appellate division for review by writ of certiorari.”

We next consider our jurisdiction to issue a writ of certiorari in order to review a defendant’s appeal following entry of a plea of guilty. “The jurisdiction of the Court of Appeals is established in the North Carolina Constitution: ‘The Court of Appeals shall have such appellate jurisdiction as the General Assembly may prescribe.’ N.C. Const. art. IV, § 12(2).” *State v. Stubbs*, 368 N.C. 40, 42, 770 S.E.2d 74, 75 (2015). By enacting N.C. Gen. Stat. § 7A-32(c) (2015), our General Assembly expressly granted the Court of Appeals jurisdiction to issue a writ of certiorari:

(c) The Court of Appeals has jurisdiction, exercisable by one judge or by such number of judges as the Supreme Court may by rule provide, to issue the prerogative writs, including mandamus, prohibition, certiorari, and super-sedeas, in aid of its own jurisdiction, or to supervise and control the proceedings of any of the trial courts of the General Court of Justice[.] . . . The practice and procedure shall be as provided by statute or rule of the Supreme Court, or, in the absence of statute or rule, according to the practice and procedure of the common law.

In this case, although defendant’s appeal does not raise any of the issues for which an appeal of right is afforded, N.C. Gen. Stat. § 15A-1444(e) allows him to seek review by petitioning for issuance of a writ of certiorari. “Accordingly, given that our state constitution authorizes the General Assembly to define the jurisdiction of the Court of Appeals, and given that the General Assembly has given that court broad powers ‘to supervise and control the proceedings of any of the

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trial courts of the General Court of Justice,' *id.* § 7A-32(c)," *Stubbs*, 368 N.C. at 43, 770 S.E.2d at 76, and given that "the General Assembly has placed no limiting language in subsection 15A-[1444(e)]" *id.*, we conclude that this Court has jurisdiction to grant defendant's petition for issuance of a writ of certiorari.

In reaching this conclusion, we are aware that N.C. R. App. P. 21(a)(1) (2015) of our Rules of Appellate Procedure provides that:

(a)(1) The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to N.C.G.S. § 15A-1422(c)(3) of an order of the trial court ruling on a motion for appropriate relief.

In this case, defendant's application for issuance of a writ of certiorari does not allege that his right to an appeal was lost by failure to take timely action, that he seeks to appeal from an interlocutory order, or that he is appealing from an order of the trial court ruling on a motion for appropriate relief. Thus, defendant's petition for a writ of certiorari, although authorized by N.C. Gen. Stat. § 15A-1444(e), is not based upon the criteria specified in Appellate Rule 21. However, our Supreme Court has addressed the tension between a statute that grants a right to seek review by certiorari and the apparent limitations that Appellate Rule 21 places on that right.

In *Stubbs*, the State sought review of a trial court's ruling that granted a defendant's motion for appropriate relief. N.C. Gen. Stat. § 15A-1422(c)(3) allows review of a court's ruling on a motion for appropriate relief "[i]f the time for appeal has expired and no appeal is pending, by writ of certiorari." This statute gave the State a right to seek review by writ of certiorari. However, at the time that *Stubbs* was decided, Rule 21(a)(1) specified that a writ of certiorari could be issued to obtain review of a trial court's denial of a motion for appropriate relief. (Rule 21 was later amended to allow review by writ of certiorari of any "ruling" on a motion for appropriate relief.) As in the instant case, a statute provided the right to seek certiorari to obtain review of a ruling that did not arise from any of the procedural contexts specified in Rule 21. Our Supreme Court held as follows:

As noted by the parties and the Court of Appeals, the Rules of Appellate Procedure are also in play here. *See* [N.C.

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Gen. Stat. § 7A-32(c)] (“The practice and procedure shall be as provided by statute or rule of the Supreme Court, or, in the absence of statute or rule, according to the practice and procedure of the common law.”). Appellate Rule 21 states in relevant part:

. . . “The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to N.C.G.S. § 15A-1422(c)(3) of an order of the trial court denying a motion for appropriate relief.

N.C. R. App. P. 21(a)(1)[.] . . . Defendant argues that because of this Rule, the State may not appeal an order of a trial court granting a motion for appropriate relief. We disagree. As stated plainly in Rule 1 of the Rules of Appellate Procedure, “[t]hese rules shall not be construed to extend or limit the jurisdiction of the courts of the appellate division as that is established by law.” *Id.* at R. 1(c). Therefore, while Rule 21 might appear at first glance to limit the jurisdiction of the Court of Appeals, the Rules cannot take away jurisdiction given to that court by the General Assembly in accordance with the North Carolina Constitution.

Stubbs at 43-44, 770 S.E.2d at 76. The language of the opinion in *Stubbs* does not indicate that its holding was based in any way upon the specific substantive or procedural aspects of a motion for appropriate relief, or that its holding was limited to appeals from a trial court’s ruling on a motion for appropriate relief. Indeed, *Stubbs*’ central holding, that “while Rule 21 might appear at first glance to limit the jurisdiction of the Court of Appeals, the Rules cannot take away jurisdiction given to that court by the General Assembly[,]” constitutes a general ruling that a statutory right to seek certiorari may not be limited or restricted by the provisions of Appellate Rule 21. Our Supreme Court has held, upon review of *Stubbs*:

In other words, because the state constitution gives the General Assembly the power to define the jurisdiction of the Court of Appeals, only the General Assembly can take away the jurisdiction that it has conferred. Subsection 7A-32(c) thus creates a default rule that the Court of

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Appeals has jurisdiction to review a lower court judgment by writ of certiorari. The default rule will control unless a more specific statute restricts jurisdiction in the particular class of cases at issue.

State v. Thomsen, __ N.C. __, __, 789 S.E.2d 639, 641-42 (2016).

Appellate cases decided after *Stubbs* have, almost without exception, held that a defendant's statutory right to seek issuance of a writ of certiorari is not abridged by Appellate Rule 21. See, e.g., *Thomsen*, *supra*. We are aware that in two instances this Court has held, notwithstanding the holding of *Stubbs*, that we are without authority to issue a writ of certiorari in order to review a defendant's appeal following his entry of a plea of guilty. See *State v. Biddix*, __ N.C. App. __, 780 S.E.2d 863 (2015), and *State v. Ledbetter*, __ N.C. App. __, __, 779 S.E.2d 164, 171 (2015) (holding that "Defendant's petition to issue a writ of certiorari does not assert grounds which are included in or permitted by Appellate Rule 21(a)(1)"), *remanded for reconsideration in light of Stubbs and Thomsen*, __ N.C. __, 793 S.E.2d 216 (2016) (unpublished), *on remand at* __ N.C. App. __, __, 794 S.E.2d 551, 554 (2016) ("Defendant's petition, purportedly under N.C. Gen. Stat. § 1444(e), does not invoke any of the three grounds set forth in Appellate Rule 21[.]"), *stay granted*, __ N.C. __, 794 S.E.2d 527 (2016) (unpublished). We are, of course, also cognizant that "[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Appeal of Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Thus, as a general rule, we are bound by prior opinions of this Court.

"However, this Court has no authority to reverse existing Supreme Court precedent." *Respass v. Respass*, 232 N.C. App. 611, 625, 754 S.E.2d 691, 701 (2014). "[I]t is elementary that we are bound by the rulings of our Supreme Court." *Mahoney v. Ronnie's Rd. Serv.*, 122 N.C. App. 150, 153, 468 S.E.2d 279, 281 (1996), *aff'd per curiam*, 345 N.C. 631, 481 S.E.2d 85 (1997). We have examined both *Biddix* and *Ledbetter* and conclude that these cases fail to follow the binding precedent established by *Stubbs*, and as a result, do not control the outcome in the present case. In this case, as in *Stubbs*, although defendant has a statutory right to apply for a writ of certiorari to obtain review of his sentence, Appellate Rule 21 does not include this circumstance among its enumerated bases for issuance of the writ. We find the present case to be functionally and analytically indistinguishable from that of *Stubbs* and hold that, pursuant to the opinion of our Supreme Court in *Stubbs*, this Court has jurisdiction to

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grant defendant's petition for a writ of certiorari. In the exercise of our discretion, we choose to grant his petition.

III. Defendant's Right to Allocute at the Sentencing Hearing

[2] At the outset of defendant's sentencing hearing, his counsel informed the trial court that defendant wished to speak to the court prior to entry of judgment, and the court acknowledged defendant's request. However, the trial court subsequently terminated the sentencing hearing without affording defendant an opportunity to be heard. On appeal, defendant contends that he is entitled to a new sentencing hearing on the grounds that the trial court violated his right to speak on his own behalf at sentencing. For the reasons that follow, we agree with defendant.

N.C. Gen. Stat. § 15A-1334(b) (2015) provides in relevant part that "[t]he defendant at the hearing may make a statement in his own behalf." This Court has previously noted that "[a]llocution, or a defendant's right to make a statement in his own behalf before the pronouncement of a sentence, was a right granted a defendant at common law." *State v. Miller*, 137 N.C. App. 450, 460, 528 S.E.2d 626, 632 (2000). The United States Supreme Court has also emphasized the significance of this right, observing that "[t]he most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself." *Green v. United States*, 365 U.S. 301, 304, 5 L. Ed. 2d 670, 673 (1961).

Our appellate cases have held that where defense counsel speaks on the defendant's behalf and the record does not indicate that the defendant asked to be heard, the statute does not require the court to address the defendant and personally invite him or her to make a statement. "[N.C. Gen. Stat. §] 15A-1334, while permitting a defendant to speak at the sentencing hearing, does not require the trial court to personally address the defendant and ask him if he wishes to make a statement in his own behalf." *State v. McRae*, 70 N.C. App. 779, 781, 320 S.E.2d 914, 915 (1984) (citation omitted).

However, a trial court's denial of a defendant's request to make a statement prior to being sentenced is reversible error that requires the reviewing court to vacate the defendant's sentence and remand for a new sentencing hearing. *See Miller*, 137 N.C. App. at 461, 528 S.E.2d at 632 ("N.C. Gen. Stat. § 15A-1334(b) expressly gives a non-capital defendant the right to make a statement in his own behalf' at his sentencing hearing if the defendant requests to do so prior to the pronouncement of sentence. Because the trial court failed to do so, we must remand these cases for a new sentencing hearing.") (internal quotation omitted).

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Moreover, in certain factual circumstances, we have held that a trial court effectively denied a defendant the right to be heard prior to sentencing even when the court did not explicitly forbid the defendant to speak. For example, in *State v. Griffin*, 109 N.C. App. 131, 132, 425 S.E.2d 722, 722 (1993), the trial court commented that it “would be a big mistake” to allow the defendant to speak at sentencing. On appeal, we held that “defense counsel could have reasonably interpreted the trial judge’s statement to mean that the defendant would receive a longer sentence if he testified. Accordingly, we find that the defendant’s right to testify under G.S. § 15A-1334(b) was effectively chilled by the trial judge’s comment.” *Griffin*, 109 N.C. App. at 133, 425 S.E.2d at 723. We vacated the defendant’s sentence and remanded for a new sentencing hearing. Similarly, in *McRae*, the trial court informed defendant’s counsel in advance of the sentencing hearing that the court intended to impose the same sentence on defendant as it had previously imposed on a codefendant. We held that the defendant was entitled to a new sentencing hearing:

[W]e are not dealing here with the mere failure to issue an invitation to defendant to speak personally on his own behalf prior to sentencing. It is apparent from the facts that the trial court had decided the defendant’s sentence a month prior to the date of the sentencing hearing held for defendant. By his actions the trial judge foreclosed any real opportunity for defendant or his counsel to present testimony relevant to the sentencing hearing[.] . . . Where the trial judge may have been uninformed as to relevant facts because of his failure to afford the defendant a proper sentencing hearing . . . we are restrained from saying defendant has not been prejudiced.

McRae, 70 N.C. App. at 781, 320 S.E.2d at 915-16 (citation omitted).

Resolution of this issue requires examination of the transcript of the sentencing proceeding. At the outset of the hearing, defense counsel informed the trial court that defendant wanted the opportunity to address the court:

DEFENSE COUNSEL: Yes, Your Honor. May it please the Court. Mr. Jones is 56 years old. I do want to tell you a little bit about his background. As you see there’s no agreement with regard to sentencing. I would like to tell the Court a little bit about him and then he’d like to address the Court at the appropriate time, Your Honor.

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THE COURT: All right.

(emphasis added).

Defendant's counsel then spoke to the trial court about defendant's background, including his prior criminal record, employment history, and family background. When defendant's counsel informed the court that defendant had behaved well during the more than 1000 days he had been incarcerated prior to sentencing, the trial court interrupted and the following discussion ensued:

DEFENSE COUNSEL: . . . He's cooperated throughout with law enforcement. But everyone I [have] spoken to at the jail, everytime I [have] gone over to the jail, everybody knows Angelo, several of the jailers have said he's the best inmate we ever had, wished everybody was like him. . . .

THE COURT: So what you're telling me is he ought to stay in jail for the rest of his life --

DEFENSE COUNSEL: No, Your Honor.

THE COURT: -- because when he's out --

DEFENSE COUNSEL: No, Your Honor.

THE COURT: -- he raise[s] havoc, possessing stolen firearm, possess stolen firearm. It just goes on and on.

DEFENSE COUNSEL: . . . [T]hat's far from what I'm telling you and what I want the Court to infer. I do want you to take into consideration also the following things, of course with regard to the facts of the case, as you know he was not one of the persons who actually went to the door of the house. He tells me he did not have any idea there would be a gun much less a murder --

THE COURT: How do you go rob people if you don't have a weapon?

DEFENSE COUNSEL: I understand, Your Honor, but he did not have a weapon and tells me he did not know Percible Pettiford-Bynum had a weapon either --

THE COURT: Two or more people joined together acting in concert present therewith --

DEFENSE COUNSEL: We've talked about acting in concert.

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THE COURT: Felony murder.

DEFENSE COUNSEL: Yes, sir.

THE COURT: Listen, this man is not that innocent. He knows exactly what's going on.

DEFENSE COUNSEL: I'm not trying to suggest that to the Court, Your Honor, nor is he.

THE COURT: Is he ready for his time?

DEFENSE COUNSEL: Is it going to do me any good to tell you a little bit more about him?

THE COURT: You can tell me whatever you want to tell me.

(emphasis added).

The transcript excerpt suggests both that the trial court held a negative opinion of defendant (“this man is not that innocent”) and also that the court had decided on the sentence to impose (“Is he ready for his time?”) prior to hearing from either the prosecutor or defendant. Thereafter, defense counsel offered testimony from a lead detective in the case, who spoke on defendant’s behalf:

DETECTIVE KEARNEY: Your Honor, I was involved in this case since day one . . . and we were able to come [up] with no leads on this for more than a year, more than two years, until . . . we were able to go to Mr. Jones and ever since day one he come clean with us and he provided us with our probable cause that did lead us to breaking this case wide open. Without his involvement or without him telling us the truth that we could corroborate, justice in this case would be delayed, possibly never even come to fruition. So we are grateful for his involvement. I'm aware of his past, but everytime we've come into contact with him and interviewed him on multiple occasions, myself, Detective Hendricks with Miss Ann, or Miss Kirby, we have been, he gave us information [we were] able to corroborate and [that led] to the arrest of other felons.

At that point, the trial court interrupted, expressed frustration with the information that had been provided, and terminated the sentencing proceeding:

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THE COURT: What is it you all want me to do? You all taken this from first degree to robbery to burglary. You've taken it down to attempted armed robbery. Now what you all want me to do, give him a merit badge and send him home? The statute doesn't even allow me to give him a merit badge and send him home. It's an active sentence. What do you all want to talk about?

PROSECUTOR: Your Honor, I thought what [defense counsel] was referring to in our talks --

THE COURT: Was he the man that Mr. Jones went to, sat down with, told what he wanted and then he said, yes? He went -- is he the man that went out that has this record up to a Record Level VI --

PROSECUTOR: Yes.

THE COURT: -- and goes out and recruits other people to come, who participates in the drive-by to try to see, who comes back a second time and you all want to paint him out like he's a choir boy.

PROSECUTOR: No, Your Honor, the State's --

THE COURT: I'm ready to give the judgment.

PROSECUTOR: Yes, sir.

THE COURT: Now is there anything else?

PROSECUTOR: State would just say that he's been consistent since before he was, we ever had probable cause. His story has been consistent. He is the reason that we were, that they were able to solve the crime and it's generally you see a defendant give a statement of self-interest at first, particularly before any charges are taken out but this defendant did not. Just thought the Court would take that into account.

THE COURT: There's no finding in aggravation and no finding in mitigation. The sentence that is imposed is within the presumptive range. Defendant has entered a plea of guilty to a Class D, maximum punishment is 201. He is a Record Level VI. Give him 128 months minimum, 163 months maximum in the North Carolina Department of Corrections. Next case.

(emphasis added).

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Our review of the transcript shows that the trial court was informed that defendant wished to address the court and that the trial court acknowledged this request. However, during defense counsel's presentation, the court indicated that it had already decided how to sentence defendant. After hearing from a detective who had investigated the case, the trial court became impatient, asking if those present expected the court to give defendant "a merit badge" and accusing them of portraying defendant as "a choir boy." Immediately thereafter, the trial court pronounced judgment. We conclude that, on the facts of this case, defendant was denied the opportunity to be heard prior to entry of judgment. In reaching this conclusion, we have considered the cases cited by the State. However, we find them to be factually distinguishable, given that none of the cited cases address a situation in which the trial court first acknowledged an explicit request by the defendant to address the court and then abruptly entered judgment without giving the defendant an opportunity to speak.

IV. Conclusion

For the reasons discussed above, we hold that this Court has the authority to entertain a petition for issuance of a writ of certiorari by defendant in order to obtain review of his sentencing following his entry of a plea of guilty, and we elect to grant defendant's petition. We further conclude that defendant was denied the opportunity afforded him under N.C. Gen. Stat. § 15A-1334(b) to address the trial court prior to entry of judgment. As a result, his sentence must be vacated and this matter remanded for a new sentencing hearing.

VACATED AND REMANDED FOR NEW SENTENCING HEARING.

Chief Judge McGEE and Judge HUNTER, JR. concur.

STATE v. MOSTAFAVI

[253 N.C. App. 803 (2017)]

STATE OF NORTH CAROLINA

v.

SEID MICHAEL MOSTAFAVI, DEFENDANT

No. COA16-1233

Filed 6 June 2017

1. Appeal and Error—preservation of issues—fatal variance—Appellate Rule 2 review denied

The Court of Appeals declined to exercise its discretion to review Defendant's issue under Appellate Rule 2 where defendant conceded that he failed to preserve the issue and did not demonstrate the exceptional circumstance necessary for the invocation of Appellate Rule 2.

2. False Pretense—indictment money—specificity—amount required

An indictment for obtaining property by false pretenses was not sufficient where it described the property obtained as "UNITED STATES CURRENCY" but the amount was not included.

3. Appeal and Error—precedent—Court of Appeals—may not overrule Supreme Court

While a Court of Appeals panel is bound by the decision of a prior panel, the Court of Appeals is bound to follow the Supreme Court when there is a conflict between the prior Court of Appeals opinion and a Supreme Court opinion.

4. False Pretense—indictment—money—specificity

North Carolina Supreme Court precedent requiring that an indictment for taking money by false pretenses include the amount of U.S. Currency obtained was not overruled by N.C.G.S. § 15-149. The predecessor of that statute was enacted in 1877, prior to which drafters of instruments were generally required to describe not only the amount of money obtained but also the type of money. There must still be some further description of the money, at least by its amount.

Judge TYSON concurring in part and dissenting in part.

Appeal by Defendant from judgment entered 9 June 2016 by Judge Anderson D. Cromer in Forsyth County Superior Court. Heard in the Court of Appeals 20 April 2017.

STATE v. MOSTAFAVI

[253 N.C. App. 803 (2017)]

Attorney General Joshua H. Stein, by Assistant Attorney General Brent D. Kiziah, for the State.

Joseph P. Lattimore for the Defendant.

DILLON, Judge.

Seid Michael Mostafavi (“Defendant”) appeals from judgment entered after he was convicted in a bench trial of two counts of obtaining property by false pretenses. We hereby vacate Defendant’s convictions.¹

Defendant was also convicted of a single count of felony larceny. However, Defendant did not properly preserve his challenge to this conviction. In our discretion, we decline to invoke Rule 2 and do not address Defendant’s challenge regarding his conviction for felony larceny.

I. Background

Defendant was charged with a number of crimes in connection with a break-in of a house where certain items were later discovered to have been stolen.

The State’s evidence tended to show as follows: A home shared by two individuals was broken into while they were on vacation. The house-sitter testified that she was indebted to Defendant and allowed Defendant to break into the home and to help himself to certain items belonging to the two victims. Some of the missing items were found and recovered at a pawn shop. These items were either sold or pawned by Defendant.

Defendant testified and presented evidence tending to show that the house-sitter claimed she owned the stolen items and that he bought the items from the house-sitter for a negotiated price.

The trial court found Defendant guilty of one count of felony larceny and two counts of obtaining property by false pretenses from the pawn shop. The trial court sentenced Defendant accordingly. Defendant appeals.

II. Analysis

Defendant makes several arguments on appeal, which are addressed in turn below.

1. Because we have vacated Defendant’s convictions for obtaining property by false pretenses, we need not reach Defendant’s IAC claim related to these convictions.

STATE v. MOSTAFAVI

[253 N.C. App. 803 (2017)]

A. Larceny Conviction

[1] Defendant argues that there was a fatal variance between the indictment and the evidence presented at trial on the larceny charge. Specifically, he notes that the indictment identified one of the homeowners as the owner of the stolen property. This is indicated by the State's evidence, which showed that the stolen property was owned by the other homeowner. See *State v. Greene*, 289 N.C. 578, 584-85, 223 S.E.2d 365, 369-70 (1976).

Defendant concedes that he failed to properly preserve this issue on appeal. Defendant requests we invoke Rule 2 of the North Carolina Rules of Appellate Procedure to review the merits of his claim.

Appellate Rule 2 authorizes this Court to “suspend or vary the requirements or provisions of any of [the Rules of Appellate Procedure].” N.C. R. App. P. 2. Although Appellate Rule 2 is available to prevent “manifest injustice,” our Supreme Court has stated that this residual power to vary the default provisions of the appellate procedure rules should only be invoked on “‘rare occasions’ and under ‘exceptional circumstances.’” *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 201, 657 S.E.2d 361, 367 (2008).

Defendant has failed to demonstrate the “exceptional circumstances” necessary to for us to invoke Appellate Rule 2. *Id.* In the exercise of our discretion, we decline to invoke Appellate Rule 2 to reach the merits of Defendant's argument regarding his felony larceny conviction. Defendant's larceny conviction remains undisturbed.

B. Indictment – Obtaining Property By False Pretenses

[2] Defendant contends the trial court erred by failing to dismiss the charges for obtaining property by false pretenses. Defendant contends that the language in the indictment describing the property obtained as “UNITED STATES CURRENCY” was not sufficient to sustain the indictment. We agree.

“Where an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court.” *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341 (2000).

We conclude that our Supreme Court's decision in *State v. Reese*, 83 N.C. 637 (1880), which was reaffirmed by that Court in 1941 in *State v. Smith*, 219 N.C. 400, 14 S.E.2d 36 (1941), and reaffirmed again in 2014 in *State v. Jones*, 367 N.C. 299, 758 S.E.2d 345 (2014), compels

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us to conclude that the indictment charging Defendant with obtaining “UNITED STATES CURRENCY” by false pretenses was fatally defective because it failed to describe the United States Currency obtained with sufficient specificity. These cases instruct that, where money is the thing obtained by false pretenses, the money must be described “*at least by the amount*, as, for instance, so many dollars and cents.” *Smith*, 219 N.C. at 401, 14 S.E.2d at 36-37 (emphasis added).

1. Current Supreme Court Jurisprudence Compels our
Conclusion that the Indictment is Fatally Defective

[3] Our Supreme Court has repeatedly held that an indictment is constitutionally sufficient if it “apprises the defendant of the charge against him with enough certainty to enable him to prepare his defense and to protect him from subsequent prosecution for the same offense.” *State v. Snyder*, 343 N.C. 61, 65, 468 S.E.2d 221, 224 (1996) (citation omitted).

Here, Defendant was indicted for violating N.C. Gen. Stat. § 14-100, which provides that a person is guilty of obtaining property by false pretenses where he obtains “any money, goods, . . . , services . . . , or other thing of value” by means of a false pretense. N.C. Gen. Stat. § 14-100 (2011).

For indictments charging under N.C. Gen. Stat. § 14-100, our Supreme Court has held that “*the thing obtained* [(i.e., the money, goods, services, etc.) by false pretenses] *must be described with reasonable certainty*, and by the name or term usually employed to describe it.” *Jones*, 367 N.C. at 307, 758 S.E.2d at 351 (emphasis added) (internal quotation marks omitted).

In 1880, our Supreme Court held in *State v. Reese* that an indictment describing the property obtained as “money” was fatally defective, stating that “the money obtained should have been described *at least by the amount – as, for instance, so many dollars and cents.*” *Reese*, 83 N.C. at 639 (emphasis added).

In 1941, our Supreme Court reaffirmed its 1880 holding. *See Smith*, 219 N.C. at 401, 14 S.E.2d at 36-37. In *Smith*, the indictment described the money as “goods and things of value.” *Id.* The Court held that this description was fatally defective. Relying on its 1880 decision in *Reese*, the Court stated that the money “should have been described [in the indictment] *at least by the amount, as, for instance, so many dollars and cents.*” *Id.* at 401, 14 S.E.2d at 36-37 (emphasis added).

More recently, in 2014, our Supreme Court reaffirmed both the 1880 *Reese* and the 1941 *Smith* decisions, stating as follows:

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This Court has not had occasion to address this issue recently, but consistently has held that simply describing the property obtained as “money,” *State v. Reese*, 83 N.C. 637, 640 (1880), or “goods and things of value,” *State v. Smith*, 219 N.C. 400, 401, 14 S.E.2d 36, 36 (1941), is insufficient to allege the crime of obtaining property by false pretenses.

Jones, 367 N.C. at 307, 758 S.E.2d at 351. Following the reasoning in these older cases, our Supreme Court held that an indictment alleging that the defendant obtained “services” without some description as to *the type* of services which were fraudulently obtained, was fatally defective. *Id.* at 307-08, 758 S.E.2d at 351. The Court so held even though, like in the present case, the indictment was specific in identifying the *name* of the victim, the *date* of the offense, and the stolen credit card defendant used to obtain the services.²

“United States Currency” is synonymous with “money,” though the former language does provide *some* further description of the money as some *unspecified* amount of “dollars and cents” issued by *our* federal government, rather than by a foreign government. *See State v. Gibson*, 169 N.C. 318, 320, 85 S.E. 7, 9 (1915) (defining “money” as “any lawful currency, whether coin or paper, issued by the Government as a medium of exchange”). However, this description – “UNITED STATES CURRENCY” – still falls short of the specificity which our Supreme Court has repeatedly indicated is *minimally required* in describing money in a false pretenses indictment, namely, that the description “*at least* [state] the amount” of “dollars and cents.” *Reese*, 83 N.C. at 639 (emphasis added).

And where the amount of money is *not* known to the pleader, our Supreme Court instructs that describing the money by the name of the victim from whom it was obtained, the date it was obtained, and the false pretense used to obtain the money is still not sufficiently specific. For instance, the indictment found to be fatal in the 1880 *Reese* case alleged that “on 1 January 1876,” the defendant defrauded “Henderson Pritchard and John A. Pritchard” out of “goods and money” by stating that he was the owner of “a large and valuable farm, with team and stock thereon, in the county of Northampton[.]” *Reese*, 83 N.C. at 638. The indictment found to be fatal in the 1941 *Smith* case alleged that the defendant defrauded “Freeman Grady” of “goods and things of value” by pretending that he owned “two certain mules . . . free and clear of

2. The indictment at issue in *Jones* alleged, in part, that “on or about the 19th day of May, 2010, in Mecklenburg County,” the defendant did “obtain services from Tire Kingdom, Inc.”

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all encumbrances[.]” *Smith*, 219 N.C. at 401, 14 S.E.2d at 36. And in the 2014 *Jones* case, the indictment found to be fatal alleged the name of the victim as a certain auto service business, the date of the offense, and that the item used by the defendant to obtain “services” was “the credit card number belonging to Mary Berry.” See Record on Appeal at 7, *State v. Jones*, No. COA12-282.

Our Court has on occasion sustained indictments which seemingly conflict with our Supreme Court’s decisions. See *State v. Ricks*, ___ N.C. App. ___, 781 S.E.2d 637 (2016); see also *State v. Ledwell*, 171 N.C. App. 314, 614 S.E.2d 562 (2005).³

In *Ricks* – the recent case from our Court relied upon by the dissenting judge in the present case – our Court decided not to follow the Supreme Court precedent cited above, reasoning that the Supreme Court’s analysis in those cases was “faulty” and “incorrect.” *Ricks*, ___ N.C. App. at ___, 781 S.E.2d at 644. In *Ricks*, our Court sustained an indictment which described the property as “a quantity of U.S. currency” relying on N.C. Gen. Stat. § 15-149, which was originally codified in 1877. *Id.* at ___, 781 S.E.2d at 642. The *Ricks* panel distinguished the 1880 *Reese* opinion, stating that *Reese* was based on the law prior to the enactment of N.C. Gen. Stat. § 15-149. However, we conclude *infra* that our Supreme Court in *Reese* did apply the language in N.C. Gen. Stat. § 15-149. *Id.* at ___, 781 S.E.2d at 648. Then, our *Ricks* panel chose not to apply our Supreme Court’s 1941 *Smith* and 2014 *Jones* decisions which reaffirmed *Reese*, stating as follows:

The [1941 Supreme] Court failed to look to the statute when deciding *Smith*. The Court quoted *Reese*, but failed to follow *Reese* as a whole by not considering the statute governing the description of money in indictments. This faulty citation to *Reese* . . . led our [Supreme] Court to the incorrect conclusion again in *Jones*.

Ricks, ___ N.C. App. at ___, 781 S.E.2d at 644. Therefore, rather than relying on Supreme Court precedent which had been reaffirmed as recently as 2014, our *Ricks* panel relied on a 2005 opinion from our Court which sustained an indictment describing the property merely as “a quantity of U.S. Currency.” See *State v. Ledwell*. 171 N.C. App. 314, 318, 614 S.E.2d

3. Other decisions from our Court are in accord with *Ricks* and *Ledwell*. For instance, in 1993, an indictment which identified the thing obtained as “United States money” was sustained. See *State v. Almond*, 112 N.C. App. 137, 148, 435 S.E.2d 91, 98 (1993). In an unpublished 2006 opinion, an indictment which identified the thing obtained as “money” was sustained. See *State v. Thompson*, 2006 N.C. App. LEXIS 1962, *7.

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562, 565 (2005). In *Ledwell*, our Court held that the case was distinguishable from *Reese* and *Smith* because “the [*Ledwell*] indictment mentions the specific item which defendant used to obtain the money,” and therefore provided the defendant with “notice of the crime of which he [was] accused.” *Id.* It could be argued that the additional facts gave the defendant notice; however, the indictments in *Reese*, *Smith*, and more recently *Jones* also described the items used by the defendants to obtain the property.

In general, and as noted by the dissent, where a panel of the Court of Appeals has decided an issue, “a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.” *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989). However, “where there is a conflict between an opinion from this Court and one from our Supreme Court, we are bound to follow the Supreme Court’s opinion” *Employment Staffing Grp., Inc. v. Little*, ___ N.C. App. ___, ___ n.3, 777 S.E.2d 309, 313 n.3 (2015); *see also Crawford v. Commercial Union Midwest Ins. Co.*, 147 N.C. App. 455, 459 n.5, 556 S.E.2d 30, 33 n.5 (2001) (“When there is a conflict in the opinions of this Court and opinions of our Supreme Court, we are bound by the Supreme Court opinion.” (citing *Mahoney v. Ronnie’s Rd. Serv.*, 122 N.C. App. 150, 153, 468 S.E.2d 279, 281 (1996), *aff’d per curiam*, 345 N.C. 631, 481 S.E.2d 85 (1997))). Because we determine here that *Ricks*, *Ledwell*, and their progeny are in conflict with *Jones*, *Smith*, and *Reese* – binding precedent from our Supreme Court – we are not bound by this Court’s prior opinions and must instead follow the guidance of our Supreme Court. *Employment Staffing*, ___ N.C. App. at ___ n.3, 777 S.E.2d at 313 n.3.

In sum, our Court “has no authority to overrule decisions of our Supreme Court and we have the responsibility to follow those decisions until otherwise ordered[.]” *Andrews v. Haygood*, 188 N.C. App. 244, 248, 655 S.E.2d 440, 443, *aff’d*, 362 N.C. 599, 669 S.E.2d 310 (2008) (internal quotation marks omitted). It is not for the Court of Appeals to say that the Supreme Court’s jurisprudence is “faulty” or “incorrect.” Therefore, following *Reese*, *Smith* and *Jones*, as we are bound to do, we must conclude that the indictments charging Defendant with obtaining “UNITED STATES CURRENCY” by false pretenses are fatally defective, and the judgments convicting him of those crimes are therefore vacated.

2. N.C. Gen. Stat. § 15-149 Does Not Overrule
Supreme Court Precedent

[4] Our Court in *Ricks* relied, in part, on language in N.C. Gen. Stat. § 15-149 to conclude that the language in the indictment in that case

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describing the thing obtained as “U.S. Currency” is sufficient. This statute provides in relevant part as follows:

In every indictment which it is necessary to make any averment as to the larceny of any money, or United States treasury note, or any note of any bank whatsoever, it is sufficient to describe such money, or treasury note, or bank note, simply as money, without specifying any particular coin, or treasury note, or bank note[.]

N.C. Gen. Stat. § 15-149 (2013).

The predecessor of N.C. Gen. Stat. § 15-149 was originally enacted by our General Assembly in 1877 (the “1877 Act”) and is referenced in the 1880 *Reese* decision. *See Reese*, 83 N.C. at 639. Our *Ricks* panel suggests that *Reese* stands for the proposition that N.C. Gen. Stat. § 15-149 was intended to *relieve* the drafter of an indictment from having to describe money obtained by false pretenses “at least” by its amount. However, we conclude that *Reese* stands for the proposition that N.C. Gen. Stat. § 15-149 merely relieved the drafter of the more stringent requirement of that day to *also* “[describe] and [identify] [the exact type of] bank bills, Treasury notes, [etc.]” that were obtained. *Id.* Unlike today, where our paper money consists solely of “federal reserve notes,” paper money in the 1800’s was issued in a variety of forms, including “bank notes” issued by state and federally-chartered banks and “treasury notes” issued by the federal government.⁴

Prior to the passage of the 1877 Act, drafters of indictments were generally required to describe not only the *amount* of money obtained, but also the *type* of money obtained, e.g. three \$10 bank notes or two \$5 dollar treasury notes, etc. *See State v. Fulford*, 61 N.C. 563, 563 (1868) (stating that “[i]t is sufficient to describe [the money] as a bank note for so many dollars on a certain bank, of the value of so many dollars”); *see also State v. Thomason*, 71 N.C. 146, 146-47 (1874) (holding that language indicating “two five dollar United States Treasury notes” to be sufficient); *State v. Rout*, 10 N.C. 618, 618 (1825) (holding that language indicating

4. The Citizens’ State Bank in New Orleans issued a \$10 bank note containing the word “DIX” (French for “ten”), which some historians believe is the genesis for the word “Dixie,” an historical nickname for the southern region of the United States. *See “Dixie” Originated From Name “Dix” An Old Currency*, *New Orleans American*, May 29, 1916, vol. 2, no. 150, at 3. The word “greenbacks” originally described certain treasury notes with green ink used on the reverse side issued by the United States to help fund the Civil War. *See Lackey v. Miller*, 61 N.C. 26 (1866).

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“one twenty dollar bank note on the State Bank of North Carolina” was sufficient). As stated by the Supreme Court in *Reese*, a pre-1877 indictment which merely described the thing obtained as “money” without any further description was fatally defective. *Reese*, 83 N.C. at 639.

The *Reese* Court noted that the General Assembly had passed the 1877 Act “to remedy the difficulty of *describing and identifying* bank bills, Treasury notes, etc.” *Id.* at 639 (emphasis added). However, the Court still held that even under the recently enacted statute, describing the thing obtained merely as “ ‘money’, without anything added to make it more definite, is too loose in indictments of this kind[.]” *id.* at 640, and that the money should be “described at least by the amount.” *Id.* at 639. Our Supreme Court reaffirmed this understanding of our law in the 1941 *Smith* decision and again more recently in its 2014 *Jones* decision.

N.C. Gen. Stat. § 15-149 does state that “it is sufficient to describe such money, or treasury note, or bank note, *simply as money*,” which could be construed to relieve an indictment drafter from any requirement to provide some further description of the money obtained, for instance, the *amount* of money. N.C. Gen. Stat. § 15-149 (emphasis added.) However, the phrase “simply as money” in the statute is followed by the qualifying language, “without specifying any particular coin, or treasury note, or bank note[.]” which clarifies that the statute is intended only to relieve a drafter of the requirement of describing the *type* of money obtained, e.g., type of bank note or treasury note or coins.

III. Conclusion

In conclusion, as our Supreme Court restated in its 2014 *Jones* decision, there remains a requirement to describe the thing obtained in an indictment for false pretenses with “reasonable certainty.” *Jones*, 367 N.C. at 307, 758 S.E.2d at 351. Where the thing obtained is money, N.C. Gen. Stat. § 15-149 does not require that the indictment provide a description of each piece of money in detail (e.g. “three \$10 federal reserve notes”). However, *some* further description of the money must be included in the indictment to be sufficient. Our Supreme Court has held that describing the victim, date, and manner by which the money was obtained is simply not enough. There must be some further description of the money itself, “at least” by its amount (e.g. “\$30 in U.S. Currency”). Accordingly, we vacate Defendant’s obtaining property by false pretenses convictions. Defendant’s felony larceny conviction is affirmed.

AFFIRMED IN PART; VACATED IN PART.

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Chief Judge McGEE concurs.

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

TYSON, Judge, concurring in part, dissenting in part.

I fully concur with those portions of the majority's opinion, which affirm Defendant's felony larceny conviction and holds Defendant's IAC claims are without merit. I respectfully dissent from the majority's notion that the description of the property obtained as "UNITED STATES CURRENCY" is insufficient to lawfully sustain the indictment for obtaining property by false pretenses. This Court is bound by its previous un-appealed and precedential decisions. *See State v. Ricks*, __ N.C. App. __, __, 781 S.E.2d 637, 645 (2016); *State v. Ledwell*, 171 N.C. App. 314, 317-18, 614 S.E.2d 562, 565 (2005); *State v. Almond*, 112 N.C. App. 137, 148, 435 S.E.2d 91, 98 (1993); *see also In Re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Defendant's convictions for obtaining property by false pretenses are properly affirmed.

I. Indictments for Obtaining Property by False Pretenses

"Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In Re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37.

A. State v. Ricks

Last year, this Court considered "the same issue" in *Ricks. Id.* In *Ricks*, this Court upheld a conviction for obtaining property by false pretenses where the indictment described the property obtained as "a quantity of U.S. Currency." *State v. Ricks*, __ N.C. App. at __, 781 S.E.2d at 645.

This Court held the indictment did not contain a fatal defect to deprive the trial court of jurisdiction. *Id.* This conclusion was based upon application of N.C. Gen. Stat. § 15-149 and a review of the prior Supreme Court decisions cited by Defendant and in the majority's opinion. *Id.*; *see State v. Jones*, 367 N.C. 299, 307-08, 758 S.E.2d 345, 351 (2014) (holding the indictment alleging defendant obtained "services" failed to describe with reasonable certainty the property obtained); *State v. Smith*, 219 N.C. 400, 401, 14 S.E.2d 36, 36 (1941) (holding the indictment alleging defendant obtained "goods and things of value" was insufficient); *State v. Reese*, 83 N.C. 637, 639 (1880) (holding the indictment alleging defendant obtained "goods and money" was too vague and uncertain).

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The majority opinion in *Ricks* explained:

[N.C. Gen. Stat. § 15-149] which says describing money simply as “money” is sufficient suggests that term is enough to put a defendant on notice of the property obtained in order to prepare for his or her trial. Here, we have an indictment describing the property as “U.S. Currency,” a term more specific than money.

Ricks, __ N.C. App. at __, 781 S.E.2d at 645.

This holding is wholly consistent with multiple binding precedents of this Court. See *Ledwell*, 171 N.C. App. at 317-18, 614 S.E.2d at 565 (holding the indictment was sufficient where it mentioned the specific item which defendant used to obtain the money); *Almond*, 112 N.C. App. at 148, 435 S.E.2d at 98 (holding there was nothing ambiguous about the indictment where it alleged defendant obtained “United States money”); see also *State v. Crowder*, __ N.C. App. __, 795 S.E.2d. 833 (2017) (unpublished) (holding this Court is bound by *Ricks* to hold the indictment was not fatally defective); *State v. Thompson*, 179 N.C. App. 652, 634 S.E.2d 641 (2006) (unpublished) (holding the indictment was sufficient where it alleged the defendant obtained “money” by accepting a wallet that did not belong to him).

Neither Defendant nor the majority’s opinion attempts to distinguish this case from *Ricks* or the other cases cited above. The majority’s opinion acknowledges U.S. Currency “is practically synonymous with ‘money,’ though admittedly, the former language does provide *some* further description of the money . . . issued by *our* federal government.” (emphasis original). Rather, Defendant and the majority’s opinion assert this Court in *Ricks* misconstrued N.C. Gen. Stat. § 15-149 and attempted to “overrule” the Supreme Court precedent in *Jones*, *Smith*, and *Reese*. This Court cannot so rule.

The majority’s opinion attempts to resurrect and re-assert the identical arguments stated in the dissenting opinion in *Ricks*, even though the Defendant in *Ricks* did not exercise his appeal as of right to our Supreme Court, nor his right to petition for discretionary review before the Supreme Court. See *Ricks*, __ N.C. App. at __, 781 S.E.2d at 645 (Dillon, J., concurring in part, dissenting in part). The defendant in *Ricks* also chose not to file a motion to withdraw the opinion or any motion for reconsideration before this Court. N.C. R. App. P. 37.

This Court has no power to overrule our Supreme Court, and “we are bound by the rulings of our Supreme Court.” *Mahoney v. Ronnie’s*

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Rd. Serv., 122 N.C. App. 150, 153, 468 S.E.2d 279, 281 (1996). However, contrary to the majority's re-assertion of the dissent in *Ricks*, the *Ricks* majority opinion in no way attempted to overrule Supreme Court precedent. *Ricks* expressly considered, applied, and *distinguished* the above-referenced Supreme Court decisions from the case presented in *Ricks*, which is within this Court's authority to do. *Ricks*, __ N.C. App. at __, 781 S.E.2d at 643-45.

Under binding Supreme Court precedents, we are bound by our prior decision and analysis in *Ricks*. See *In Re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37. *Ricks* clearly held an indictment, which alleges the defendant obtained "U.S. Currency," is legally sufficient to give the trial court jurisdiction. I am compelled to conclude the indictment in 15 CRS 57188 was not fatally defective. See *id.*; *Almond*, 112 N.C. App. at 148, 435 S.E.2d at 98.

B. State v. Ledwell

Presuming, *arguendo*, that the failure to allege the specific amount of United States Currency is error, such "error" in this case is not fatal. See *Ledwell*, 171 N.C. App. at 317-18, 614 S.E.2d at 565.

Chapter 15, Article 15 of the North Carolina General Statutes provides the indictment requirements for certain crimes, including N.C. Gen. Stat. § 15-149, at issue in this case. However, the General Assembly also clearly provided:

Every criminal proceeding by warrant, indictment, information, or impeachment is sufficient in form for all intents and purposes if it express [es] the charge against the defendant in a plain, intelligible, and explicit manner; and *the same shall not be quashed, nor the judgment thereon stayed, by reason of any informality or refinement, if in the bill or proceeding, sufficient matter appears to enable the court to proceed to judgment.*

N.C. Gen. Stat. § 15-153 (2015) (emphasis supplied); see also *State v. Greer*, 238 N.C. 325, 327, 77 S.E.2d 917, 919 (1953) (holding "[q]uashing indictments is not favored," N.C. Gen. Stat. § 15-153 was enacted to simplify forms of indictments, and this statute "has received a very liberal construction").

An indictment must contain, "[a] plain and concise factual statement in each count which . . . asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision

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clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation.” N.C. Gen. Stat. § 15A-924(a)(5) (2015).

As our Supreme Court has noted:

“it is not the function of an indictment to bind the hands of the State with technical rules of pleading; rather, its purposes are to identify clearly the crime being charged, thereby putting the accused on reasonable notice to defend against it and prepare for trial, and to protect the accused from being jeopardized by the State more than once for the same crime.”

State v. Spivey, 368 N.C. 739, 742, 782 S.E.2d 872, 874 (2016) (quoting *State v. Sturdivant*, 304 N.C. 293, 311, 283 S.E.2d 719, 731 (1981)).

“An indictment must allege all the essential elements of the offense endeavored to be charged[.]” *Id.* (citation and internal quotation marks omitted). The elements of obtaining property by false pretenses are “(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).

In *Ledwell*, the challenged indictments alleged the defendant attempted to obtain “United States currency” by false pretenses. *Ledwell*, 171 N.C. App. at 318, 614 S.E.2d at 565. This Court distinguished the indictment in *Ledwell* from those in *Smith* and *Reese*, “because the [*Ledwell*] indictment mention[ed] the specific item which defendant used to obtain the money.” *Id.* In concluding the indictment was sufficient, this Court noted:

The term “United States currency” is sufficient to describe the money and the inclusion of the watch band in the indictment provides defendant with notice of the crime of which he is accused. The indictment in question set forth the elements necessary to provide defendant with proper notice regarding the conduct of attempting to obtain property by false pretenses.

Id.

Here, the two counts of obtaining property by false pretenses alleged Defendant obtained “UNITED STATES CURRENCY from CASH NOW PAWN” and the false pretenses consisted of the following:

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BY PAWING AN ACER LAPTOP, A VIZIO TELEVISION AND A COMPUTER MONITOR AS HIS OWN PROPERTY TO SELL, when in fact the property had been stolen from GRAHAM HYDER and the defendant was not authorized to sell the property.

BY PAWING JEWELRLRY AS HIS OWN PROPERTY TO SELL, when in fact the property had been stolen from GRAHAM HYDER and the defendant was not authorized to sell the property.

The specificity of these indictments includes: (1) all the essential elements of the crime; (2) provides Defendant proper notice of the crimes with which he is accused; and, (3) protects him from being placed in jeopardy by the State more than once for the same crime.

Moreover, if Defendant wished for additional information in the nature of the specific acts with which he was charged, he could have moved for a bill of particulars from the State. *See* N.C. Gen. Stat. § 15A-925 (2015); *see State v. Wadford*, 194 N.C. 336, 338, 139 S.E.2d 608, 610 (1927) (holding while a bill of particulars cannot cure a defect in the indictment, it may cure uncertainty and add specificity).

The majority's opinion attempts to overrule *Ledwell* and *Almond*, just as it attempts to overrule *Ricks*, and argues *Ledwell* also misconstrued the Supreme Court decisions in *Reese* and *Smith*. However, as with the defendant in *Ricks*, the defendant in *Ledwell* never appealed to the Supreme Court and our Supreme Court in *Jones* did not overrule *Ledwell*. *See Jones*, 367 N.C. at 303, 758 S.E.2d at 348. *Ledwell* and *Almond* also stand as binding precedent this Court must follow. *See In Re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37.

It is for the Supreme Court to determine whether this Court erred in the analysis and conclusions as set forth in *Ricks* and *Ledwell*. *See id.* Based upon the reasoning in both *Ricks* and *Ledwell*, Defendant's argument is without merit and the indictment for obtaining property by false pretenses is legally sufficient. The trial court did not err by failing to dismiss these charges. There is no error in Defendant's jury convictions for both charges.

II. Insufficient Evidence

As I vote to uphold the indictment alleging Defendant obtained property by false pretenses, I briefly address Defendant's contention the trial court erred by failing to dismiss these charges due to

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insufficient evidence to show that Defendant made a false representation of ownership.

A. Standard of Review

The standard of review for a trial court's denial of a motion to dismiss for insufficient evidence is *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). This Court must determine whether the State has offered "substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Smith*, 186 N.C. App. at 62, 650 S.E.2d at 33 (citation and quotation marks omitted).

"In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993). Where "the evidence supports a reasonable inference of the defendant's guilt, a motion to dismiss is properly denied even though the evidence also permits a reasonable inference of the defendant's innocence." *State v. Miller*, 363 N.C. 96, 99, 678 S.E.2d 592, 594 (2009) (citation and quotation marks omitted).

B. Analysis

"The gist of obtaining property by false pretense is the false representation of a subsisting fact intended to and which does deceive one from whom property is obtained." *State v. Linker*, 309 N.C. 612, 614-15, 308 S.E.2d 309, 310-11 (1983). Thus, the State must prove the defendant made the representation as alleged. *Id.* at 615, 308 S.E.2d at 311. "If the state's evidence fails to establish that defendant made this misrepresentation but tends to show some other misrepresentation was made, then the state's proof varies fatally from the indictments." *Id.*

Our Supreme Court has clearly stated, "the false pretense need not come through spoken words, but instead may be by act or conduct." *State v. Parker*, 354 N.C. 268, 284, 553 S.E.2d 885, 897 (2001); *see State v. Perkins*, 181 N.C. App. 209, 216, 638 S.E.2d 591, 596 (2007) ("[A] false pretense may be established by conduct alone and does not necessarily depend upon the utterance of false or misleading words."); *State v. Bennett*, 84 N.C. App. 689, 691, 353 S.E.2d 690, 692 (1987) ("In determining the absence or presence of intent, the jury may consider 'the acts and conduct of the defendant and the general circumstances existing at

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the time of the alleged commission of the offense charged.’ ” (quoting *State v. Hines*, 54 N.C. App. 529, 533, 284 S.E.2d 164, 167 (1981)).

Defendant argues the State failed to present any evidence tending to show Defendant made a false representation to Cash Now Pawn. I disagree. The State called employee Austin Dotson to establish the events, which occurred at Cash Now Pawn. Dotson first testified regarding the general procedure for sale or loan transactions at the pawn shop. Dotson testified he requests the identification of the person presenting the property and “check[s] to make sure the person who handed [him] the identification is the same person as reflected in the identification.” After checking identification, he and the customer sign a ticket acknowledging the person is “giving a security interest in the below described goods.”

Dotson testified he followed this procedure on 10 July 2015 and 21 July 2015. Dotson testified he checked the identification presented by the individual who pawned the items on both dates, and the identification listed Defendant’s name. The State presented and entered into evidence the pawn tickets from both transactions, which listed the customer as Defendant but were not signed at the bottom. The tickets entered into evidence contained Defendant’s name, address, driver’s license number, and birthday. Dotson explained original signed receipts are kept by the owner pawning the property. Each ticket contained the following language, “[y]ou are giving a security interest in the below described goods” and “[b]y signing, I acknowledge . . . I agree to all terms and conditions on the front and back[.]”

Additional evidence shows Defendant had pawned items previously. Defendant further testified he had prepared a bill of sale in a personal property transaction. This bill of sale included language where the seller acknowledged the “property items were lawfully hers.”

Viewed in the light most favorable to the State and resolving all reasonable inferences in the State’s favor, the State presented sufficient evidence tending to show Defendant’s conduct constituted a false representation to submit the offense to the jury. *See Barnes*, 334 N.C. at 75, 430 S.E.2d at 918. Defendant was aware of the pawn shop’s policies and through his conduct indicated to Cash Now Pawn that he had a right to sell or use the property being pawned as collateral. The trial court correctly denied Defendant’s motion to dismiss the charges for insufficient evidence.

III. Conclusion

I fully concur with those portions of the majority’s opinion, which affirm Defendant’s felony larceny conviction and hold Defendant’s IAC

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claims are without merit. As this Court is bound by its previous decisions in *Ricks* and *Ledwell*, I respectfully dissent from that portion of the majority's opinion vacating Defendant's convictions for obtaining property by false pretenses. There is no error in Defendant's convictions for obtaining property by false pretenses or in the judgments entered thereon.

STATE OF NORTH CAROLINA

v.

CARLOS ANTONIO RILEY JR., DEFENDANT

No. COA16-700

Filed 6 June 2017

1. Sentencing—prior record level—possession of firearm by felon—prior federal offense—substantially similar to N.C. defense

The trial court's prior record determination for a conviction for possession of a firearm by a felon was correct where defendant had pleaded guilty in federal court to being a felon in possession of a firearm. The federal offense of being a felon in possession of a firearm was substantially similar to the North Carolina offense of possession of a firearm by a felon. Subtle distinctions between the two offenses did not override the conclusion that both criminalized essentially the same conduct.

2. Constitutional Law—exculpatory evidence—reviewed in camera

The Court of Appeals *in camera* review of sealed records, made at defendant's request, did not reveal any *Brady* evidence that the trial court did not produce for defendant after its *in camera* review.

Appeal by defendant from judgment entered 14 August 2015, as amended 11 September 2015, by Judge James K. Roberson in Durham County Superior Court. Heard in the Court of Appeals 22 February 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Kimberly N. Callahan, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Emily H. Davis, for defendant-appellant.

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ELMORE, Judge.

Carlos Antonio Riley Jr. (defendant) pleaded guilty to possession of a firearm by a felon and was convicted of common law robbery upon evidence that he fled a traffic stop with an officer's badge, handcuffs, cell phone, and service weapon following an altercation with the officer. At sentencing, the trial court assigned four points to defendant's prior federal conviction, felon in possession of a firearm, which was listed as a Class G felony on the worksheet. He was sentenced as a prior record level IV offender.

On appeal, defendant argues that he is entitled to a new sentencing hearing because the State failed to prove his federal conviction was "substantially similar" to a Class G felony in North Carolina. To the extent that the State failed to meet its burden of proof, any resulting error was harmless. The record contains sufficient information for this Court to determine that the federal offense of being a felon in possession of a firearm, 18 U.S.C. § 922(g)(1), is substantially similar to the North Carolina offense of possession of a firearm by a felon, N.C. Gen. Stat. § 14-415.1(a), a Class G felony.

At defendant's request, we have also reviewed the sealed records from Professional Standards Division of the Durham Police Department to determine if the trial court, after its *in camera* review, provided defendant with all exculpatory material in the records. Based upon our own review and our understanding of the evidence to which defendant had access, we have not discovered any Brady evidence in the sealed records which was not produced to defendant.

I. Background

The State's evidence tended to show the following: On 18 December 2012, Officer Kelly Stewart of the Durham Police Department was on patrol in a high drug crime area when he observed a vehicle parked alongside the curb near an intersection. A black male was standing outside the vehicle on the passenger's side. As the man walked away, the driver took off, burning rubber and fishtailing down the road. Officer Stewart activated his blue lights in his unmarked patrol car and pulled the vehicle over.

Officer Stewart exited his patrol car and approached the driver's side of the vehicle. Defendant, the sole occupant, was in the driver's seat. In the course of the traffic stop, Officer Stewart noticed that defendant appeared nervous and repeatedly reached down to the floorboard. He

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ordered defendant out of the vehicle, placed his license and registration on the roof, and frisked him for weapons to confirm that he was unarmed. After the frisk, defendant took his license and registration off the roof of the vehicle and put them in his pants pocket. When Officer Stewart told defendant that he was not yet free to leave, defendant jumped back into his vehicle and revved the engine. Officer Stewart followed defendant into the vehicle and pulled the emergency brake as defendant started driving away. The two began fighting inside the vehicle, “going blow for blow” as Officer Stewart told defendant to “stop resisting.”

During the fight, defendant ripped the officer’s badge off from his neck chain and knocked away his handcuffs. Positioned on his back with defendant on top of him, Officer Stewart drew his service weapon. Defendant grabbed the handgun and, as the two fought for control, Officer Stewart was shot in his right thigh. At that point, defendant took control of the handgun, pulled the officer out of the vehicle, and drove away. He was apprehended shortly thereafter. Officer Stewart’s badge, handcuffs, and personal cell phone were eventually recovered elsewhere in Durham but his service weapon was never found.

On 7 January 2013, a Durham County grand jury indicted defendant on charges of possession of a firearm by a felon, careless and reckless driving, assault on a law enforcement officer inflicting serious injury, assault on a law enforcement officer with a deadly weapon, robbery with a dangerous weapon, and two counts of assault with a firearm on a law enforcement officer. A superseding indictment was issued on 2 March 2015 for robbery with a dangerous weapon and assault on a law enforcement officer with a deadly weapon.

Meanwhile, the Professional Standards Division of the Durham Police Department conducted an internal investigation to determine if Officer Stewart violated the department’s professional standards during the traffic stop. Upon defendant’s motion for production of exculpatory evidence, the trial court reviewed the internal investigation records *in camera*. At the hearing on defendant’s motion, defense counsel indicated that he had been provided many, if not all, of the reports and statements in the sealed records. After its *in camera* review, the trial court ruled that there was no evidence in the sealed records “that constitutes exculpatory material under Brady versus Maryland, or any of its progeny.”

Before trial, defendant pleaded guilty to “possession of a firearm by a felon” in violation of N.C. Gen. Stat. § 14-415.1(a). He had also pleaded guilty in federal court on 5 August 2013 for being a “felon in possession of a firearm,” in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2), based

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on conduct arising from the same incident. Defense counsel explained to the trial court:

Mr. Riley intends to plead guilty to the possession of a firearm by a felon . . . Your Honor. You know the federal equivalent he's pled guilty to, he's serving a ten-year term, so it's the same admission that he possessed the firearm at some point after the incident in the car and that he's pleading guilty to that.

The jury ultimately acquitted defendant on all remaining charges except common law robbery, of which he was found guilty.

At sentencing, the trial court determined that it would treat defendant's federal conviction as a Class G felony in assigning prior record level points:

The Court finds . . . [t]hat in our April 2nd, 2015, motion/hearing that we had here, there was evidence presented of a plea agreement and a judgment in the Middle District of North Carolina in case 1:13 CR 122-1 in which Mr. Riley pled guilty and was sentenced in federal jurisdiction to, among other things, violation of Title 18 of the United States Code Section 922(g)(1), which essentially says it's unlawful for any person who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year "to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce," that that is a criminal offense that is substantially equivalent to a Class G felony of possession of a firearm by a felon in the State of North Carolina, which means that I am going to count the points related to that plea and conviction in federal court.

The court assessed a total of ten prior record level points against defendant, including four points for his prior federal conviction. At a prior record level IV, defendant was sentenced in the presumptive range to fifteen to twenty-seven months of imprisonment for possession of a firearm by a felon, and nineteen to thirty-two months of imprisonment for common law robbery, set to begin at the expiration of his first sentence. Defendant gave notice of appeal in open court.

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II. Discussion

[1] Defendant argues that he is entitled to a new sentencing hearing because the trial court's prior record level determination was not supported by the record. Specifically, defendant contends that the State failed to prove, and no stipulation established, that defendant's prior federal conviction was substantially similar to a Class G felony in North Carolina.

N.C. Gen. Stat. § 15A-1340.14 (2015) provides direction in calculating a criminal defendant's prior record level for felony sentencing. Points are assigned to each prior felony conviction, depending on its classification. N.C. Gen. Stat. § 15A-1340.14(b). The total number of points is then used to determine the prior record level. N.C. Gen. Stat. § 15A-1340.14(a), (c).

A prior felony conviction in a different jurisdiction is classified according to subsection (e), which provides in pertinent part:

Except as otherwise provided in this subsection, a conviction occurring in a jurisdiction other than North Carolina is classified as a Class I felony if the jurisdiction in which the offense occurred classifies the offense as a felony If the State proves by the preponderance of the evidence that an offense classified as either a misdemeanor or a felony in the other jurisdiction is substantially similar to an offense in North Carolina that is classified as a Class I felony or higher, the conviction is treated as that class of felony for assigning prior record level points.

N.C. Gen. Stat. § 15A-1340.14(e).

The State may prove a defendant's prior conviction by any of the following methods:

- (1) Stipulation of the parties.
- (2) An original or copy of the court record of the prior conviction.
- (3) A copy of records maintained by the Department of Public Safety, the Division of Motor Vehicles, or of the Administrative Office of the Courts.
- (4) Any other method found by the court to be reliable.

N.C. Gen. Stat. § 15A-1340.14(f).

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“Whether an out-of-state offense is substantially similar to a North Carolina offense is a question of law” which requires a comparison of their respective elements. *State v. Burgess*, 216 N.C. App. 54, 57, 715 S.E.2d 867, 870 (2011) (citing *State v. Hanton*, 175 N.C. App. 250, 254, 623 S.E.2d 600, 604 (2006)); see also *State v. Sanders*, 367 N.C. 716, 720–21, 766 S.E.2d 331, 333–34 (2014) (holding that Tennessee offense of “domestic assault” was not substantially similar to North Carolina offense of “assault on a female,” as the Tennessee offense did “not require the victim to be a female or the assailant to be male and of a certain age”); *State v. Hogan*, 234 N.C. App. 218, 229–31, 758 S.E.2d 465, 473–74 (holding that, based on “the disparity in [their] elements,” the New Jersey offense of “third degree theft” was not substantially similar to North Carolina offense of “misdemeanor larceny”), *writ denied, disc. review denied, appeal dismissed*, 367 N.C. 525, 762 S.E.2d 199 (2014).

A party may establish the elements of the out-of-state offense by producing evidence of the applicable statute, including printed copies thereof. *State v. Rich*, 130 N.C. App. 113, 117, 502 S.E.2d 49, 52 (1998) (citing N.C. Gen. Stat. § 8-3). In *Burgess*, we held that the State failed to establish sufficient evidence of the out-of-state offenses because it was unclear whether the printed copies of the statutes offered by the State reflected the basis for the defendant’s prior out-of-state convictions. 216 N.C. App. at 57–58, 715 S.E.2d at 870. The out-of-state convictions listed “on the State’s worksheet were not identified by statutes, but only by brief and non-specific descriptions” which could have described more than one offense in the other jurisdictions. *Id.* at 57, 715 S.E.2d at 870 (alterations, citations, and internal quotation marks omitted). In addition, the copies reflected the 2008 version of the statutes, and the State “presented no evidence that the statutes were unchanged from the 1993 and 1994 versions under which defendant had been convicted.” *Id.* at 58, 715 S.E.2d at 870; see also *State v. Morgan*, 164 N.C. App. 298, 309, 595 S.E.2d 804, 812 (2004) (holding that the State failed to prove the defendant’s prior conviction in New Jersey was substantially similar to the North Carolina offense where the State produced a copy of the 2002 New Jersey statute but no evidence that the “statute was unchanged from the 1987 version under which Defendant was convicted”).

In this case, the State produced evidence of defendant’s prior federal conviction through a copy of the federal district court record, which included the plea agreement and judgment. The judgment reveals that defendant pleaded guilty to one count of “felon in possession of a firearm” in violation of 18 U.S.C. § 922(g)(1). As the State concedes, it is not clear from the transcript whether the prosecutor offered a copy of

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the federal statute, 18 U.S.C. § 922(g)(1), to the trial court at sentencing. Although the court appears to have read a portion of the statute into the record, there is no evidence that the version of § 922(g)(1) relied upon by the trial court was the same version under which defendant was convicted, or if it was the most recent version, that the statute remained unchanged since defendant's conviction.

To the extent that the State failed to meet its burden of proof at sentencing, however, the resulting error was harmless. The record contains sufficient information for this Court to determine that defendant's prior conviction in federal court was substantially similar to a Class G felony in North Carolina. *Cf. State v. Henderson*, 201 N.C. App. 381, 388, 689 S.E.2d 462, 467 (2009) (remanding for resentencing where this Court "lack[ed] the information necessary to conduct our own substantial similarity analysis for harmless error purposes").

Pursuant to 18 U.S.C. § 922(g)(1), it is unlawful "for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to . . . possess in or affecting commerce, any firearm." 18 U.S.C.A. § 922(g)(1) (2015).¹ The federal offense of being a felon in possession of a firearm requires proof that (1) the defendant had been convicted of a crime punishable by more than one year in prison, (2) the defendant possessed (3) a firearm, and (4) the possession was in or affecting commerce.

Pursuant to N.C. Gen. Stat. § 14-415.1(a), it is unlawful in North Carolina "for any person who has been convicted of a felony to . . . possess . . . any firearm." N.C. Gen. Stat. § 14-415.1(a) (2015).² The state offense of possession of a firearm by a felon requires proof that (1) the defendant had been convicted of a felony and (2) thereafter possessed (3) a firearm. Any person who violates N.C. Gen. Stat. § 14-415.1(a) is guilty of a Class G felony. *Id.*

There are two notable differences between the offenses, the first being the "interstate commerce" element. This "jurisdictional element" requires "the government to show that a nexus exists between the firearm and interstate commerce to obtain a conviction under § 922(g)." *United States v. Wells*, 98 F.3d 808, 811 (4th Cir. 1996). It "is typically satisfied by proof that the firearm . . . , or parts of the firearm, were

1. 18 U.S.C. § 922(g)(1) remained unchanged from 2012, when defendant was charged, to 2015, when defendant was tried.

2. N.C. Gen. Stat. § 14-415.1(a) also remained unchanged from 2012 to 2015.

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manufactured in another state or country.” Carl Horn, III, *Fourth Circuit Criminal Handbook* § 137, at 280 (2013 ed.); see, e.g., *United States v. Gallimore*, 247 F.3d 134, 138 (4th Cir. 2001) (“[T]he Government may establish the requisite interstate commerce nexus by showing that a firearm was manufactured outside the state where the defendant possessed it.” (citations omitted)). A conviction under 18 U.S.C. § 922(g)(1) necessarily includes conduct which would violate N.C. Gen. Stat. § 14-415.1(a), but not vice versa. If, for example, the firearm was manufactured within the state, possessed by a felon within the same, and was not transported by any vehicle of interstate commerce, then possession would presumably fall short of conduct prohibited by § 922(g)(1). Such a situation seems unlikely, however, based upon the federal courts’ broad interpretation of “in or affecting commerce.” See, e.g., *United States v. Verna*, 113 F.3d 499, 502 (4th Cir. 1997) (“[E]vidence [the defendant] possessed and placed the bomb in an automobile, which travels the highways of North Carolina if not the federal highway system itself, is sufficient to fulfill section 922(g)’s requirement that [the defendant] have possessed the bomb ‘affecting’ interstate commerce.”).

The second difference concerns the persons subject to punishment. The federal offense requires that the person have been previously convicted of a crime “punishable by imprisonment for a term exceeding one year,” while the North Carolina offense requires that the person have been previously “convicted of a felony.” A felony conviction in North Carolina is not necessarily punishable by more than one year in prison.³ See N.C. Gen. Stat. § 14-1 (2015) (defining “felony” as “a crime which: [w]as a felony at common law; [i]s or may be punishable by death; [i]s or may be punishable by imprisonment in the State’s prison; or [i]s denominated as a felony by statute”); see also N.C. Gen. Stat. § 14-415.1(b) (2015) (defining “conviction,” which would cause disenfranchisement under section 14-415.1, “as a final judgment in any case in which felony punishment, or imprisonment for a term exceeding one year, as the case may be, is authorized, without regard to the plea entered or to the sentence imposed” (emphasis added)). If convicted of a Class I felony, a defendant with a prior record level IV or higher may be imprisoned for a term exceeding one year, but a defendant with a prior record level III

3. The U.S. Court of Appeals for the Fourth Circuit has held that whether a predicate offense is “punishable by imprisonment for more than one year” depends on the maximum sentence the defendant could have actually received given his prior record level and the court’s finding of aggravating factors, rather than the maximum aggravated sentence that could have hypothetically been imposed upon a defendant with the highest possible record level. *United States v. Simmons*, 649 F.3d 237 (4th Cir. 2011).

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or lower faces only community or intermediate punishment. N.C. Gen. Stat. § 15A-1340.17 (2015); *see also* James M. Markham & Shea Riggsbee Denning, *North Carolina Sentencing Handbook*, at 22–23 (2014). Apart from this limited example, however, every other class of felony in North Carolina is punishable by imprisonment for a term exceeding one year and thus comports with the element of the federal offense.

There may be other hypothetical scenarios which highlight the more nuanced differences between the two offenses. But the subtle distinctions do not override the almost inescapable conclusion that both offenses criminalize essentially the same conduct—the possession of firearms by disqualified felons. Both statutes remained unchanged in the 2012 to 2015 time period, and despite the differences we have discussed, the federal offense of being a felon in possession of a firearm is substantially similar to the North Carolina offense of possession of a firearm by a felon, a Class G felony. The trial court’s prior record level determination was correct.

A. *Brady* Evidence

[2] Defendant also requests this Court to review the sealed records to determine if the trial court, after its *in camera* review, provided defendant with all exculpatory material in the records.

The Supreme Court of the United States held in *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Id.* at 87, 83 S. Ct. at 1196–97, 10 L. Ed. 2d at 218. “Evidence favorable to an accused can be either impeachment evidence or exculpatory evidence.” *State v. Williams*, 362 N.C. 628, 636, 669 S.E.2d 290, 296 (2008) (citing *United States v. Bagley*, 473 U.S. 667, 676, 105 S. Ct. 3375, 3380, 87 L. Ed. 2d 481, 490 (1985)). Evidence is “material” if “there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.” *Bagley*, 473 U.S. at 682, 105 S. Ct. at 3383, 87 L. Ed. 2d at 494; *see also State v. Alston*, 307 N.C. 321, 337, 298 S.E.2d 631, 642 (1983) (“In determining whether the suppression of certain information was violative of the defendant’s right to due process, the focus should not be on the impact of the undisclosed evidence on the defendant’s ability to prepare for trial, but rather should be on the effect of the nondisclosure on the outcome of the trial.” (citations omitted)).

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Defendant included in the record on appeal the transcript from the hearing on his *Brady* motion. At the hearing, the trial court identified several pieces of evidence in the sealed records which may have been helpful to defendant for purposes of cross-examination. Defense counsel confirmed his own possession of the evidence identified by the trial court. Based upon our own review and our understanding of the evidence to which defendant had access, we have not discovered any *Brady* evidence in the sealed records which was not produced to defendant.

III. Conclusion

To the extent that the State failed to produce evidence of the prior offense under which defendant was convicted, the error was harmless. There is sufficient information in the record to conclude that the federal offense of being a felon in possession of a firearm is substantially similar to the North Carolina offense of possession of a firearm by a felon, a Class G felony. We have also reviewed the sealed records and found no additional evidence therein to which defendant was constitutionally entitled.

NO PREJUDICIAL ERROR.

Judges DIETZ and TYSON concur.

STATE OF NORTH CAROLINA,
v.
MICHAEL ANTHONY SCATURRO, JR., DEFENDANT

No. COA16-1026

Filed 6 June 2017

1. Appeal and Error—preservation of issues—fatal variance

The question of whether there was a fatal variance between the indictment and the proof in a hit and run prosecution was not addressed on appeal where it was argued for the first time on appeal. Moreover, the Court of Appeals declined to review the issue under Rule 2 of the Rules of Appellate procedure.

2. Motor Vehicles—hit and run—willfulness—instructions—taking victim to hospital

There was plain error and defendant's hit and run conviction was reversed where defendant left the scene to take the victim to the hospital and the trial court did not instruct the jury on willfulness.

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The only controverted issue was whether defendant willfully violated N.C.G.S. § 20-166(a) by not remaining at the scene or returning to it. To prevent future confusion, it was noted that while N.C.G.S. § 20-166(a) prohibits a driver from leaving the scene except to call for help, that authorization is expanded by the requirement in subsection (b) that drivers shall render reasonable assistance. Taking a seriously injured person to the hospital is not prohibited if reasonable under the circumstances.

Judge DIETZ concurring in the result only.

Appeal by defendant from judgment entered 29 January 2015 by Judge Phyllis M. Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 5 April 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Anne Goco Kirby, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Michele A. Goldman, for defendant-appellant.

MURPHY, Judge.

Michael Scaturro, Jr. (“Defendant”) appeals from his convictions for felony hit and run and attaining habitual felon status. He was indicted for failing to remain at the scene of the crash in which he was involved. On appeal, he contends that the trial court erred by denying his motion to dismiss the felony hit and run charge on the grounds that the record did not contain sufficient evidence to show that he willfully and unlawfully failed to remain at the scene and, in the alternative, that his trial counsel provided him with constitutionally deficient representation by failing to preserve that error for appellate review. If the Court finds no error on that basis, Defendant instead argues he was denied his right to a unanimous jury verdict because the trial court’s instructions permitted the jury to convict Defendant on the basis of either failure to remain or failure to return. Finally, in the alternative to his first two assignments of error, Defendant maintains that the trial court committed plain error by failing to instruct on an essential element of the offense – that a “willful” failure to remain or return is one “without justification or excuse.” After careful consideration of Defendant’s challenges to the trial court’s judgments in light of the record and applicable law, we conclude that the trial court’s judgments should be overturned.

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Background

On 6 July 2013, Christopher Jamie Eric Fisher (“Fisher”) left home on his bicycle to go to his friend’s house. As he rode up Gordon Road and approached the Farrington Farms Road intersection, he noticed a truck waiting to turn onto Gordon Road from Farrington Farm Road. Rather than continuing straight on his route up Gordon Road and thereby crossing in front of the truck, Jamie turned right onto Farrington Farm Road, planning to make a U-turn around a median to get back onto Gordon Road, so as to allow the truck a clear path. As he made the U-turn, Defendant struck Fisher with his car. As a result, Fisher was thrown from his bicycle and the left side of his head, shoulder, and elbow hit the pavement as he skidded across the road. The fall nearly severed Fisher’s left ear from his head, and he was left profusely bleeding. Defendant got out of his car and told Fisher, “You pulled out in front of me.” Then, Defendant retrieved a rag from his car and gave it to Fisher to hold against his head.

Fisher called 911, but as the emergency operator began speaking to him, Defendant told Fisher that he would take him to the hospital. Fisher decided to go with Defendant, and he reported that Defendant drove “like a maniac to get [him] to the hospital.” Although at trial Fisher testified that Defendant refused to provide his name during the drive to the hospital, Fisher, in an earlier, statement said that Defendant did provide his name. Upon exiting his vehicle at Cape Fear Hospital, Fisher made note of Defendant’s license plate number before Defendant drove away.

After checking into the emergency room, Fisher was transferred to New Hanover Hospital where he underwent surgery to remove his torn ear. He has had to return to the hospital several times for additional surgeries as well.

Around 4:45 p.m., Trooper Michael A. Kirk (“Trooper Kirk”) of the North Carolina Highway Patrol was dispatched to the accident scene and arrived just as the fire department was clearing it. At the time, Fisher’s bicycle was still lying in the yard just off the roadway. Defendant did not return to the accident scene during the 30 to 45 minutes Trooper Kirk remained to wait for a wrecker and mark pertinent evidence. Moreover, Trooper Kirk did not receive any calls informing him that Defendant attempted to contact him, the highway patrol, or any other police agency during his investigation of the scene.

After completing his initial on-scene investigation, Trooper Kirk went to the Cape Fear Hospital upon receiving information from the New

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Hanover County Sheriff's Department that a possible collision victim was being treated there. While at the hospital, Trooper Kirk spoke with Fisher and his mother. Fisher reported being hit by a car with Defendant's license plate number. Trooper Kirk contacted another trooper and asked him to respond to the address to which the vehicle bearing that license plate number was registered. After spending approximately 10 minutes at the hospital, Trooper Kirk returned to the accident scene for another 30 to 45 minutes in order to complete his investigation. Once again, Defendant did not return to the scene during that period, and the trooper sent to his address was unable to locate him there.

On 8 July 2013 Trooper Kirk located Defendant and confronted him about the accident. Defendant readily admitted to being involved, and Trooper Kirk arrested him. After being read his *Miranda* rights, Defendant initially stated he was willing to speak with law enforcement; however, upon placing two phone calls, he refused to discuss the accident further.

On 23 September 2013, Defendant was indicted for one count of felony hit and run resulting in serious bodily injury in violation of N.C.G.S. § 20-166(a). Specifically, the indictment charged that Defendant "unlawfully, willfully, and feloniously did fail to remain at the scene" in which he was involved until law enforcement completed its investigation and authorized him to leave. He was also indicted for having attained habitual felon status. Beginning on 28 January 2015, a jury trial was held in New Hanover County Superior Court before the Honorable Phyllis Gorham. Defendant moved to dismiss the charge of felony failure hit and run at the close of the State's evidence and at the close of all of the evidence, arguing that the State had not met its burden beyond a reasonable doubt and that "there is no jury question as a matter of law." The trial court denied Defendant's motions.

The trial court instructed the jury that in order to find Defendant guilty of the offense, the State must prove six things beyond a reasonable doubt:

First, that the defendant was driving a vehicle.

Second, that the vehicle was involved in a crash.

Third, that a person suffered serious bodily injury in this crash. Serious bodily injury is bodily injury that creates or causes serious permanent disfigurement or permanent or protracted loss or impairment of the functions of any bodily member or organ.

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Fourth, that the defendant knew or reasonably should have known that the defendant was involved in a crash and that a person suffered serious bodily injury in this crash. A defendant's knowledge can be actual or implied. It may be inferred where the circumstances proven such as would lead the defendant to believe that the defendant has been in a crash which resulted in serious bodily injury to a person.

Fifth, that the defendant, after stopping, did not remain at the scene of the crash until a law enforcement officer completed the investigation or authorized the defendant to leave. If a driver leaves the scene of a crash for the purpose of rendering the person injured in the crash reasonable assistance, including reasonable medical assistance, the driver must return to the scene of the crash within a reasonable period of time unless otherwise instructed by a law enforcement officer.

Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be inferred by circumstances from which it may be -- it must ordinarily be proved by circumstances from which it may be inferred. You arrive at the intent of a person by such just and reasonable deductions from the circumstances proven as such a reasonably prudent person would ordinarily draw therefrom.

And, sixth, that the defendant's failure to remain at the scene of the crash was willful, that is intentional. I instruct you to apply the definition of intent given in element number five above.

If you find from the evidence beyond a reasonable doubt that on about the alleged date the defendant was driving a vehicle which was involved in a crash, that a person suffered serious bodily injury in this crash, and that the defendant knew or reasonably should have known that the defendant was involved in a crash which resulted in serious bodily injury to a person and that the defendant intentionally failed to remain at the scene of the crash until a law enforcement officer completed the investigation and authorized the defendant to leave, it would be your duty to return a verdict of guilty of felonious hit and run with serious bodily injury. If you do not so find or have a reasonable

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doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

Defense counsel did not object to the instruction.

On 29 January 2015, the jury found Defendant guilty of felony hit and run resulting in serious bodily injury. Defendant then stipulated to attaining habitual felon status and pleaded guilty pursuant to an information charging him with possession of heroin in case number 14 CRS 59132. The trial court sentenced Defendant on the hit and run charge as a habitual felon with a prior record level of II, imposing a presumptive range sentence of 67 to 93 months confinement. As to the possession charge, the trial court found that Defendant had a prior record level of III, but imposed an intermediate sentence in the mitigated range of 4 to 14 months confinement, which was suspended for 12 months, with a split sentence of 3 months confinement. The trial court terminated Defendant's probation upon completion of the split sentence.

On 11 January 2016, Defendant petitioned this Court to issue a writ of certiorari to review the trial court's decision. On 26 January 2016, we allowed that petition.

Analysis**I. Alleged Fatal Variance in Hit and Run Indictment**

[1] In his first assignment of error, Defendant argues that his motion to dismiss should have been granted because there was insufficient evidence to support the charge of hit and run based upon failure to remain. Specifically, he submits that his failure to remain at the scene was not willful or felonious because he was expressly permitted and excused pursuant to N.C.G.S. § 20-166(a) to leave the scene of the accident for the purpose of seeking medical treatment for Fisher. Instead, Defendant maintains that the State presented evidence of the charge of hit and run based upon his failure to return to the scene of the accident, an entirely separate crime, and thus there was a fatal variance between the indictment and the evidence submitted at trial. We do not reach Defendant's alleged fatal variance.

“In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.” N.C. R. App. P. 10(a)(1); *see also State v. Maness*, 363 N.C. 261, 273, 677 S.E.2d 796, 804 (2009), *cert. denied*, 559 U.S. 1052, 176 L. Ed. 2d 568 (2010). In order to preserve a fatal variance argument for appellate review, a defendant

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must specifically state at trial that a fatal variance is the basis for his motion to dismiss. *State v. Hooks*, ___ N.C. App. ___, ___, 777 S.E.2d 133, 139 (2015); *State v. Curry*, 203 N.C. App. 375, 384, 692 S.E.2d 129, 137, *disc. review denied*, 364 N.C. 437, 702 S.E.2d 496 (2010).

In the instant case, at trial Defendant based his motion to dismiss solely on insufficiency of the evidence, and a review of the trial transcript reveals that Defendant never alleged the existence of a fatal variance between the indictment and the jury instructions. In fact, when the trial court asked the parties if they had any additions, corrections, or comments as to the proposed jury instruction regarding Defendant's failure to return to the scene of the accident, which Defendant now alleges is a separate offense than that which was charged in the indictment, Defendant only argued that the jury should be instructed as to willfulness and never asserted fatal variance.

Defendant argues for the first time on appeal that the trial court erred by denying his motion to dismiss due to a fatal variance between the indictment, charging failure to remain, and the State's proof at trial, demonstrating failure to return. However, Defendant has waived his right to appellate review of this issue because he failed to properly preserve it at trial. *See Hooks*, ___ N.C. App. at ___, 777 S.E.2d at 139; *see also Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934) ("[T]he law does not permit parties to swap horses between courts in order to get a better mount" on appeal). Accordingly, we decline to address this issue. Moreover, although Defendant requests in the alternative that we review this issue pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure, we decline to suspend our rules in this case.

II. Plain Error in Failing to Instruct as to Willfulness

[2] We next consider Defendant's argument that the trial court erred in failing to provide an instruction as to willfulness. According to Defendant, the evidence demonstrates that he only left the scene of the accident to take Fisher to the nearest hospital, as is permitted by the language of N.C.G.S. § 20-166(a) and (b), and therefore he did not willfully violate the statute. In response, the State's sole argument is that Defendant was not entitled to an instruction on willfulness because the statute does not permit a driver to leave the scene of an accident at all, even to obtain medical assistance. Defendant did not object to the instruction as given at trial, so we consider whether this instruction constitutes plain error. *See N.C. R. App. P. 10(a)(4)*; *see also State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012).

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The plain error standard requires a defendant to “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.’” *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (internal citation omitted) (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). “[P]lain error is to be applied cautiously and only in the exceptional case” in which the defendant is able to show that the error at issue is “one that seriously affects the fairness, integrity or public reputation of judicial proceedings.” *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (alteration, citation, and quotations omitted). “For plain error to be found, it must be probable, not just possible, that absent the instructional error the jury would have returned a different verdict.” *State v. Juarez*, ___ N.C. ___, ___, 794 S.E.2d 293, 300 (2016).

In instructing the jury, it is well settled that “[t]he trial court has the duty to ‘declare and explain the law arising on the evidence relating to each substantial feature of the case.’” *State v. Snelling*, 231 N.C. App. 676, 679, 752 S.E.2d 739, 742 (2014) (quoting *State v. Hockett*, 309 N.C. 794, 800, 309 S.E.2d 249, 252 (1983)); *see also State v. Ramos*, 363 N.C. 352, 355, 678 S.E.2d 224, 226 (2009) (“A trial court must instruct the jury on every essential element of an offense” (brackets, citation, and quotations omitted)); *State v. Harris*, 306 N.C. 724, 727, 295 S.E.2d 391, 393 (1982) (“[A] judge has an obligation to fully instruct the jury on all substantial and essential features of the case embraced within the issue and arising on the evidence”); *State v. Floyd*, 241 N.C. 298, 300, 84 S.E.2d 915, 917 (1954) (“The defendant had a substantial legal right to have the judge to declare and explain the law arising on this evidence of his presented to the jury.”). A defendant’s failure to request an instruction as to a substantial and essential feature of the case does not vitiate the trial court’s affirmative duty. *See State v. Morgan*, 315 N.C. 626, 643, 340 S.E.2d 84, 95 (1986).

Section 20-166 of the North Carolina General Statutes under which Defendant was charged provides in pertinent part:

(a) The driver of any vehicle who knows or reasonably should know:

- (1) That the vehicle which he or she is operating is involved in a crash; and
- (2) That the crash has resulted in serious bodily injury, as defined in G.S. 14-32.4, or death to any person;

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shall immediately stop his or her vehicle at the scene of the crash. The driver shall remain with the vehicle at the scene of the crash until a law-enforcement officer completes the investigation of the crash or authorizes the driver to leave and the vehicle to be removed, unless remaining at the scene places the driver or others at significant risk of injury.

Prior to the completion of the investigation of the crash by a law enforcement officer, or the consent of the officer to leave, the driver may not facilitate, allow, or agree to the removal of the vehicle from the scene for any purpose other than to call for a law enforcement officer, to call for medical assistance or medical treatment as set forth in subsection (b) of this section, or to remove oneself or others from significant risk of injury. If the driver does leave for a reason permitted by this subsection, then the driver must return with the vehicle to the accident scene within a reasonable period of time, unless otherwise instructed by a law enforcement officer. *A willful violation of this subsection shall be punished as a Class F felony.*

. . . .

(b) In addition to complying with the requirements of subsection[] (a) . . . the driver . . . shall render to any person injured in such crash reasonable assistance, including the calling for medical assistance if it is apparent that such assistance is necessary or is requested by the injured person. A violation of this subsection is a Class 1 misdemeanor.

(Emphasis added).

The principles of statutory construction by which we are guided instruct that we are to interpret statutes in a manner which does not render any of its words superfluous and gives each word meaning. *State v. Coffey*, 336 N.C. 412, 417-18, 444 S.E.2d 431, 434 (1994). It is significant, then, that N.C.G.S. § 20-166(a) penalizes only *willful* violations of the statute. As confirmation of this fact, this Court has confirmed that willfulness is an essential element of the offense of hit and run as provided by the statute. *State v. Acklin*, 71 N.C. App. 261, 264, 321 S.E.2d 532, 534 (1984) (noting that one of “[t]he essential elements [is] . . . that

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the defendant's failure to stop was wil[l]ful, that is, intentional and without justification or excuse" (citing N.C.G.S. § 20-166)).

Although the General Assembly did not define "willful" for purposes of hit and run, this Court has long recognized that "[w]illful" is defined as "the wrongful doing of an act without justification or excuse, or the commission of an act purposely and deliberately in violation of law." *Ramos*, 363 N.C. at 355, 678 S.E.2d at 226 (quoting *State v. Arnold*, 264 N.C. 348, 349, 141 S.E.2d 473, 474 (1965) (per curiam) (citations omitted)). It "means something more than an intention to commit the offense." *Ramos*, 363 N.C. at 355, 678 S.E.2d at 226.

We find persuasive support for this definition in the state's pattern jury instructions. N.C.P.I.—Crim. 271.50 provides specific instructions regarding the element of willfulness in regard to hit and run on the bases of both failure to stop and failure to remain. It states that the State must prove "that the defendant's failure to [stop the defendant's vehicle] [remain at the scene of the crash] was willful, that is intentional (and without justification or excuse.)" A footnote to that paragraph states, "7. If there is evidence of justification or excuse, the jury should be instructed accordingly."

In the instant case, the trial court never instructed the jury that an act is willful if it is without justification or excuse, as set out in the pattern jury instructions. Instead, the trial court conflated willful acts with intentional ones. However, as was the case here, a defendant might leave the scene of an accident intentionally and still not "willfully" violate N.C.G.S. § 20-166(a) if his intentional departure was justified or with excuse. Therefore, the trial court's instruction was erroneous as it did not satisfy the requirement that the jury be instructed as to willfulness where, as here, that issue is an essential element of the offense and a "substantial feature" of the case.

In turning to whether that error constitutes plain error, a close inspection of the record and trial transcript reflects that Defendant's sole defense to the charge of hit and run by failure to remain was that his departure from the accident site was authorized, and actually required, by statute as he left in an effort to get Fisher medical assistance. Further, to the extent Defendant failed to return to the scene, again Defendant's sole defense was willfulness – he was in an extremely emotional state, traumatized by having just been involved in an accident with someone who subsequently lost their ear, and did everything he could to aid Fisher before returning to his home. In this way, Defendant's entire defense was predicated on the argument that he neither willfully left the scene of the accident nor willfully failed to return to it.

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Furthermore, there is evidence in the record to support a conclusion that Defendant did not willfully violate the statute. Specifically, both Defendant and Fisher testified at length as to Defendant's decision to leave the scene to take Fisher to the nearest hospital instead of waiting for emergency responders upon witnessing Fisher covered in blood with "his ear . . . com[ing] off in his hand" and believing "he was about to bleed to death." Additionally, Defendant explained that after dropping Fisher off at the hospital he remained shaking and in shock from the experience, but also believed he had done all that he could to help him, and therefore returned home. The trial court's failure to provide an instruction on willfulness, then, deprived Defendant of the gravamen of his basis for acquittal. Had he received the instruction, it is at least probable that a jury would have concluded that Defendant had a justification or excuse for leaving the scene and failing to return.

We are mindful that it is the rare case in which a defendant on plain error review is able to demonstrate that an unpreserved instructional error warrants reversal. However, in conducting plain error review, we are required to examine the entire record to determine whether the error "had a probable impact on the jury's finding that the defendant was guilty." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. "In many cases, . . . an examination of the entire record reveals overwhelming and uncontroverted evidence of guilt such that a defendant is unable to show the probability of a different outcome." *State v. Coleman*, 227 N.C. App. 354, 363, 742 S.E.2d 346, 352, *writ denied, review denied*, 367 N.C. 271, 752 S.E.2d 466 (2013). In the case before us, the only controverted issue was whether Defendant willfully violated the statute by failing to remain at the scene or to return to it. Therefore, this is one of the rare cases in which the trial court's failure to give an additional instruction regarding the only controverted issue at trial – willfulness – had a probable impact on the jury verdict. Accordingly, we reverse Defendant's convictions and remand this matter for a new trial.¹

To prevent future confusion and danger, we also take this opportunity to address the State's argument that N.C.G.S. § 20-166 prohibits a driver from leaving the scene of an accident to obtain medical care for himself or others and instead only authorizes a driver to temporarily

1. Having concluded that Defendant is entitled to a new trial on the basis of the erroneous jury instruction, we need not address Defendant's alternative assignments of error — (1) whether Defendant received ineffective assistance of counsel at trial due to his attorney's failure to object to the alleged fatal variance; or (2) whether Defendant was deprived of his Sixth Amendment right to a unanimous jury verdict.

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leave to in order to call for help. While it is true that subsection (a) instructs that a driver may not leave the scene of an accident “for any purpose other than to call for a law enforcement officer, to call for medical assistance or medical treatment,” we do not read statutory subsections in isolation. Instead, statutes dealing with the same subject matter must be construed *in pari materia* and reconciled, if possible. *See, e.g., Elec. Supply Co. of Durham, Inc. v. Swain Elect. Co., Inc.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991) (citing *Great S. Media, Inc. v. McDowell Cty.*, 304 N.C. 427, 430-31, 284 S.E.2d 457, 461 (1981)).

Applying that principle here leads us to conclude that, even though N.C.G.S. § 20-166(a) instructs that drivers may only leave for the limited purpose of calling for aid, that authorization is expanded by N.C.G.S. § 20-166(b)’s requirement that drivers, among other things, “*shall* render to any person injured in such crash *reasonable assistance*, including the calling for medical assistance” permitted by subsection (a). (Emphasis added). The plain language of this provision indicates that a driver’s obligation to an injured person permits him to take action including but not limited to that which is authorized by subsection (a). Accordingly, it is clear that taking a seriously injured individual to the hospital to receive medical treatment is not prohibited by the statute in the event that such assistance is reasonable under the circumstances. In fact, the violation of that directive is itself a Class 1 misdemeanor.

Conclusion

Defendant failed to assert and preserve his argument that a fatal variance existed between the indictment and the proof at trial. However, the trial court erroneously failed to instruct the jury on the element of willfulness contained in N.C.G.S. § 20-166(a). After examining the whole record, this meets the standard for plain error. Accordingly, we reverse Defendant’s convictions and remand this matter for a new trial.

REVERSED AND REMANDED.

Judge CALABRIA concurs.

Judge DIETZ concurs in result only.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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EAGLES SERVS. & TOWING, LLC v. ACE MOTOR ACCEPTANCE CORP. No. 16-693	Mecklenburg (13CVS10981)	Affirmed
FAUCHER v. MARCUS No. 16-1056	Guilford (13CVD45)	Dismissed
HENSON v. HENSON No. 16-1064	Cabarrus (11CVD4064)	Affirmed in part; Reversed and Remanded in Part
IN RE D.L.M. No. 16-1188	Gaston (15JT208)	Vacated and Remanded
IN RE L.C.D. No. 16-1035	New Hanover (15JA123)	Affirmed
STATE v. ABNEY No. 16-840	Guilford (13CRS24481) (13CRS75989)	No Error
STATE v. BOWDEN No. 16-1074	Montgomery (12CRS51235-36) (13CRS667)	No Error in Part; Vacated and Remanded in Part.
STATE v. BUTLER No. 16-1255	Brunswick (13CRS2004) (13CRS2008-11)	No Error
STATE v. CARRELL No. 16-984	Durham (14CRS57222)	No Error
STATE v. DOREST No. 16-890	Mecklenburg (15CRS214459) (15CRS25201)	No Plain Error
STATE v. DUBOSE No. 16-169	New Hanover (15CRS51345)	No Error
STATE v. FOYE No. 16-675	Craven (13CRS52419)	No Prejudicial Error
STATE v. GILLESPIE No. 16-881	Wake (13CRS229939)	No Error

STATE v. GRIFFIN No. 16-972	Catawba (15CRS5540)	No Error
STATE v. JOHNSON No. 16-1170	Watauga (13CRS50307)	Affirmed
STATE v. JOHNSON No. 16-1036	Vance (15CRS50869)	No Error
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STATE v. REDDICK No. 16-451	Mecklenburg (14CRS230517)	Affirmed
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STATE v. ROGERS No. 16-1087	Lenoir (14CRS448)	Vacated
STATE v. SAINT CLAIR No. 16-836	Union (14CRS53012) (14CRS53027)	NO ERROR IN PART; VACATED IN PART; REMANDED IN PART
STATE v. SIMMONS No. 16-975	Mecklenburg (15CRS216405)	No Error
STATE v. TAPIA No. 16-909	Forsyth (10CRS55397)	Affirmed
STATE v. TETTERTON No. 16-967	Beaufort (13CRS52807) (15CRS51228)	NO PREJUDICIAL ERROR
STATE v. WALKER No. 16-1195	Pitt (14CRS60547-48)	No Error
STATE v. WIGGINS No. 15-1385	Wake (13CRS2579)	No error in part; dismissed without prejudice in part; vacated and remanded in part.
STATE v. YOUNG No. 16-995	Wake (13CRS224736)	No Error

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Appealability—interlocutory appeal—substantial right—forum selection clause—An interlocutory appeal was heard where it involved a forum selection clause, which is a substantial right. **US Chem. Storage, LLC v. Berto Constr., Inc., 378.**

Appealability—interlocutory orders—demand for jury trial—An order denying petitioner's motion to strike respondent's demand for a jury trial was addressed on appeal because it affected a substantial right. **City of Asheville v. Frost, 258.**

Appealability—pretrial orders multiple liability insurers—asbestos and benzene—no certification—petition for certiorari denied—In a case involving the manufacturer of products containing benzene and asbestos and multiple liability insurance companies, it was noted that neither plaintiff-Radiator Safety Company (RSC) nor Fireman's Fund Insurance Company had attempted to obtain N.C.G.S. § 1A-1, Rule 54(b) certification of interlocutory orders, and those orders thus remained subject to change until entry of a final judgment. Moreover, petitions for certiorari by RSC and Fireman's Fund were denied. Significant non-collateral issues such as damages remained disputed and it was unclear whether other claims had been resolved. **Radiator Specialty Co. v. Arrowood Indem. Co., 508.**

Appealability—waiver—venue—participation in trial court proceedings—Defendant mother in a child custody modification case waived her right to challenge venue on appeal where she participated in the trial court proceedings and failed to contest venue. **Farmer v. Farmer, 681.**

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Certiorari—jurisdiction to grant—The Court of Appeals had the authority to grant defendant's petition for a writ of certiorari, and defendant's petition was granted. N.C.G.S. § 15A-1444(e) granted defendant the right to petition the appellate division for review by certiorari, and N.C.G.S. § 7A-32(c) granted the Court of Appeals jurisdiction to issue a writ of certiorari. Although defendant's petition was not based upon the criteria specified in Appellate Rule 21, the Rules of Appellate Procedure cannot remove jurisdiction given by the General Assembly in accordance with the North Carolina Constitution. Although there are two cases from the Court

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of Appeals holding that the Court of Appeals was without authority to issue a writ of certiorari following defendant's guilty plea, the Court of Appeals had no authority to reverse existing precedent from the North Carolina Supreme Court, *State v. Stubbs*, 368 N.C. 40. **State v. Jones**, 789.

Change of venue—interlocutory—substantial right—An order changing venue as a matter of right was interlocutory because it did not dispose of the case, but it was immediately appealable as affecting a substantial right. **Terry v. Cheesecake Factory Rests., Inc.**, 216.

Interlocutory appeal—heard in the discretion of the Court—In a case arising from a dispute between a town and its volunteer fire department, issues arising from the denial of the Town's Rule 12(b)(6) motion to dismiss and an order allowing amendment of a complaint and imposing a preliminary injunction were heard in the Court of Appeals' discretion even though they were interlocutory. **Providence Vol. Fire Dep't v. Town of Weddington**, 126.

Interlocutory appeal—subject matter jurisdiction—personal jurisdiction—In a case arising from a dispute between a town and its volunteer fire department, plaintiff's motion to dismiss the Town's appeal as interlocutory was granted as to the Town's appeal under Rule 12(b)(1) (subject matter jurisdiction) and denied as to the Town's appeal under Rule 12(b)(2). Governmental immunity has been traditionally recognized as an issue of personal jurisdiction and is immediately appealable. **Providence Vol. Fire Dep't v. Town of Weddington**, 126.

Interlocutory order—multiple insurance companies—trigger order for coverage—substantial right not affected—In a case involving a manufacturer of products containing benzene and asbestos and multiple liability insurance companies, one of the insurance companies (Fireman's Fund) could not establish appellate jurisdiction over an interlocutory appeal based on the contention that a Trigger Order for liability coverage affected a substantial right. The Trigger Order had no practical effect on Fireman's Fund's substantial rights because the trial court entered an order that Fireman's Fund owed no duty to plaintiff absent its consent. Additionally, Fireman's Fund did not show how application of the trigger order would impact any particular claim. **Radiator Specialty Co. v. Arrowood Indem. Co.**, 508.

Interlocutory orders—partial summary judgment—An appeal was dismissed as interlocutory where the case involved an action to collect attorney fees and a summary judgment for one of the two defendants. The judgment did not contain a certification that there was no just reason for delay and plaintiff made no argument on appeal that the order impacted a substantial right. **Moon Wright & Houston, PLLC v. Cole**, 113.

Interlocutory orders—partial summary judgment—non-collateral issues remaining—not a final judgment—In a complex liability insurance case involving a company that manufactured products containing benzene and asbestos, partial summary judgment orders were interlocutory even though defendant-Fireman's Fund Insurance Company contended that the orders constituted a final judgment for appellate purposes. Certain coverage disputes were resolved, but non-collateral issues remained, including damages and the individual claims of plaintiff against defendant-National Union Fire Insurance Company. **Radiator Specialty Co. v. Arrowood Indem. Co.**, 508.

APPEAL AND ERROR—Continued

Interlocutory orders—substantial right exception—duty to defend—unidentified pending claims—appeal dismissed—The Court of Appeals dismissed the appeals of the manufacturer of products containing benzene and asbestos (Radiator Specialty Company (RSC)) in a case that involved multiple liability insurance companies. While RSC contended that partial summary judgment and other orders affected its substantial right to duty-to-defend coverage, the duty-to-defend substantial right exception has never been applied to orders that resolve ancillary coverage disputes with respect to numerous unidentified claims. RSC made a bare citation to *Cinoman v. Univ. of N. Carolina*, 234 N.C. App. 481 (2014), without application or analysis and did not establish that *Cinoman* controlled here. Furthermore, RSC never explained the practical impact that applying any of these orders (including allocation and trigger orders for determining coverage and costs) would have on its right to insurance defense in any allegedly pending claim. **Radiator Specialty Co. v. Arrowood Indem. Co.**, 508.

Interlocutory orders and appeals—contempt order—substantial right—The owners of a closely held business's appeal from a contempt order was properly before the Court of Appeals. The appeal of any contempt order affects a substantial right and is immediately appealable. **Plasman v. Decca Furniture (USA), Inc.**, 484.

Interlocutory orders and appeals—no substantial right alleged—motion to amend brief improper after other party filed brief—Defendants' appeal from an interlocutory order granting plaintiffs' motion for summary judgment in a dispute between minority shareholders was dismissed. Defendants failed to allege a substantial right was affected and were not permitted correct their mistake by moving to amend their principal brief after plaintiffs already filed their brief pointing out the error. **Edwards v. Foley**, 410.

Interlocutory orders and appeals—partial summary judgment—voluntary dismissal without prejudice—filing of new action—An appeal in a wrongful death case from an interlocutory order granting partial summary judgment was dismissed where plaintiff estate commenced a new action by refiling its claims against the remaining defendant companies in a new action. The trial court did not include certification under N.C.G.S. § 1A-1, Rule 54(b) in the summary judgment order and plaintiff presented no argument that the dismissal of this appeal would deprive her of a substantial right. **Parmley v. Barrow**, 741.

Interlocutory orders and appeals—Rule 54(b) certification—In a declaratory judgment action involving a dispute over ownership of a community pier and walkway, defendant lot owners' appeal from the trial court's interlocutory order (on the parties' cross-motions for summary judgment with a remaining punitive damages claim) was subject to immediate appellate review based on the trial court's N.C.G.S. § 1A-1, Rule 54(b) certification. **Kings Harbor Homeowners Ass'n, Inc. v. Goldman**, 726.

Interlocutory orders and appeals—Rule of Appellate Procedure 2—writ of certiorari—dismissal of one but not all defendants—The Court of Appeals exercised its authority under Rule of Appellate Procedure 2 to consider plaintiff's appeal in a personal injury case as a petition for writ of certiorari in order to review the trial court's interlocutory order dismissing one but not all defendants. **Henderson v. Charlotte-Mecklenburg Bd. of Educ.**, 416.

Interlocutory orders and appeals—substantial right—pretrial order—partial taking—land affected by taking—An appeal from an interlocutory pretrial

APPEAL AND ERROR—Continued

order involving land affected by a partial taking affected a substantial right and was immediately appealable. **Dep't of Transp. v. Riddle, 20.**

Interlocutory orders and appeals—undetermined money judgment—substantial right—failure to show business kept from operating as a whole—Defendant's appeal from an interlocutory order regarding the undetermined amount of a money judgment in a breach of contract case arising from the sale of a track loader was dismissed. Although the inability to practice one's livelihood and the deprivation of a significant property interest affect substantial rights, an order that does not prevent the business as a whole from operating does not affect a substantial right. **Hanna v. Wright, 413.**

Issue not raised at trial—considered under Rule 2—Although defendant did not raise at trial the issue of whether there was a fatal variance between an indictment and the evidence, the Court of Appeals elected to hear the matter on the merits under Rule 2 of the N.C. Rules of Appellate Procedure. It is difficult to contemplate a more manifest injustice than a conviction without adequate evidentiary support. **State v. McNair, 178.**

Mootness—case overruled between trial and appeal—Defendant's argument that a trial court erred by not allowing him to refer to a Court of Appeals case in his closing argument was moot where the N.C. Supreme Court overruled the Court of Appeals case between trial and appeal. **State v. Reynolds, 359.**

Mootness—requirements of Interstate Compact on Placement of Children—guardian returned to North Carolina—Although respondent mother argued in a child guardianship case that the trial court erred by appointing the paternal great grandmother as the minor child's guardian without first complying with the requirements of the Interstate Compact on the Placement of Children (ICPC), the issue of the applicability of the ICPC was rendered moot by the great grandmother's return to North Carolina. Respondent failed to show an exception to the mootness doctrine. **In re M.B., 437.**

Motion to dismiss appeal—violations—motion to strike portions of appellate brief—In a child neglect dependency case, the Court of Appeals denied a joint motion to dismiss respondent mother's appeal and an alternative motion to strike portions of respondent's appellate brief. The alleged violations were not jurisdictional or gross violations. Further, the pertinent portions of the brief were unnecessary to the decision in the appeal. **In re A.P., 38.**

Motions to dismiss denied—appellate issue not decided below—An appeal was dismissed where the action involved sovereign immunity and defendants argued a trial court order denying their motions to dismiss was interlocutory but immediately appealable. The question of whether defendants were immune from suit was never decided below. **Page v. Chaing, 117.**

Notice of appeal—inaccurate judgment date—certiorari—The Court of Appeals granted defendant's petition for certiorari where defendant's notice of appeal contained an inaccurate judgment date, in violation of Rule 4 of the N.C. Rules of Appellate Procedure. **State v. Regan, 351.**

Precedent—Court of Appeals—may not overrule Supreme Court—While a Court of Appeals panel is bound by the decision of a prior panel, the Court of Appeals is bound to follow the Supreme Court when there is a conflict between the prior Court of Appeals opinion and a Supreme Court opinion. **State v. Mostafavi, 803.**

APPEAL AND ERROR—Continued

Preservation of issue—failure to object at trial—Defendant did not preserve for appellate review a double jeopardy issue that was not objected to at trial in a prosecution for obtaining property by false pretenses. Defendant made a false complaint for fraud involving the cashing of three checks meant for his children and then attempted to use a false affidavit to obtain the value of the three checks in a single transaction from his bank, but was only partly successful. Although defendant argued that the trial court violated the single taking rule by not instructing the jury that it could not convict defendant of both obtaining property by false pretenses and attempting to obtain property by false pretenses, the error was constitutional in nature. **State v. Buchanan, 783.**

Preservation of issues—exception noted—An issue concerning evidence of a prior incident and instructions was preserved for appeal where defendant first objected to the evidence prior to jury selection but the trial court deferred its ruling and defendant noted an exception after a voir dire at trial, but did not object and defense counsel did not object at trial before the jury, but renewed the objection during the charge conference. **State v. Williams, 606.**

Preservation of issues—express plain error argument in brief—An issue concerning firearms seized during a search of defendant's home was properly preserved for appeal where defendant expressly made a plain error argument in his appellate brief. **State v. Powell, 590.**

Preservation of issues—failure to argue or present at trial—Certain issues in plaintiff business owners' brief were not properly argued or presented, and thus, were deemed abandoned. Certain other issues were preserved since they were specifically argued on appeal. **Plasman v. Decca Furniture (USA), Inc., 484.**

Preservation of issues—failure to object at trial—Plaintiff abandoned the issue that his motion to continue a hearing on defendants' motion to dismiss all charges should have been granted based on plaintiff's filing of an amended complaint. Plaintiff failed to object at trial. **Wilson v. Pershing, LLC, 643.**

Preservation of issues—fatal variance—Appellate Rule 2 review denied—The Court of Appeals declined to exercise its discretion to review Defendant's issue under Appellate Rule 2 where defendant conceded that he failed to preserve the issue and did not demonstrate the exceptional circumstance necessary for the invocation of Appellate Rule 2. **State v. Mostafavi, 803.**

Preservation of issues—fatal variance—The question of whether there was a fatal variance between the indictment and the proof in a hit and run prosecution was not addressed on appeal where it was argued for the first time on appeal. Moreover, the Court of Appeals declined to review the issue under Rule 2 of the Rules of Appellate procedure. **State v. Scaturro, 828.**

Preservation of issues—offer of proof—not sufficient—Defendant did not preserve for appellate review issues concerning excluded evidence of bias against him in a prosecution for the sexual abuse of a child. Although defendant contended that his statements were an offer of proof, speculation about what the testimony would have been was not sufficient to show the actual content of the testimony. **State v. Martinez, 574.**

Preservation of issues—plain error not argued—appeal dismissed—An issue concerning the instruction of the jury on two counts of manufacturing methamphetamine was not preserved for appeal where defendant did not object at trial and did

APPEAL AND ERROR—Continued

not specifically and distinctly argue plain error on appeal. The issue was deemed waived. **State v. Maloney, 563.**

Preservation of issues—standing—abandonment of argument—Plaintiff abandoned the issue of standing based on his failure to argue it in his brief. The trial court's dismissal of all claims against certain defendants under Rule 12(b)(1) remained undisturbed. **Wilson v. Pershing, LLC, 643.**

Relief granted on other grounds—issue not heard—The question of whether the trial court erred in a prosecution for possession of a firearm by a felon resulting from the search of defendant by officers was not considered where the relief sought by defendant was granted on another issue. **State v. Malachi, 170.**

ATTORNEY FEES

Criminal contempt—civil contempt—sufficiency of findings—Defendant father's appeal of attorney fees incurred in relation to a criminal contempt finding was dismissed since the appeal of that portion of the order was not properly before the Court of Appeals. The portion related to the civil contempt finding was vacated where the district court made no finding that the father refused to allow the parties' minor child to live with plaintiff mother or refused to obey the custody orders. **McKinney v. McKinney, 473.**

BURGLARY AND UNLAWFUL BREAKING OR ENTERING

Mere presence—contention rejected—Defendant's contention that the evidence merely showed his presence at the scene of a breaking and entering was rejected. **State v. McNair, 178.**

Place of religious worship—storage building—In a case arising from a break-in at a barn behind a rented building used as a church, the trial court erred by denying defendant's motion to dismiss the charge of breaking or entering a place of religious worship. The barn was used to store equipment for the church, but the State presented no evidence that the barn was used as a place of worship. It is clear from the wording of N.C.G.S. § 14-54.1 that the specific building must have been a building regularly used and clearly identifiable as a place for religious worship. **State v. McNair, 178.**

Place of religious worship—curtilage—In a case arising from a break-in at a barn behind a rented building used as a church, the trial court erred by denying defendant's motion to dismiss the charge of breaking or entering a place of religious worship. Although the State argued that the barn was within the curtilage of the building used for church services, the term used in N.C.G.S. § 14-54 for "building" references "curtilage" solely by referring to a building within the curtilage of a dwelling house. The State did not argue that any portion of the portion of the property occupied by the church was used as a dwelling. **State v. McNair, 178.**

Possession of tools—control of area where tools found—The evidence was sufficient to support a finding that defendant had constructive possession of burglary tools that were found in a fenced area outside the building that was broken into. While defendant was not in exclusive control of the area where the tools were found, there were other incriminating circumstances. **State v. McNair, 178.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Abuse adjudication—improperly compelled testimony—The trial court erred in a juvenile adjudication hearing by compelling the juvenile's mother to testify in violation of her Fifth Amendment right against self-incrimination. The trial court was instructed to disregard the portions of respondent mother's improperly compelled testimony at a hearing in which she testified to her belief regarding the source of the minor child's injuries. **In re L.C., 67.**

Abuse and neglect—sufficiency of findings—The trial court did not err by adjudicating a minor child as abused and neglected where respondent mother failed to challenge the sufficiency of the stipulated findings. **In re J.S.C., 291.**

Child abuse—sufficiency of findings—physical injury by other than accidental means—The trial court did not err by adjudicating a minor child as an abused juvenile. The trial court's findings supported the conclusions that respondent parents created a substantial risk of physical injury to the minor child by other than accidental means, and that respondents inflicted or allowed to be inflicted on the minor child serious physical injury by other than accidental means. **In re K.B., 423.**

Child neglect—failure to provide proper supervision—failure to keep medications current—The trial court did not err by adjudicating a minor child as a neglected juvenile. The findings showed that respondent mother failed to provide proper supervision for the minor child including that she was unable to provide appropriate discipline or nurturing to deal with the child's emotional and behavioral issues. Further, respondent did not follow instructions to take the minor child to a psychiatrist, and she let the child's prescription lapse for two weeks for a medication that could not just be stopped without causing side effects. **In re K.B., 423.**

Dependency adjudication—sufficiency of findings of fact—care or supervision—alternative child care arrangements—The trial court erred by adjudicating a child dependent where it failed to address the parent's ability to provide care or supervision and the availability to the parent of alternative child care arrangements. **In re L.C., 67.**

Dependency—petition failed to allege—sufficiency of allegations—The trial court did not err by adjudicating a minor child as a dependent juvenile. Although the Department of Social Services did not check the box alleging dependency on the petition form, the allegations attached to the petition were sufficient to put respondent mother on notice that dependency would be at issue. **In re K.B., 423.**

Disposition order—ceasing reunification efforts—aggravating circumstances required in a prior order—The trial court failed to make adequate findings of fact in support of its decision to cease reunification efforts between respondent mother and her minor child in a child abuse, dependency, and neglect case. The trial court's determination as to the existence of aggravating circumstances appeared for the first time in its dispositional order rather than in a prior order. **In re L.C., 67.**

Neglect adjudication—failure to seek timely medical attention—The trial court did not err in its adjudication of neglect where it made sufficient findings, including respondent's decision to not seek medical attention for two days despite being on notice of the minor child's injuries. The findings were unaffected by the Fifth Amendment violation compelling respondent mother to testify. **In re L.C., 67.**

Neglect and dependency—subject matter jurisdiction—standing—The trial court erred by concluding that the Department of Social Services (DSS) had

CHILD ABUSE, DEPENDENCY, AND NEGLECT—Continued

standing to file a juvenile petition. The trial court lacked subject matter jurisdiction to adjudicate the minor child as dependent and neglected since the minor child was neither found in nor residing in Mecklenburg County at the time DSS filed its juvenile petition. **In re A.P.**, 38.

Permanency planning order—best interests of child—clerical errors—The trial court did not err in a child neglect and dependency case by granting custody of the minor child to respondent father and not respondent mother in the permanency planning order. The record supported that this was in the minor child's best interests. The references to "the Respondents" in conclusions of law 2 and 7 were clerical errors that should have read "Respondent Mother" only. **In re J.K.**, 57.

Permanent plan—adoption—appropriate relative placements—sufficiency of findings of fact—The trial court erred in a child abuse, dependency, and neglect case by setting adoption as the minor child's permanent plan without making sufficient findings of fact as to whether appropriate relative placements existed. While the trial court may have been waiting for the Department of Social Services to complete its evaluation, that fact did not obviate the need for specific findings of fact under N.C.G.S. § 7B-903(a1). **In re L.C.**, 67.

CHILD CUSTODY AND SUPPORT

Child custody modification—visitation—sufficiency of evidence—substantial change in circumstances—best interest of child—The trial court erred in a child custody modification case by entering an order modifying custody and visitation where no evidence was presented at the hearing, and instead the court attempted to mediate the parties' visitation disputes. The court needed to find that there existed a substantial change in circumstances and that modification of visits would be in the children's best interest. **Farmer v. Farmer**, 681.

Civil custody order—child neglect and dependency—termination of juvenile court jurisdiction—The trial court erred in a child dependency and neglect case by entering a custody order that was not in compliance with N.C.G.S. § 7B-911. **In re J.K.**, 57.

Custody modification—circumstances at all relevant times—specific findings—The trial court did not err in a child custody modification case by allegedly refusing to allow defendant father to ask questions that dealt with circumstances of co-parenting that existed at the time of the previous order and prior to the existing order. The findings showed the circumstances at all relevant times. **LaPrade v. Barry**, 296.

Custody modification—motion to dismiss—sufficiency of evidence—Although defendant father contended the trial court erred in a child custody modification case by denying his motions to dismiss, there was a substantial change of circumstances concerning the parents' unwillingness or inability to communicate in a reasonable manner regarding their child's needs. **LaPrade v. Barry**, 296.

Custody modification—substantial change of circumstances—The trial court did not err by concluding that a substantial change of circumstances justified child custody modification where there were issues regarding communication between the parents and the father's care of the child. **LaPrade v. Barry**, 296.

CIVIL PROCEDURE

Motion to dismiss—unfounded allegation in verified complaint—alternate basis for ruling—The issue of whether an unfounded allegation in a verified complaint could be used as evidence for purposes of a motion to dismiss was not addressed where the trial court order was affirmed on an alternate basis. **Providence Vol. Fire Dep’t v. Town of Weddington, 126.**

Rule 12(b)(6) motion to dismiss—alternative ground in amended pleading—In a case arising from a dispute between a town and its volunteer fire department, the trial court properly denied defendant-town’s motion to dismiss based on Rule 12(b)(6). That motion was based primarily on the first verified amended complaint and the trial court did not err by allowing plaintiff to amend the complaint. The second verified complaint alleged alternative grounds upon which immunity was unavailable beyond waiver by purchase of liability insurance and to which defendant did not adequately respond in its initial motion to dismiss or the accompanying affidavit. **Providence Vol. Fire Dep’t v. Town of Weddington, 126.**

CONDEMNATION

Partial taking—entire tract—unity of use—Although the trial court did not err in a partial taking case by concluding that several lots were not part of the “entire tract,” it erred by concluding that another lot was part of the “entire tract.” The portions of two other lots were not reasonably or substantially necessary to defendant landowners’ ability to use and enjoy any of the other lots. **Dep’t of Transp. v. Riddle, 20.**

CONSTITUTIONAL LAW

Equal protection—conviction in another state requiring sex offender registration—The trial court did not err by concluding that plaintiff failed to state a claim that his equal protection rights were violated in a civil case against government employees in their official capacities who compelled plaintiff to register as a sex offender. Although plaintiff contended that he was treated differently from other 17-year-olds who have consensual sex with 15-year-olds, defendant was convicted in Michigan and initially required to register in Michigan (before a change in Michigan law). North Carolina treated plaintiff exactly like all individuals who had a final conviction in another state of an offense that required registration under the sex offender registration statutes of that state. **Bunch v. Britton, 659.**

Equal protection—Eugenics Asexualization and Sterilization Compensation Program—living victims—similarly situated—The Industrial Commission did not err by concluding that the Eugenics Asexualization and Sterilization Compensation Program, providing benefits for living claimants who were asexualized involuntarily or sterilized involuntarily, did not violate equal protection rights even though it required that claimants be alive on June 30, 2013. The intended beneficiaries of the compensation program were the living victims and not their heirs, and thus, the estates of victims were not similarly situated with living victims. **In re Hughes, In re Redmond, In re Smith, 699.**

Equal protection—Eugenics Asexualization and Sterilization Compensation Program—special benefits—sacrifices for governmental objective—The Industrial Commission did not err by concluding that the Eugenics Asexualization and Sterilization Compensation Program, providing benefits for living claimants who were asexualized involuntarily or sterilized involuntarily, did not violate equal

CONSTITUTIONAL LAW—Continued

protection rights. The United States Supreme Court has held that special benefits can be provided to certain citizens based upon voluntary or involuntary sacrifices they have made in the furtherance of some governmental objective. **In re Hughes, In re Redmond, In re Smith, 699.**

Equal protection—rational basis—The Industrial Commission did not err by concluding that the Eugenics Asexualization and Sterilization Compensation Program, providing benefits for living claimants who were asexualized involuntarily or sterilized involuntarily, did not violate equal protection rights by limiting compensation to living victims whose rights had vested. The challenged legislation demonstrated a rational relationship between a legitimate government interest and the disparate treatment of heirs of victims who died before the vesting date and victims who were alive on that date. A living victim's knowledge that compensation would be awarded even if that claimant predeceased the payout constituted a form of restitution whereas heirs of victims who died before enactment of the program had no such expectation. **In re Hughes, In re Redmond, In re Smith, 699.**

Exculpatory evidence—reviewed in camera—The Court of Appeals *in camera* review of sealed records, made at defendant's request, did not reveal any *Brady* evidence that the trial court did not produce for defendant after its *in camera* review. **State v. Riley, 819.**

Federal—double jeopardy—sex offender—failure to notify sheriff of change of address—failure to report in person to sheriff's office—Double jeopardy was violated where defendant, a sex offender, was convicted of failing to inform the sheriff of a change of address under N.C.G.S. § 14-208.11(a)(2) and (a)(7), pursuant to the requirements in N.C.G.S. § 14-208.9(a). The latter statute applied to both subsections of N.C.G.S. § 14-208.11, so that both had the same elements. **State v. Reynolds, 359.**

Federal—effective assistance of counsel—failure to object to doctor's testimony—testimony admissible—Defendant was not denied effective assistance of counsel where his trial counsel did not object to a doctor's testimony about a child sexual abuse victim. The doctor testified, "But in the fact that she did experience abuse," but the statement in context referred to a hypothetical victim and did not amount to a statement that this victim was in fact abused. **State v. Martinez, 574.**

Federal—Miranda warnings—conversation not custodial—driver's license retained by officer—There was no error in an impaired driving prosecution where the trial court denied defendant's motions to suppress statements made without *Miranda* warnings. Although defendant argued that he was in custody after he handed the officer his driver's license, defendant was not under formal arrest and, under totality of the circumstances, an objectively reasonable person would not have believed that he restrained to that degree. The encounter occurred in a hotel parking lot, defendant was standing outside his vehicle while speaking with the officer, he was not handcuffed or told he was under arrest, and his movement was not limited beyond the officer retaining his driver's license. **State v. Burris, 525.**

Federal—right to impartial jury—juror's statement—no plain error—The trial court's failure to act upon a prospective juror's statement did not amount to plain error in a prosecution for the sexual abuse of a child. The prospective juror said that her uncle was a defense attorney and that he had said his job was to "get the bad guys off." Although defendant contended that this amounted to a comment on his guilt, it was a generic statement and did not imply that the prospective juror

CONSTITUTIONAL LAW—Continued

had any particular knowledge of defendant's case or the possibility that he might be guilty. **State v. Martinez, 574.**

Liberty interests—due process—sex offender registration—In a civil case against a county and a state employee in their official capacity arising from plaintiff being compelled to register in North Carolina for a Michigan sex offense, the trial court did not err by concluding that plaintiff failed to state a claim that his liberty interests were violated. Plaintiff was afforded due process in Michigan, which gave him the opportunity to avoid any wrongful deprivation due to a change in its statute by requesting removal from the registry, but plaintiff failed to exercise that opportunity. **Bunch v. Britton, 659.**

North Carolina—legislature—delegation of power—The delegation of power by the N.C. Department of Transportation for a traffic congestion management project was constitutional where the legislative goals and policies set forth in the statute, combined with procedural safeguards, were sufficient. **WidenI77 v. N.C. Dep't of Transp., 390.**

North Carolina—public purpose—traffic congestion relief project—The trial court did not err by concluding that expenditures from a traffic congestion improvement project that would include tolls constituted a public purpose pursuant to Article V, Section 2(1) of the North Carolina Constitution. **WidenI77 v. N.C. Dep't of Transp., 390.**

North Carolina—unanimous instructions—disjunctive instructions—prejudicial error—There was prejudicial error in an impaired driving prosecution where the trial court erred by instructing the jury on both driving under the influence and driving with an alcohol concentration of .08 or more, even though there was no evidence of a specific blood alcohol level. There was prejudicial error in that it was impossible to determine the charge on which offense the jury based its verdict. This is not a case where there was overwhelming evidence of impaired driving. **State v. Fowler, 547.**

Right to counsel—prior conviction—clerk's electronic records—The trial court did not err by denying defendant's motion to suppress a prior conviction used for habitual offender status. Defendant contended that the prior conviction was obtained in violation of his right to counsel, but there were no written records of the trial court's order. The presumption of correctness was applied to the clerk's electronic records, which supported the trial court's findings and conclusion that the prior conviction was not obtained in violation of defendant's right to counsel. **State v. Thorpe, 210.**

Right to speedy trial—delay in bringing before magistrate—holding without bond—The trial court did not err in a prosecution for second-degree murder and other charges by denying defendant's motion to dismiss due to a seven-hour delay in bringing him before a magistrate. Defendant was afforded multiple opportunities to have witnesses or an attorney present, which he elected not to exercise. **State v. Cox, 306.**

Sovereign immunity—not a bar to state constitutional claims—In a civil case arising from plaintiff being required to register as a sexual offender in North Carolina for a Michigan offense, sovereign immunity was not a bar to plaintiff's claims under the North Carolina Constitution against individuals in their official capacity. There is a long-standing emphasis in our state on ensuring redress for every constitutional injury. **Bunch v. Britton, 659.**

CONSTITUTIONAL LAW—Continued

State constitution—removal from sex offender registration list—adequacy of state remedy—Where plaintiff was required to register as a sex offender and his petition to terminate that registration was granted, his state constitutional claims against the individuals who required him to register, in their official capacities, was his only way to seek redress. Another form of “adequate state remedy,” such as a common law claim for monetary damages, would invoke immunity by defendants. **Bunch v. Britton, 659.**

CONTEMPT

Civil contempt—jurisdiction—preliminary injunction—appeal from underlying interlocutory order—no substantial right—The North Carolina Business Court had jurisdiction to hold the owners of a closely held business in civil contempt based on their failure to comply with an order enforcing the terms of a preliminary injunction entered against them in federal court. The appeal of an underlying interlocutory order enforcing the injunction did not affect a substantial right and did not stay the contempt proceedings. **Plasman v. Decca Furniture (USA), Inc., 484.**

Civil contempt—obligation to return diverted funds—Although the owners of a closely held business argued in a civil contempt case that an injunction and order requiring them to return diverted funds and provide an accounting of those funds to a partner furniture manufacturer were no longer enforceable because the furniture manufacturer refused to comply with the requirement that the business owners be provided with certain information, the business owners’ obligation to return diverted funds remained in place. **Plasman v. Decca Furniture (USA), Inc., 484.**

Civil contempt—order vacated—compliance prior to entry of order—Defendant father’s appeal of the portion of an order finding him in civil contempt for failure to return the parties’ minor son back to the mother (after the child ran away from the mother’s house to the father’s house) was dismissed where the father returned the minor son to the mother prior to the effective date of the order. **McKinney v. McKinney, 473.**

Civil contempt—present ability to pay—jointly held bank accounts—individually held retirement accounts—The trial court did not err in a civil contempt case by considering the jointly held bank accounts and individually held investment retirement accounts of owners of a closely held business in assessing their present ability to comply with an order requiring them to return diverted funds and provide an accounting of those funds. The protections afforded real property held by spouses as tenants by the entirety did not apply. **Plasman v. Decca Furniture (USA), Inc., 484.**

Civil contempt—willful noncompliance—The judge’s finding in a civil contempt case that the owners of a closely held business were in willful noncompliance with an order requiring them to return diverted funds and provide an accounting of those funds was supported by competent evidence. The record revealed instances in which the business owners acted with knowledge of and stubborn resistance to the order’s clear directives. **Plasman v. Decca Furniture (USA), Inc., 484.**

CRIMINAL LAW

Continuance denied—new evidence—no prejudice—There was no prejudice in an assault prosecution involving self-defense where the trial judge denied defendant a continuance to deal with evidence recently provided by the State. The trial court

CRIMINAL LAW—Continued

had already committed prejudicial error by limiting other evidence of violence by the victim and it appeared that the trial court would have improperly excluded any such testimony. **State v. Bass, 754.**

Continuance—time to prepare motion to dismiss—bodycam footage destroyed—no Brady violation—The trial court did not abuse its discretion by denying defendant's motion for a continuance in a prosecution for assaulting a government officer. The motion for a continuance was for the purpose of preparing a motion to dismiss based on the destruction of video footage from officers' body cameras. The recordings were erased in accordance with routine policy and had been reviewed by the prosecutor and defendant's original counsel. Defense counsel's decision not to preserve copies could not be the basis of a contention that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963). Moreover, defendant did not establish precisely how a continuance would have helped him prepare for trial. **State v. Mylett, 198.**

Guilty plea—motion to withdraw—assertion of innocence—Alford pleas not sufficient—Defendant's assertion of an *Alford* plea was not a sufficient assertion of innocence for a withdrawal of his plea. **State v. Whitehurst, 369.**

Guilty plea—motion to withdraw—coercion—timing—Defendant did not establish a fair and just reason to withdraw a guilty plea where the record did not support his contention that the plea was entered hastily or that he moved promptly to withdraw the plea. There was no authority for the proposition that the incarceration is per se evidence of coercion. **State v. Whitehurst, 369.**

Guilty plea—motion to withdraw—strength of State's evidence—sufficient—Defendant failed to effectively challenge the strength of the State's evidence against him on a motion to withdraw his plea. The prosecutor's summary indicated that the case was simple and straightforward, defendant did not identify evidentiary issues, and defendant did not contend that the case presented complex legal or forensic issues. **State v. Whitehurst, 369.**

Guilty plea—withdrawal of plea—burden not shifted to State—The burden did not shift to the State to show that it was prejudiced in a hearing on a motion to withdraw a guilty plea where defendant did not meet his burden of showing a fair and just reason to withdraw his plea. **State v. Whitehurst, 369.**

Instructions—self-defense—duty to retreat—confusion in jury room—In an assault prosecution in which defendant raised self-defense, a letter from a juror to the trial judge expressing concern about the jury discussion of the duty to retreat demonstrated the prejudice defendant suffered from an erroneous instruction on the subject. **State v. Bass, 754.**

Jury instructions—disjunctive—one offense not supported by evidence—There was no plain error in a prosecution for several types of sexual abuse of a child where the trial court gave disjunctive instructions on the types of abuse but one type was not supported by the evidence. Defendant did not meet his burden of showing that the instruction had any probable impact on the verdict. **State v. Martinez, 574.**

Right to allocute—sentencing hearing—denied—A defendant was denied his right to speak on his own behalf at sentencing and was entitled to a new sentencing hearing. The trial court was informed that defendant wished to address the court and the trial court acknowledged the request, but, without giving defendant the chance to speak, the trial court indicated that it had already decided how to sentence defendant, became impatient, and pronounced judgment. **State v. Jones, 789.**

CRIMINAL LAW—Continued

Self-defense—duty to retreat—erroneous instruction—prejudicial—Omitting language that defendant did not have a duty to retreat from a place he had a legal right to be was prejudicial in an assault prosecution in which defendant claimed self-defense. The trial court omitted a key and required phrase from the pattern jury instructions and then similarly confused the jury in response to a question by stating that the duty to retreat did not apply to that case. **State v. Bass, 754.**

Self-defense—instructions—duty to retreat—In an assault prosecution involving self-defense and the duty to retreat, the Court of Appeals was not bound by a prior opinion where, in the prior case, defendant did not object to the jury instruction and did not argue to the trial court that defendant had no duty to retreat. In this case, defendant was clearly entitled to the self-defense instruction, defense counsel specifically requested a duty to retreat instruction, the trial court initially gave an incomplete instruction, and a question from the jury clearly indicated concern with whether defendant had a duty to retreat. After the question, the trial court improperly instructed the jury on duty to retreat. **State v. Bass, 754.**

Self-defense—instructions—duty to retreat—jury question—The trial court erred in a prosecution for assault with a deadly weapon inflicting serious injury by instructing the jury, in response to a question, that the duty to retreat statute did not apply to this case. **State v. Bass, 754.**

Self-defense—instructions—duty to retreat—The trial court erred in a prosecution for assault with a deadly weapon inflicting serious injury by not instructing the jury that defendant had no duty to retreat. Defendant was standing outside his home with friends when an altercation erupted, during which defendant shot the victim. It appeared that the trial court was under the erroneous impression that the “no duty to retreat” language only applied when defendant acted in defense of his home, workplace, or vehicle. **State v. Bass, 754.**

Self-defense—prior violence by victim—The trial court abused its discretion in an assault prosecution in which self-defense was claimed by excluding testimony about prior violence by the victim. Defendant was entitled to present evidence of specific acts of violent conduct to show that the victim was the aggressor in the assault, whether or not those acts of violence were known to defendant at the time of the assault. **State v. Bass, 754.**

DECLARATORY JUDGMENTS

Ownership of community pier and walkway—The trial court erred in a declaratory judgment action involving a dispute over ownership of a community pier and walkway by denying defendant lot owners’ motion for summary judgment and granting summary judgment in favor of plaintiff homeowners association. The homeowners association’s reliance on the parties’ intent was misplaced. The grantor’s intent must be understood as expressed in the language on the deed, and the deed here was clear and unambiguous. **Kings Harbor Homeowners Ass’n, Inc. v. Goldman, 726.**

DIVORCE

Alimony—cohabitation defense—The trial court acted under a misapprehension of law when it denied plaintiff’s request to assert a cohabitation defense, stating that “cohabitation isn’t a defense to an alimony claim.” **Orren v. Orren, 480.**

DIVORCE—Continued

Equitable distribution—classification—car—sufficiency of findings—The trial court erred in an equitable distribution case by classifying a 2011 Suburban and the debt it secured as plaintiff husband's separate property and debt. The case was remanded for clear findings to support the classification, valuation, and distribution of the Suburban and its debt. **Miller v. Miller, 85.**

Equitable distribution—in-kind distribution—sale of real property—marital home—valuation of marital and divisible assets—The trial court erred in an equitable distribution case by failing to provide for an in-kind distribution and ordering the sale of real property (the marital home and the Virginia property). The case was reversed and remanded for valuation of each marital and divisible asset, and to determine the total net value of the entire marital estate. **Miller v. Miller, 85.**

Equitable distribution—valuation—Timber Agreement—speculation—The trial court erred in an equitable distribution case by its valuation of a Timber Agreement at \$5,000.00. It involved timber of an unknown variety, age, and quantity, and was not supported by competent evidence. **Miller v. Miller, 85.**

Setting aside divorce judgment—Rule of Civil Procedure 60(b)—equitable distribution—subject matter jurisdiction—The trial court did not abuse its discretion by entering a decree setting aside a divorce judgment under Rule of Civil Procedure 60(b). The trial court had subject matter jurisdiction over defendant wife's equitable distribution counterclaim as stated in her amended answer to the divorce complaint. **Miller v. Miller, 85.**

DRUGS

Continuing offense—manufacture of methamphetamine—The Court of Appeals concluded in an alternative argument that the trial court did not err by entering judgment on two separate counts of manufacturing methamphetamine. Debris from the manufacturing process was found in black garbage bags in two separate locations, a storage unit and the trunk of a car. Although defendant contended that the evidence suggested a continuous operation by the same participants, the garbage bags contained evidence that separate manufacturing offenses had been completed and defendant's own witness testified that the garbage bags contained trash from separate batches manufactured on separate dates. **State v. Maloney, 563.**

Methamphetamine—possession of precursor chemicals—indictment not sufficient—The trial court lacked jurisdiction, and a conviction for possession of the precursor chemicals to methamphetamine was vacated where the indictment was fatally flawed in that it failed to allege an essential element of the crime (that defendant knew or had reason to know that the materials would be used to manufacture methamphetamine). The State's amendment of the indictment to add the missing element could not cure the defect. **State v. Maloney, 563.**

EASEMENTS

Riparian rights—no extension by implication—The trial court erred in a declaratory judgment action involving a dispute over ownership of a community pier and walkway by denying defendant lot owners' motion for summary judgment and granting summary judgment in favor of plaintiff homeowners association. The ten-foot access easement relied upon by the homeowners association ended at the boundary of the lot adjacent to the pier and could not be extended into the creek by implication, including riparian rights or structures located on the creek. **Kings Harbor Homeowners Ass'n, Inc. v. Goldman, 726.**

ENVIRONMENTAL LAW

Industrial contamination—post-closure clean-up—multiple successive owners—In a case involving the determination of who was responsible for the current clean-up of a closed industrial chemical storage site that had changed ownership multiple times, the trial court was correct to look for guidance in federal law when interpreting the term “operator” in the context of the State Hazardous Waste Rules and, specifically, the hazardous waste permit program. An “operator” is the person responsible for, or in charge of the facility subject to regulation; moreover, “operator” includes those parties in charge of or directing post-closure activities under the State Hazardous Waste Program and the federal Resource Conservation and Recovery Act. Petitioner WASCO was the party responsible for and directly involved in the post-closure activities subject to regulation. **WASCO LLC v. N.C. Dep’t of Env’t & Nat. Res.**, 222.

EQUITABLE DISTRIBUTION

Distributional factors—failure to make findings—The trial court erred in an equitable distribution case by failing to make findings and give proper consideration to plaintiff husband’s evidence of distributional factors. The case was remanded for findings regarding all distributional factors for which evidence was presented and to determine whether an equal division was equitable. **Miller v. Miller**, 85.

EQUITY

Lease and option to purchase agreement—ambiguous relationship of parties—The trial court erred by granting summary judgment in favor of defendant property owner on plaintiff tenants’ claim to recover their “equity” that they accrued during the term of the parties’ lease and option to purchase agreement where the agreement was ambiguous and there was a genuine issue of material fact regarding whether the relationship of the parties was landlord/tenant or mortgagor/mortgagee. **Lee v. Cooper**, 734.

EVIDENCE

Cross-examination—limitation on scope—The trial court did not err in an impaired driving case, resulting in a car accident and death of the other driver, by preventing defendant from cross-examining a witness regarding the contents of a verified complaint in a related civil case. Defendant failed to show that the trial court’s decision to limit the scope of cross-examination influenced the jury’s verdict. **State v. Cox**, 306.

Photographs—not authenticated—used for illustrative purposes only—The trial court did not err in a prosecution for armed robbery by allowing a witness to use photographs for illustrative purposes even though the photographs had not been authenticated. **State v. Little**, 159.

Prior accusation of domestic violence—other evidence of guilt—exclusion—no prejudicial error—There was no prejudicial error in a prosecution for the sexual abuse of a child where the trial court erroneously excluded evidence that the mother had previously accused defendant of domestic violence, possibly indicating bias. Considering the other evidence of guilt, there was not a reasonable possibility of another result had the evidence been heard. **State v. Martinez**, 574.

Prior convictions—cross examination—instructions to defendant before testifying—The trial court did not err in a prosecution for armed robbery by instructing

EVIDENCE—Continued

defendant that the prosecutor could question him about prior convictions if he testified. The trial court limited its discussion with defendant to the possibility of impeachment by proof of prior convictions and defendant identified nothing in the trial court's statements to defendant that suggested that defendant would be questioned beyond the permissible scope of limited cross-examination. **State v. Little, 159.**

Prior firearms incident—offered as evidence of knowledge—not admissible—Evidence of a prior incident in which a firearm was found in a vehicle occupied by defendant was not admissible in a prosecution for possession of a firearm by a felon. Here, firearms were found in a vehicle by which defendant was standing with the car keys in his pocket and the State offered the prior incident as evidence that defendant knew of the firearms. The State's assertion depended on an improper character inference. **State v. Williams, 606.**

Prior incident—admitted for no proper purpose—prejudicial—There was prejudicial error warranting a new trial in a prosecution for possession of a firearm by a felon where evidence of a prior incident involving a firearm was admitted for no proper purpose. The Court of Appeals was not convinced that the trial court's limiting instruction had a meaningful impact so as to cure the prejudice. **State v. Williams, 606.**

Prior incident—admitted to show opportunity—abuse of discretion—The trial court abused its discretion in a prosecution for possession of a firearm by a felon by admitting evidence of a prior incident in which a firearm was found in a vehicle occupied by defendant. The State offered the evidence to show opportunity, but offered only conclusory statements of the connection between the prior incident, opportunity, and possession of a firearm. Any probative value was minimal and was substantially outweighed by the danger of unfair prejudice. **State v. Williams, 606.**

Witness interview video—past recorded recollection hearsay exception—corroboration—The trial court did not err in a second-degree murder and possession of a firearm by a felon case by allowing the State to introduce a video of a witness's interview by law enforcement and to play the video for the jury. The video was a "past recorded recollection" hearsay exception and also served as corroborative evidence substantiating witness testimony. **State v. Harris, 322.**

FALSE PRETENSE

Indictment money—specificity—amount required—An indictment for obtaining property by false pretenses was not sufficient where it described the property obtained as "UNITED STATES CURRENCY" but the amount was not included. **State v. Mostafavi, 803.**

Indictment—money—specificity—North Carolina Supreme Court precedent requiring that an indictment for taking money by false pretenses include the amount of U.S. Currency obtained was not overruled by N.C.G.S. § 15-149. The predecessor of that statute was enacted in 1877, prior to which drafters of instruments were generally required to describe not only the amount of money obtained but also the type of money. There must still be some further description of the money, at least by its amount. **State v. Mostafavi, 803.**

Obtaining property by—thing of value—The trial court did not err in a prosecution for obtaining property by false pretenses by denying defendant's motion to

FALSE PRETENSE—Continued

dismiss for insufficient evidence on the contention that he had not obtained something of value. A \$600 provisional credit was placed in defendant's bank account after he completed a "Check Fraud/Forgery Affidavit" at his bank, although there was no evidence that defendant accessed the provisional credit. The provisional credit was the equivalent of money being placed in his account to which he had access, at least temporarily. There was evidence which a reasonable mind could accept as sufficient to support the conclusion that defendant lied to the bank in order to obtain the provisional credit. **State v. Buchanan, 783.**

FIREARMS AND OTHER WEAPONS

Possession by a felon—evidence of possession—insufficient—The trial court should have granted defendant's motion to dismiss a charge of possession of a firearm by a felon where a rifle was found seventy-five to one hundred yards from the spot to which a dog tracked defendant. No evidence was presented regarding the ownership of the rifle. Viewed in the light most favorable to the State, the evidence raised only a suspicion or conjecture and was not sufficient for an inference of actual or constructive possession of the rifle. **State v. Battle, 141.**

Possession of firearm by felon—constructive possession—disjunctive instruction—The trial court erred in a prosecution for possession of a firearm by a felon by instructing the jury that defendant could be found guilty based on constructive possession where the State presented no evidence of constructive possession. The analysis in *State v. Boyd*, 366 N.C. 548 (2013), applies only to plain error review and did not change the established presumption that the jury relied on an erroneous disjunctive review not supported by the evidence and objected to by defendant. Here, there was a reasonable possibility that the jury would have reached a different result without the erroneous instruction. **State v. Malachi, 170.**

GUARDIAN AND WARD

Parental rights—visitation suspended until mental health stabilized—The trial court did not err by allegedly failing to designate what parental rights, if any, respondent mother retained following the establishment of the minor child's guardianship. A parent's rights and responsibilities, apart from visitation, are lost if the order does not otherwise provide. The trial court's order specifically provided that respondent's visitation with the minor child was suspended until she showed that her mental health stabilized. **In re M.B., 437.**

HIGHWAYS AND STREETS

Toll roads—number of toll roads not reduced—A highway congestion management project that included tolls did not violate N.C.G.S. § 136-89.199, the Turnpike Statute, where the project did not reduce the number of non-toll general purpose lanes. **Widen177 v. N.C. Dep't of Transp., 390.**

Toll roads—Turnpike statute—not applicable—The Turnpike Statute, N.C.G.S. § 136-89(5), did not apply to a traffic congestion management project that was governed by N.C.G.S. § 136-89.18(39) et seq., the P3 Statute, which begins "Notwithstanding the provisions of N.C.G.S. § 89-136-89(a)(5)." **Widen177 v. N.C. Dep't of Transp., 390.**

IMMUNITY

Governmental—contract waiver—not applicable to tort claims—The precedent that government immunity is waived when a town enters into a valid contract was not extended to tort claims arising from a contract. **Providence Vol. Fire Dep't v. Town of Weddington, 126.**

Governmental—proprietary activity—The trial court did not err in case arising from a dispute between a town and its volunteer fire department by denying a motion to dismiss a fraud claim based on governmental immunity. There was an uncontroverted allegation in the second verified amended complaint that defendant-town's action was proprietary in nature. **Providence Vol. Fire Dep't v. Town of Weddington, 126.**

Law enforcement training officer—public official—A community college Basic Law Enforcement Training firearms instructor was sufficiently exercising the sovereign's power and his own experience, judgment, and discretion to be a public official in an action arising from an accident during firearms training. **Chastain v. Arndt, 8.**

Piercing the veil—firearms training accident—malice—constructive intent—In an action against a community college Basic Law Enforcement Training (BLET) firearms instructor that arose from an accident during firearms training, plaintiff's pleadings were sufficient to pierce defendant's public official immunity to allow suit to proceed against him in his individual capacity. Plaintiff alleged that that defendant, an experienced law enforcement officer and a certified BLET firearms instructor, pulled the trigger of a loaded deadly weapon while it was pointed at a student's abdomen. **Chastain v. Arndt, 8.**

Statutory immunity—governmental immunity—contract to lease school gymnasium to non-school group—third-party beneficiary—Although plaintiff contended defendant Board of Education waived governmental immunity by entering into a contract with defendant Carolina Basketball Club, the Board was required to do so under the mandate of N.C.G.S. § 115C-524(c). Although plaintiff claimed he was a third-party beneficiary of the contract, plaintiff's argument was premised upon common law immunity instead of statutory immunity. **Henderson v. Charlotte-Mecklenburg Bd. of Educ., 416.**

Statutory immunity—personal injury claims—lease of school gymnasium to non-school group—The trial court did not err by granting defendant Board of Education's motion to dismiss personal injury claims based on the doctrine of statutory immunity. The Board properly followed its own rules and regulations when it leased the school gymnasium to defendant Carolina Basketball Club on the date plaintiff referee was injured. **Henderson v. Charlotte-Mecklenburg Bd. of Educ., 416.**

INDICTMENT AND INFORMATION

Damage to personal property—lock and hasp—There was no variance between the charge alleged in the indictment and the evidence at trial in a prosecution for damage to personal property based on breaking and entering and damage to a lock. Defendant contended that the hasp affixed to the barn door was not owned by the church (Vision), which was allowed to use the building for storage, and which rented the adjacent building for services. Viewing the evidence in the light most favorable to the State, there was sufficient evidence that Vision owned the lock and that the lock was damaged. **State v. McNair, 178.**

INDICTMENT AND INFORMATION—Continued

Stealing from church storage building—capable of owning property—An indictment for injury to personal property owned by a church did not have a facial invalidity where defendant contended that the indictment did not allege that the victim (Vision) was capable of owning property. The indictment identified Vision as “a place of religious worship” and then subsequently listed Vision as the owner of the personal property that defendant damaged. **State v. McNair, 178.**

Tracking language of relevant statute—Indictments for two offenses, which involved the failure of a sex offender to register, each alleged the essential elements of the offense charged where they tracked the language of the relevant statute. **State v. Reynolds, 359.**

Variance with evidence—possession of burglary tools—There was not a fatal variance between an indictment for the possession of burglary tools and the evidence where the indictment only identified two implements of housebreaking but the instruction was that the jury could find defendant guilty if he possessed either of those two tools or a pair of work gloves found at the scene. The trial court properly instructed the jury on the essential elements of the offense; the mere fact that the trial court mentioned three implements of housebreaking rather than two does not constitute error. Even if there was a variance, possession of either of the two items mentioned was sufficient to convict defendant. **State v. McNair, 178.**

INJUNCTIONS

Irreparable harm—ripeness—federal court—impermissible collateral attack of underlying injunction—Whether the issuance of an injunction was necessary to avoid irreparable harm to a furniture manufacturer was an issue ripe for consideration in federal court. The owners of a closely held business who partnered with the furniture manufacturer could not mount an impermissible collateral attack on the underlying injunction over three years after its entry. **Plasman v. Decca Furniture (USA), Inc., 484.**

Preliminary—*lis pendens*—adequate remedy at law—The trial court erred by granting plaintiff’s motion for a preliminary injunction in a case arising from a dispute between a town and its volunteer fire department where plaintiff, the volunteer fire department, had filed a *lis pendens* against the fire station. The *lis pendens* provided an adequate remedy at law. **Providence Vol. Fire Dep’t v. Town of Weddington, 126.**

JURISDICTION

Action against a law enforcement instructor—official capacity—A claim against a Basic Law Enforcement Training firearms instructor in his official capacity was required to be asserted in the Industrial Commission under the Tort Claims Act. Such actions are within the exclusive and original jurisdiction of the Industrial Commission, not the Superior Court. The purchase of liability insurance by the community college at which the course was held had no bearing on the exclusive jurisdiction of the Industrial Commission. **Chastain v. Arndt, 8.**

Personal—forum selection clause—The trial court erred by concluding that a forum selection clause was not binding upon plaintiff where a New Jersey corporation had chosen a North Carolina corporation as a subcontractor to provide hazmat and storage supply buildings. The contract, interpreted pursuant to New Jersey law,

JURISDICTION—Continued

clearly contained a mandatory forum selection clause vesting exclusive jurisdiction in New York and New Jersey, not North Carolina. **US Chem. Storage, LLC v. Berto Constr., Inc.**, 378.

Personal—minimum contacts—A New Jersey corporation did not have sufficient minimum contacts with North Carolina to subject it to personal jurisdiction in North Carolina where the New Jersey corporation contracted with a North Carolina company for the manufacture and delivery of hazmat and supply storage buildings. There was no evidence that the New Jersey company knew that the buildings would be manufactured in North Carolina, and the mere fact that the New Jersey corporation had contracted with a North Carolina company a single time was not sufficient to create a reasonable anticipation that it may be haled into court here. **US Chem. Storage, LLC v. Berto Constr., Inc.**, 378.

Standing—declaratory judgment—monetary damages—injunction—Where plaintiff was required to register as a sex offender and his petition to terminate that registration was granted, plaintiff had standing to bring his civil claims for declaratory judgment and monetary damages against the government employees who, in their official capacities, had compelled plaintiff's sex offender registration. A declaratory judgment would clarify and settle one portion of the legal relations at issue, as well as afford relief from uncertainty and controversy. However, the trial court properly dismissed plaintiff's request for an injunction requiring a new legal process applicable to all future registrants that would have required statutory changes and allowed no benefit to plaintiff who was no longer registered. **Bunch v. Britton**, 659.

Subject matter jurisdiction—juvenile delinquency—juvenile court counselor signature—approved for filing language—The trial court erred by adjudicating a juvenile as delinquent where there was no subject matter jurisdiction. The second petition alleging the juvenile delinquent lacked the requisite signature and "Approved for Filing" language from the juvenile court counselor. **In re T.K.**, 443.

JURY

Supplemental jury instructions—continued deliberations after inability to reach verdict—The trial court did not commit plain error in a second-degree murder and possession of a firearm by a felon case by failing to give all supplemental jury instructions for a deadlocked jury. The trial court's instructions to continue deliberations did not coerce the jury into reaching its verdict. **State v. Harris**, 322.

Verdict—unanimity—multiple counts—instructions—There was a unanimous verdict in a case involving multiple charges and multiple counts rising from the sexual abuse of defendant's stepson. Although defendant contended that the organization of the offenses in the instructions by geographic location did not sufficiently identify the multiple offenses, the State presented evidence of offenses in each of the locations identified, defendant did not object to the instructions or the verdict sheets, and there was no indication that the jury was confused. **State v. Johnson**, 337.

LANDLORD AND TENANT

Counterclaims—failure to repair property—ambiguous agreement—unpaid rent—The trial court erred by granting summary judgment in favor of plaintiff tenants on defendant property owner's counterclaim for damages based on tenants' failure to repair the pertinent property where the nature of the parties' agreement

LANDLORD AND TENANT—Continued

regarding repairs was unclear. Although the owner also had a counterclaim for unpaid rent, that argument was dismissed where the owner made no argument in her brief regarding this counterclaim. **Lee v. Cooper, 734.**

MEDICAL MALPRACTICE

Motion to dismiss—Rule 9(j) certification—ordinary negligence—The trial court erred by dismissing the complaint of plaintiff patient, who fell off a surgical table during surgery, against all defendants under N.C.G.S. § 1A-1, Rules 12(b)(6) and 9(j) where plaintiff's claims were for ordinary negligence and not medical malpractice. Plaintiff was not required to comply with Rule 9(j). Further, the Court of Appeals did not improperly supplement plaintiff's complaint by addressing Rule 9(j) certification since it was necessary to determine whether the trial court erred in dismissing plaintiff's complaint under Rule 9(j). **Locklear v. Cummings, 457.**

MORTGAGES AND DEEDS OF TRUST

Foreclosure—latent ambiguity—description of property—extrinsic documents referenced in deed of trust—The trial court did not err by allowing a substitute trustee appointed by appellee bank to foreclose on a loan secured by property owned by appellants. The deed of trust's reference to "Section II-C" was a minor error that created only a latent ambiguity as to the description of the property, which could be rectified by examination of extrinsic documents referenced in the deed of trust. **In re Foreclosure of Thompson, 46.**

MOTOR VEHICLES

Hit and run—willfulness—instructions—taking victim to hospital—There was plain error and defendant's hit and run conviction was reversed where defendant left the scene to take the victim to the hospital and the trial court did not instruct the jury on willfulness. The only controverted issue was whether defendant willfully violated N.C.G.S. § 20-166(a) by not remaining at the scene or returning to it. To prevent future confusion, it was noted that while N.C.G.S. § 20-166(a) prohibits a driver from leaving the scene except to call for help, that authorization is expanded by the requirement in subsection (b) that drivers shall render reasonable assistance. Taking a seriously injured person to the hospital is not prohibited if reasonable under the circumstances. **State v. Scaturro, 828.**

Impaired driving—operating a motor vehicle—on a street, highway, or public vehicular area—sufficiency of the evidence—In an impaired driving prosecution arising from an encounter with an officer in a hotel parking lot, there was sufficient evidence for the jury to decide whether defendant had been driving the vehicle and whether he had driven it on a public highway, street, or public vehicular area. The officer had been called to the hotel because of robberies in the area, the engine of the vehicle was not running when the officer approached it, the vehicle was not in a parking space, defendant was sitting in the driver's seat, and defendant admitted that he had been driving the vehicle and described the route he had taken to the hotel in detail. **State v. Burris, 525.**

Impaired driving—warrantless—exigent circumstances—There were exigent circumstances supporting a warrantless blood draw in an impaired driving prosecution where the trial court found that the officer had a reasonable belief that a delay would result in the dissipation of the alcohol in defendant's blood. The reading on

MOTOR VEHICLES—Continued

the portable roadside breath test was .10; the officer believed that the reading was close to .08 after defendant was taken to the police department, refused the breathalyzer test, and made a telephone call; and the officer, who was the only officer at the scene, believed that it would have taken another hour and a half for another officer to arrive and to obtain a warrant. **State v. Burris, 525.**

Jury instruction—felonious serious injury by vehicle—driving under the influence—The trial court did not err in an impaired driving case, resulting in a car accident and death of the other driver, by instructing the jury with regard to the charge of felonious serious injury by vehicle. The trial court instructed the jury in conformity with the law, and a showing that defendant's action of driving while under the influence was one of the proximate causes was sufficient evidence. **State v. Cox, 306.**

NEGLIGENCE

Failure to properly restrain in child seat—not evidence of negligence or contributory negligence—The trial court did not abuse its discretion in an impaired driving case, resulting in a car accident and death of the other driver, by excluding evidence that the child passenger in the other car was not properly restrained in a child seat. A child restraint system violation is not evidence of negligence or contributory negligence. **State v. Cox, 306.**

Jury instruction—proximate cause—intervening negligence—The trial court did not err in an impaired driving case, resulting in a car accident and death of the other driver, by using the applicable pattern jury instruction and supplemental instruction for proximate cause. Defendant failed to show plain error was caused by the absence of a jury instruction on intervening negligence where the evidence showed that defendant drove through a red light while grossly impaired and caused a crash. **State v. Cox, 306.**

PLEADINGS

Amendment of complaint—no abuse of discretion—The trial court did not abuse its discretion by granting plaintiff's motion to amend its complaint. Even though plaintiff admitted that it had no factual basis for alleging waiver of governmental immunity through the purchase of liability insurance, the record did not show that the trial court abused its discretion by allowing the motion to amend. **Providence Vol. Fire Dep't v. Town of Weddington, 126.**

Motion for judgment on pleadings—breach of fiduciary duty—breach of contract—constructive fraud—fraud—law of the case doctrine—in pari delicto doctrine—The trial court did not err by granting defendant attorneys' motion for judgment on the pleadings or by dismissing plaintiff farmer's claims for breach of fiduciary duty, breach of contract, constructive fraud, and fraud (arising out of defendants' representation of plaintiff in federal district court over improper hog waste discharge) based upon the law of the case and *in pari delicto* doctrines. Plaintiff agreed to conceal an alleged "side deal" from the judge, and he lied under oath about the basis for his agreement to plead guilty. *Freedman I* established that plaintiff was *in pari delicto* with defendants and this holding became the law of the case. **Freedman v. Payne, 282.**

PLEADINGS—Continued

Motion for judgment on pleadings—declaratory judgment—injunctive relief—monetary damages—government employee—non-discretionary job function—In a civil case arising from plaintiff being compelled to register as a sex offender, the trial court did not err by granting a motion for judgment on the pleadings against a county employee who compelled plaintiff to register as a sex offender. Defendant was performing a non-discretionary function of his job. **Bunch v. Britton, 659.**

POLICE OFFICERS

Assaulting a public officer—general intent crime—spitting at another—hitting officer—The trial court did not err by denying defendant's motion to dismiss a charge of assaulting a government officer where defendant said he spit at another but hit the officer. In accord with *State v. Page*, 346 N.C. 689 (1997), assault on a government official is a general intent crime and N.C.G.S. § 14-33(c)(4) was satisfied. **State v. Mylett, 198.**

PREMISES LIABILITY

Slip and fall—wet moldy walkway—contributory negligence—ordinary care—The trial court erred in a premises liability case by granting summary judgment in favor of defendant homeowners association on the issue of negligence where plaintiff tenant slipped and fell on mold growth on a walkway in her condominium complex after an overnight rainfall. There was a genuine issue of material fact as to whether plaintiff exercised ordinary care to protect herself from injury despite her admission that she was not looking down at the walkway when she fell. **Rash v. Waterway Landing Homeowners Ass'n, Inc., 747.**

PROBATION AND PAROLE

Revocation—findings—The trial court did not make insufficient findings when revoking defendant's probation. The transcript and judgments reflected that the judge considered the evidence and the judge complied with the relevant statute, N.C.G.S. § 15A-1344(f), by finding good cause to revoke probation. The statute did not require that the trial court make any specific findings. **State v. Regan, 351.**

Revocation—subject matter jurisdiction—probation from another county—The Harnett County Superior Court had subject matter jurisdiction to revoke defendant's probation in a Sampson County case even though the record did not show a transfer of the case to Harnett County. Defendant was already on probation from a prior Harnett County case, her probation was supervised in Harnett County, she lived in Harnett County, and defendant violated her probation in Harnett County. **State v. Regan, 351.**

PROCESS AND SERVICE

Improper service—private process service—no evidence sheriff unable to fulfill duties—The trial court did not err by dismissing plaintiff patient's negligence claims against defendant hospital under N.C.G.S. § 1A-1, Rule 12(b)(5) based on improper service. Plaintiff used a private process service and there was no evidence that the sheriff was unable to fulfill the duties of a process server as required by statute. **Locklear v. Cummings, 457.**

PUBLIC OFFICERS AND EMPLOYEES

State employee—just cause for dismissal—unsatisfactory job performance—The administrative law judge erred by reversing a state employee's termination from his position as a laundry plant manager based on unsatisfactory job performance. The requirements of the North Carolina Human Resources Act under 25 NCAC 01J .0605(b) were met and respondent had just cause to dismiss petitioner based on his failure to become certified as a Laundry Manager and his failure to reconcile receipts and send information and invoices to a central office. **Cole v. N.C. Dep't of Pub. Safety, 270.**

SATELLITE-BASED MONITORING

Reasonable search—no determination—An order for lifetime satellite-based monitoring was reversed and remanded where the trial court did not make the reasonableness determination mandated by the U.S. Supreme Court in *Grady v. N.C.*, __U.S.__, 191 L.Ed. 459 (2015). **State v. Johnson, 337.**

SEARCH AND SEIZURE

Community caretaker doctrine—car doors open—intrusion into backyard—The trial court erred in a prosecution for possession of marijuana with intent to sell or deliver by relying on the community caretaker doctrine where the officer approached defendant's back door after seeing a car with its doors open in defendant's driveway. The facts did not justify a warrantless intrusion; moreover, there are many innocent reasons to leave the doors open on a vehicle in a driveway and there were alternatives the officer could have used. **State v. Huddy, 148.**

Denial of motion to suppress—plain error—Where the trial court erroneously denied defendant's motion to suppress firearms seized in a search of his house, the error had a probable effect on the jury's decision to convict defendant of possession of a firearm by a felon and amounted to plain error. Without this evidence, there would have been no evidence of criminal conduct. **State v. Powell, 590.**

Knock and talk doctrine—curtilage of home—The trial court erred in a prosecution for possession of marijuana with intent to sell or deliver by relying on the knock and talk doctrine to justify an officer's warrantless search of the curtilage of defendant's home. The officer did more than knock and talk: he ran a license plate not visible from the street, checked windows for signs of a break-in, and walked around the entire residence to "clear" the sides of the home before approaching the back door, which was inside a chain link fence. **State v. Huddy, 148.**

Search of parolee's home—parole officer present—not for purposes of parole—On the specific facts of this case, there was plain error where the trial court denied a parolee's motion to suppress firearms seized from his house by a violent crime task force of U.S. Marshals accompanied by two parole officers (but not defendant's parole officer). N.C.G.S. § 15A-1343(b)(13) has been amended to require that warrantless searches by a probation officer be for purposes directly related to probation supervision. The evidence presented by the State was simply insufficient to satisfy the requirements of the statute. **State v. Powell, 590.**

SENTENCING

Prior record level—possession of firearm by felon—prior federal offense—substantially similar to N.C. defense—The trial court's prior record determination

SENTENCING—Continued

for a conviction for possession of a firearm by a felon was correct where defendant had pleaded guilty in federal court to being a felon in possession of a firearm. The federal offense of being a felon in possession of a firearm was substantially similar to the North Carolina offense of possession of a firearm by a felon. Subtle distinctions between the two offenses did not override the conclusion that both criminalized essentially the same conduct. **State v. Riley, 819.**

Remand—lesser included offense—Where a conviction for breaking and entering a place of religious worship was reversed for insufficient evidence that the building was a place of worship, the matter was remanded for resentencing on the lesser-included offense of felony breaking or entering. **State v. McNair, 178.**

Restitution—amount—evidence not sufficient—An order of restitution was reversed and remanded where there was no evidence to support the amount. **State v. Whitehurst, 369.**

SEXUAL OFFENDERS

Change of address—failure to report—The trial court correctly denied the motion of sexual offender to dismiss charges involving the failure to register his change of address after he was released from jail. Defendant had registered prior to being jailed for 30 days for contempt. The N.C. Supreme Court has not established a minimum time for the facility imprisoning a registrant to be considered a new address. The defendant in this case was not merely in jail overnight. **State v. Reynolds, 359.**

Lifetime registration—findings—A lifetime order to register as a sexual offender was remanded for proper findings where defendant was convicted of sexual offense with a child and sexual activity by a substitute parent and the trial court found that the offenses were reportable and aggravated. Defendant acknowledged on appeal that he was convicted of reportable offenses but challenged the findings that he was convicted of an aggravated offense. The sexual offenses here may or may not involve the penetration statutorily required for an aggravated offense. **State v. Johnson, 337.**

STATUTES OF LIMITATION AND REPOSE

Breach of fiduciary duty—fraud—constructive fraud—outdated uncashed check in storage—due diligence—In a case involving the discovery of an outdated uncashed check found in storage files, the trial court did not err by concluding that plaintiff real estate company owner's claims for breach of fiduciary duty, fraud, and constructive fraud against defendants Synergy and JBS Liberty were barred by the applicable statute of limitations. Plaintiff's failure to use due diligence in discovering the alleged fraud was established as a matter of law. **Wilson v. Pershing, LLC, 643.**

TAXATION

Highway tolls—not a tax—The Court of Appeals rejected plaintiff's argument that the General Assembly unconstitutionally delegated its power to tax by authorizing tolls as a part of a highway congestion management program. It has previously been settled in N.C. that a toll is not a tax. **Widen177 v. N.C. Dep't of Transp., 390.**

TERMINATION OF PARENTAL RIGHTS

Grounds—failure to make adjudicatory findings—safe home—incarceration—The trial court erred by concluding that grounds existed to terminate respondent father's parental rights where it failed to make any adjudicatory findings concerning the alleged failings of respondent to provide a safe home based on his incarceration. **In re J.D.A.D., 53.**

Grounds—sufficiency of findings and conclusions—circumstances at time of hearing—The trial court's order terminating respondent mother's parental rights was vacated where the trial court's findings and conclusions did not adequately account for respondent's circumstances at the time of the termination hearing with regard to either the fitness of respondent to care for the children or the nature and extent of her reasonable progress. **In re A.B., 29.**

TRIALS

Civil—request for jury trial—Asheville Civil Service Board—Only the petitioner, the City of Asheville, had the right to request a jury trial in an appeal from the Asheville Civil Service Board to the Buncombe County Superior Court, and the trial court erred by not dismissing respondent's request for a jury trial. Applying the statutory construction rule that the specific is favored over the general, the language in N.C. Session Law 2009-401 naming petitioner as the only party who may request a jury trial controlled the more general language that the matter shall proceed to trial as any other civil action. **City of Asheville v. Frost, 258.**

Motion to consolidate cases—exclusive authority of presiding trial judge—Judge Hunt erred in a case arising from the unsuccessful sale of a 2013 Ford pickup truck by granting plaintiff Boone Ford's motion to consolidate cases. Judge Coward, who presided over the trial, had the exclusive authority to consolidate the actions. The order of consolidation was vacated and remanded to the superior court. **Boone Ford, Inc. v. IME Scheduler, Inc., 1.**

VENUE

Chain restaurant—multiple counties—The trial court erred by transferring venue from Durham County to Wake County as a matter of right in a negligence action involving a restaurant that served cheesecake which contained nuts. Defendant, though formed in California, maintained a registered office in N.C. and was thus a domestic corporation, and defendant did business in both counties. Durham County was a proper venue and the trial court erred by changing venue as a matter of right. **Terry v. Cheesecake Factory Rests., Inc., 216.**

WILLS

Handwritten notation on will—holographic codicil—present testamentary intent—sufficiency of words standing alone—The trial court erred by granting summary judgment in favor of the propounder where the record established that a handwritten notation on decedent's will was not a valid holographic codicil. Even assuming arguendo that the notation was written entirely by decedent, it did not establish a present testamentary intention rather than a plan for a future change, and it referred to another part of the will. Holographic notes that refer to another part of the will are not valid holographic codicils. **In re Will of Allen, 692.**

WORKERS' COMPENSATION

Additional medical treatment claim—time barred—The Industrial Commission did not commit prejudicial error in a workers' compensation case by concluding that a claim for additional medical treatment was time-barred by N.C.G.S. § 97-25.1. The right to medical compensation terminates two years after the employer's last payment of medical or indemnity compensation. **Anders v. Universal Leaf N. Am.**, 241.

Causation—additional medical and indemnity benefits—failure to give Parsons presumption—The Industrial Commission did not commit prejudicial error in a workers' compensation case by denying plaintiff employee's claims for additional medical and indemnity benefits related to bilateral hernias where they were not causally related to his prior compensable hernia injury. Although the Commission failed to give plaintiff the benefit of the *Parsons* presumption, a reversal on that issue would not change the outcome. **Anders v. Universal Leaf N. Am.**, 241.

Findings—use of “may”—In a case remanded on other grounds, the Industrial Commission's use of “may” when finding that plaintiff may have initially performed work-related activities, along with the lack of a finding that plaintiff was credible, left the Court of Appeals to guess what the Commission would have done if it had correctly applied precedent. **Weaver v. Dedmon**, 622.

Forklift driver doing donuts—misapprehension of law—In a case decided on another issue, the Court of Appeals pointed out that the Industrial Commission's finding that an injured forklift driver's decision to do donuts constituted an extraordinary deviation from his employment indicated a misapprehension of the law. The finding reflected a legal analysis applicable only to incidental activity not related to the employment. **Weaver v. Dedmon**, 622.

Forklift driver—donuts—imputed negligence analysis—erroneous—In a Workers' Compensation case involving a forklift driver injured when the forklift turned over while he was doing donuts, the Industrial Commission acted under a misapprehension of law by grounding its findings in the speed and manner in which plaintiff operated the forklift, appearing to impute negligence, rather than addressing whether plaintiff operated the forklift in furtherance of his job duties. **Weaver v. Dedmon**, 622.

Injury in the course of employment—findings—inconsistent—remanded—The question in a Workers' Compensation case of whether an injury to a forklift driver occurred in the scope of his employment was remanded to the Industrial Commission where the findings were inconsistent, too material to be disregarded as surplusage, and the question could not be resolved by reference to other findings. The injured forklift driver may have been turning donuts when the forklift turned over. **Weaver v. Dedmon**, 622.

ZONING

Conditional use permit—solar farm—prima facie showing—failure to rebut—The superior court erred by affirming the decision of respondent Board of Commissioners to deny petitioner companies' application for a conditional use permit (“CUP”) to construct a solar farm where petitioner presented a prima facie showing that it was entitled to issuance of a CUP under the ordinance and the opponents failed to meet their burden to rebut it. Speculative lay opinions and vague assertions did not constitute competent evidence to overcome the applicant's prima facie showing. **Innovative 55, LLC v. Robeson Cty.**, 714.

