NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 254

20 JUNE 2017

1 AUGUST 2017

RALEIGH
2019

CITE THIS VOLUME

254 N.C. APP.

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CASES REPORTED WITHOUT PUBLISHED OPINIONS

CASES REPORTED WITHOUT PUBLISHED OPINIONS

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

CHRISTINE N. BREWINGTON, PETITIONER

v.

NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, STATE BUREAU OF INVESTIGATION, RESPONDENT

No. COA16-913

Filed 20 June 2017

1. Public Officers and Employees—career state employee—wrongful termination—consumption of alcoholic beverages while on duty—untruthfulness

An Administrative Law Judge (ALJ) did not err by denying the motion of a terminated State employee (petitioner) to dismiss at the close of the Department of Public Safety's evidence. Petitioner pointed to a single sentence taken out of context from the ALJ's comments stating he was not entirely convinced just cause was shown. He was merely saying that he also needed to hear petitioner's side of the story due to the nature of the case.

2. Evidence—wrongful termination—sufficiency of findings of fact—alcohol consumption while on duty

An Administrative Law Judge's (ALJ) findings were supported by sufficient evidence in an wrongful termination case involving an SBI agent dismissed for drinking on duty. Some of the statements relied upon by petitioner to challenge the findings were excluded and not challenged on appeal or were relied upon by the ALJ to a limited extent only. As to the other evidence, conflicts were for the ALJ to resolve.

3. Evidence—wrongful termination—sufficiency of conclusion of law—alcohol consumption while on duty

In a wrongful termination case involving the dismissal of a Special Agent of the State Bureau of Investigation for consuming alcoholic beverages while on duty and being untruthful during the internal investigation process, the administrative law judge (ALJ) did not err by making a conclusion of law that petitioner consumed an alcoholic beverage during the pertinent lunch. The subparagraphs of the conclusion that were material were restatements of the findings of fact, which were not challenged successfully. The findings supported the conclusion that petitioner consumed alcohol while on duty.

4. Evidence—witness testimony—exhibits—reputation for honesty and integrity

In a wrongful termination case involving the dismissal of a Special Agent of the State Bureau of Investigation for drinking on duty, the administrative law judge (ALJ)'s findings were legally sufficient. The probative value of the character evidence was for the ALJ to determine. Furthermore, while the ALJ allegedly failed to consider testimony from seven witnesses and dozens of pages of exhibits concerning petitioner's reputation for honesty and integrity, the ALJ's final decision revealed that both were in fact considered.

5. Administrative Law—contested case—detailed findings of fact—facts material to settlement of dispute

In a wrongful termination case involving the dismissal of a Special Agent of the State Bureau of Investigation for drinking on duty, the administrative law judge (ALJ) did not err by allegedly failing to make sufficiently detailed findings of fact on all of the relevant issues. The ALJ was not obligated to find facts based on petitioner's view of the record, and was only required to make findings on those facts necessary to support its conclusions.

6. Administrative Law—contested case—findings of fact—North Carolina Personnel Manual

In a wrongful termination case involving the dismissal of a Special Agent of the State Bureau of Investigation (SBI) for drinking on duty, the administrative law judge (ALJ) did not err by not making findings on every just cause factor set forth in Section 7 of the North Carolina Personnel Manual.

7. Evidence—wrongful termination—method of documentation—typewritten summary—internal investigation interview

In a wrongful termination case involving the dismissal of a Special Agent of the State Bureau of Investigation (SBI) for drinking on duty and being untruthful during the internal investigation process, the administrative law judge did not err by concluding that a SBI agent's typewritten summary of petitioner's internal investigation interview was not defective even though the interview was not recorded on tape or video. The recording of non-custodial SBI interviews such as this is prohibited, and there is nothing requiring internal investigations in law enforcement to be recorded in specific fashion. Furthermore, another agent confirmed that the typewritten summary was accurate and petitioner failed to specify any evidence that was lost or destroyed.

8. Evidence—medications—medical, psychological, or alcohol related issue—no relation to conduct causing dismissal

In a wrongful termination case involving the dismissal of a Special Agent of the State Bureau of Investigation (SBI) for drinking on duty and then not being truthful during the internal investigation, the administrative law judge did not err by concluding the SBI was not required to determine whether petitioner was experiencing a medical, psychological, alcohol, or other issue. There was no indication that petitioner's medical conditions or the medicines she took to control them were related to the conduct that caused her dismissal.

9. Constitutional Law—due process—notice—right to present live witness testimony—internal grievance hearing

In a wrongful termination case involving the dismissal of a Special Agent of the State Bureau of Investigation for drinking on duty, the administrative law judge did not err by concluding that petitioner received due process of law even though petitioner alleged that she was not given sufficient notice of the date of her alleged offense and was not allowed to present live testimony during her internal grievance hearing. The initial erroneous dates did not impede petitioner's ability to respond at a meaningful time and her ability to fully prepare was not prejudiced. Further, nothing suggested that the denial of the request to present live testimony deprived her of a fair hearing when the written summaries of the statements of those witnesses were considered and one of the witnesses did not appear despite being subpoenaed.

10. Administrative Law—contested case—just cause factors

In a wrongful termination case involving the dismissal of a Special Agent of the State Bureau of Investigation for drinking on duty, the administrative law judge (ALJ) did not err by concluding that a deputy director's testimony was sufficient to establish that just cause factors were considered by the director. There is no requirement that the person who makes the final decision to discipline a public employee must testify at a contested case hearing. The ALJ was presented with all the information that was necessary to determine whether petitioner's actions constituted just cause for her dismissal.

Chief Judge McGEE concurring in separate opinion.

Appeal by petitioner from final decision entered 29 March 2016 by Senior Administrative Law Judge Fred G. Morrison, Jr. in the Office of Administrative Hearings. Heard in the Court of Appeals 3 April 2017.

The McGuinness Law Firm, by J. Michael McGuinness, for petitioner-appellant.

Attorney General Joshua H. Stein, by Special Deputy Attorney General J. Joy Strickland, for respondent-appellee.

Essex Richards, P.A., by Norris A. Adams, II, for amicus curiae North Carolina State Lodge of the Fraternal Order of Police.

ZACHARY, Judge.

Petitioner Christine N. Brewington appeals from a Final Decision of the North Carolina Office of Administrative Hearings, which concluded that respondent North Carolina Department of Public Safety (DPS), State Bureau of Investigation (SBI) had just cause to dismiss Brewington from her position as a Special Agent with the SBI. For the reasons that follow, and after careful analysis, we affirm the decision of the administrative law judge.

I. Background

Brewington began working as a Special Agent for the SBI in 1998, and she held that position until her dismissal in June 2015. Prior to her dismissal, Brewington was working in the Diversion and Environmental Crimes Unit. On 3 September 2014, Brewington was assigned to conduct

interviews with several employees of a pharmacy located in Lillington, North Carolina. The assignment required Brewington to work with Elizabeth Collier, an investigator with the North Carolina Pharmacy Board, in connection with a drug diversion case. This was Collier's first case as an investigator with the Pharmacy Board.

After concluding the interviews between 1:45 and 2:00 p.m., Brewington and Collier drove separately to a nearby restaurant called the Sports Zone, where Brewington had dined on prior occasions, for a working lunch. While there, Martha Sullivan waited on Brewington and Collier's table. Sullivan would usually fix Brewington a beverage known as a "Sprite Delight," unless Brewington requested something else to drink. Brewington described the Sprite Delight as a non-alcoholic beverage, pinkish in color, which contained "cranberry juice . . . along with pineapple juice or grapefruit juice." Brewington recalled that she ordered her "usual drink[,]" a Sprite Delight, during her 3 September 2014 lunch with Collier.

According to Collier, Brewington ordered "what appeared to be a cocktail[,]" which was pink and was served in a "stemmed bowl-type glass, goblet style." Brewington drank the beverage as she and Collier ate lunch. Collier also observed that Brewington ordered a second drink at the end of the meal that had the same appearance. Toward the end of the meal, Brewington's friend, Mike Mansfield, arrived at the Sports Zone and joined Brewington and Collier. Brewington recalled that Mansfield ordered a beer immediately after he sat down, but Collier did not observe Mansfield order any food or drinks and indicated that she would have remembered seeing beer on the table. According to Brewington, she did not consume any alcohol during lunch, but "throughout the time that we were there, [Mansfield] continued to order another beer. I do recall him ordering a mixed drink, but I don't know what the mixed drink was."

Shortly after Mansfield's arrival, Collier prepared to leave the restaurant. Because the Pharmacy Board authorized its representatives to pay for meals they shared with members of other state agencies, Collier offered to pay for Brewington's lunch. However, before she paid the bill, Collier informed Brewington that while she could pay for the food, she could not use her Pharmacy Board credit card to pay for alcohol. Brewington did not attempt to argue with or correct Collier's impression that the beverages Brewington had ordered contained alcohol. Collier "made a point to separate [the alcohol] from [her] portion of the bill[,]" paid for one order of loaded potato chips and one order of fish tacos at 3:28 p.m., and then left the restaurant "pretty much right after" paying the bill.

Brewington remained at the restaurant with Mansfield for approximately thirty minutes after Collier's departure. Mansfield had forgotten his wallet, so Brewington offered to "pay for his meal or whatever he had ordered, and he could just pay [her] back at a later date." At 3:57 p.m., Brewington used her personal credit card to pay for one order of loaded potato chips, "3 Coors Light" beers (totaling $9.87), and "2 Special Mixed Drink 7['s]" (totaling $15.98).

Eight months after her 3 September 2014 lunch with Brewington, Collier audited a SBI Diversion School course. After diversion classes had concluded, Collier attended a social dinner with a group of course participants, one of whom was SBI Special Agent Steven[1] Smith. During a conversation regarding professionalism, Collier mentioned to Special Agent Smith that she had observed Brewington consume alcohol during their lunch at the Sports Zone. Collier recalled that the incident "just kind of came up in conversation." Special Agent Smith informed Collier that he would have to report the issue of Brewington's alleged misconduct to his supervisor, as the SBI has a strict policy that prohibits the consumption of alcohol by on-duty agents.[2] Once Special Agent Smith reported Collier's allegations to his supervisor, the issue worked its way through the SBI's chain of command. Eventually, the Special Agent in Charge of the SBI's Special Investigations Unit, Kanawha Perry, was assigned to investigate the incident.

By letter dated 11 May 2015, Special Agent in Charge Perry notified Brewington that she was the subject of an internal investigation. However, the letter contained an error as to the date of the incident: "The nature of the allegation is as follows: Unacceptable Personal Conduct based on an allegation that in or around *January 2015* you consumed an alcoholic beverage while on duty." (Emphasis added). Special Agent in Charge Perry and Assistant Special Agent in Charge Cecil Cherry interviewed Brewington on 20 May 2015. Prior to the beginning of the interview, Special Agent in Charge Perry advised Brewington of her *Garrity* rights[3] and corrected the date of the alleged offense date

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1. Special Agent Smith's first name appears as both "Steven" and "Stephen" in the record. We use the former spelling because that is how Collier spelled it at Brewington's contested case hearing.

2. An exception to this rule is when an agent is working in an undercover capacity and becomes involved in an unavoidable situation where consumption of alcohol is necessary.

3. In *Garrity v. New Jersey*, the United States Supreme Court held that statements elicited as a result of compelling a choice between self-incrimination and loss of a public job are inadmissible in criminal proceedings. 385 U.S. 493, 500, 17 L. Ed. 2d 562, 567

to 3 September 2014. After the date in question was correctly identified, Brewington stated that she did not need extra time to prepare for the interview. Because SBI policy generally prohibits the use of tape recorders during non-custodial interviews, Special Agent in Charge Perry took notes on Brewington's answers and used these notes to generate a typewritten report.

According to Special Agent in Charge Perry's report, Brewington was asked if she took any prescription medications that affected her ability to use a firearm; in response, she identified five medications that she was taking to control various health conditions, and she stated that none of the medicines affected her cognitive abilities or her ability to use a firearm. The agents then proceeded to ask Brewington questions concerning what occurred at the Sports Zone on 3 September 2014. Brewington indicated that she drank two Sprite Delights; that she did not consume any alcohol; that Mansfield arrived near the end of the lunch; that "she [could not] recall what Mansfield had to drink or eat"; that Mansfield "usually gets water"; and that Mansfield " 'rarely' dr[ank] a beer or two and she [could not] recall if he bought a beer that day."

Later in the interview, the agents produced Brewington's 3 September 2014 receipt from the Sports Zone. Brewington confirmed that her credit card was used to pay the bill, and that her signature appeared on the receipt. Brewington also agreed that based on the price of the two mixed drinks (approximately $8.00 apiece), the drinks must have contained alcohol. However, after explaining that Sullivan never charged her for Sprite Delights, Brewington maintained that she had not ordered any alcohol and that it was possible that Mansfield had ordered the two mixed drinks and the three beers listed on the receipt.

At that point in the interview, Assistant Special Agent in Charge Cherry obtained Mansfield's cell phone number from Brewington, went to another room, and called Mansfield. Upon his return to the interview room, Assistant Special Agent in Charge Cherry reported that, according to Mansfield, no alcohol was ordered at the lunch, but if he did consume an alcoholic drink at the Sports Zone, it would have been a beer. After considering Mansfield's statement to Assistant Special Agent in Charge Cherry and noticing certain discrepancies in Brewington's statements, Special Agent in Charge Perry informed Brewington that she would be

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(1967) ("We now hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic.").

required to undergo a polygraph examination. The results of that examination included a determination that Brewington had answered the following question untruthfully: "Did you drink any alcohol at lunch on September 3, 2014? (Answer: 'No')[.]" The polygraph report also contained statements that Brewington made during a post-examination interview:

> [Special Agent] Brewington was interviewed post examination by [Assistant Special Agent in Charge] Smith. [Special Agent] Brewington stated that her memory was affected by some of her medical conditions. She further stated that she possibly could have consumed a sip of alcohol from her companion's drink and she could not remember. After thinking about the incident further, [Special Agent] Brewington stated she was "sure" she did not consume any alcohol at lunch on that particular date and time.

By letter dated 3 June 2015, the SBI notified Brewington that she was required to attend a pre-disciplinary conference with SBI Special Agent in Charge W. Ty Sawyer. The specific allegations to be discussed were that Brewington had consumed alcohol while on official duty and had been untruthful during the internal investigation. Among the conference's purposes were to allow Brewington to present facts that would counter the allegations or support her case and to respond with any information that was relevant to the question of whether disciplinary action, up to and including dismissal, was proper. The pre-disciplinary Conference was held on 10 June 2015. The next day, the SBI issued a letter informing Brewington of "Management's decision . . . to dismiss [her] effective June 11, 2015, based on Unacceptable Personal Conduct." The dismissal decision was based upon Brewington's consumption of alcoholic beverages while on duty, and her untruthfulness during the internal investigation process.

After receiving the dismissal letter, Brewington appealed the SBI's decision to the DPS's Employment Advisory Committee (EAC). As part of the grievance process, Brewington submitted two "Employee/Witness" forms requesting that Sullivan and Mansfield be permitted to appear as voluntary witnesses at the EAC Hearing. This request was denied. On 25 August 2015, the EAC heard Brewington's appeal, and considered the internal investigation file, the polygraph examination report, and other statements and evidence that Brewington presented on her own behalf. The EAC also considered the statements that Sullivan and Mansfield gave to the SBI. In a memorandum dated 7 September 2015, the EAC "found that [while] the dismissal letter specified that Ms. Brewington was dismissed for consuming alcohol, . . . the evidence presented during

the hearing indicated that she purchased alcohol on duty." The EAC concluded that this distinction was significant. Although the EAC recognized that "both purchasing and consuming alcohol on duty . . . constituted Unacceptable Personal Conduct[,]" it ultimately recommended that Brewington's dismissal be overturned.

Once EAC's memorandum was issued, the SBI's Deputy Director, Janie Sutton, was charged with issuing a final recommendation to SBI Director B.W. Collier concerning Brewington's dismissal. In carrying out this responsibility, Deputy Director Sutton considered the internal investigation file, spoke with Special Agent in Charge Perry and his staff, consulted with the SBI's legal counsel, and reviewed the EAC's memorandum. Deputy Director Sutton also spoke with Brewington's immediate supervisor and reviewed the portion of Brewington's personnel file that pertained to three previous disciplinary actions. Brewington had been given written warnings for "Unsatisfactory Job Performance" in August 2013 and September 2014, respectively, for failing to "properly store and secure evidence" that was under her control and for failing to "complete criminal investigative reports and case assignments in a timely manner." On 4 March 2015, Brewington was demoted from the position of "Agent III to Agent II" for, *inter alia*, failure to comply with certain North Carolina criminal discovery statutes (by neglecting to turn over certain discoverable materials to the appropriate District Attorneys' Offices in several cases) and for a continuing failure to timely complete investigative reports and activities. After completing her independent inquiry into the matter and conferring with Director Collier, Deputy Director Sutton recommended that Brewington's dismissal be upheld.

On 28 September 2015, Director Collier issued the SBI's final agency decision, which upheld Brewington's dismissal. Director Collier's decision was based upon the following rationale:

> The facts indicate that you not only violated SBI policy and procedure by consuming alcoholic beverages during the work day; but you were not truthful during the internal investigation process, which is also a violation of SBI policy and procedure. Each of the offenses standing alone is just cause for your dismissal for [unacceptable] personal conduct, especially in light of your disciplinary history. You could just as well be dismissed for unsatisfactory job performance. . . .
>
> Given the fact that you have been given multiple opportunities to conform your performance and conduct to the expected norms of this organization, and you have failed to

> do so, I do not believe that another demotion or even a suspension or written warning will serve any additional purpose.

On 21 October 2015, Brewington filed a petition for a contested case hearing in the OAH. The case was heard on 11 and 12 January 2016 before Senior Administrative Law Judge (ALJ) Fred G. Morrison, Jr. In a Final Decision entered 29 March 2016, ALJ Morrison made the following pertinent findings of fact:

> 14. Collier recalled a man arriving toward the end of her lunch with Petitioner, who stayed at the table briefly but he did not sit down or order food and drinks. Collier left shortly after the man arrived. Collier's recollection of her interaction with this man is consistent with Petitioner's oral statements to Special Agent in Charge Kanawha Perry (SAC Perry) made during her May 20, 2015, investigative interview that her friend Michael Mansfield arrived near the end of Collier's and her lunch after Collier and she had already eaten their lunch and that "Mansfield met Collier just before she left."
>
> 15. Collier did not remember seeing the man order mixed drinks or drink beer, or there being any beer on the table during her time at lunch. She only recalls seeing the two mixed drinks ordered by Petitioner while they ate lunch together. Collier opined that had the man sat down and ordered and consumed beer she would have remembered it. Collier's testimony in this regard is credible.
>
> . . .
>
> 22. Petitioner's testimony that Mansfield arrived at the restaurant "around three o'clock, if not a little before" . . . ; that Mansfield came in about midway through her meal with Collier and sat down while they finished their meal . . . ; and that Mansfield ordered a beer as soon as he sat down and then "continued to order another beer" while Petitioner and Collier were finishing their meal . . . is not credible in that it conflicts with the statements made by Petitioner to SAC Perry listed in Finding of Fact 14 and with Collier's testimony listed in Findings of Fact 14 and 15. Collier's testimony is more credible.
>
> 23. Petitioner's testimony that her friend Mike Mansfield ordered and consumed all of the alcoholic beverages listed

> on the Sports Zone receipt that she paid with her debit card is not credible, in that it is not reasonable to believe that Mansfield ordered and/or consumed three beers and two mixed alcoholic drinks in the approximate 30 minute time period between 3:28 p.m. when Collier paid her bill and left the restaurant, and 3:57 p.m. when Petitioner paid her bill.
>
> 24. It is more likely than not that Mansfield ordered and drank the three beers while Petitioner drank her second mixed drink after Collier left the restaurant. . . .
>
> 28. It is more likely than not that Petitioner drank alcoholic beverages while armed and on official duty on September 3, 2014, and made untrue statements to SBI agents during the course of her investigative interview on May 20, 2015. . . .
>
> 31. Based on all of the information that she reviewed, Sutton recommended to Director Collier that Petitioner be dismissed. Director Collier adopted that recommendation and designated authority to Sutton to sign the agency's final agency decision dismissing her. She was dismissed from the SBI for unacceptable personal conduct for consuming alcohol while on duty and being untruthful when questioned about the matter during the internal investigation. . . .
>
> 32. Sutton, on behalf of the SBI, considered the seriousness of the offenses and Petitioner's disciplinary history which included multiple written warnings (for unsatisfactory work performance) and a recent demotion (for unacceptable personal conduct and unsatisfactory job performance) in determining the appropriate sanction for Petitioner's unacceptable personal conduct. Based on these considerations, Sutton determined that Petitioner's conduct warranted dismissal and she continued to hold that position on behalf of the SBI at hearing.

Based on these and other findings, ALJ Morrison concluded that "substantial evidence" presented at the hearing established that Brewington "consumed an alcoholic beverage during her September 3, 2014 lunch" with Collier, and that Brewington "made untrue statements to SBI agents during her investigative interview on May 20, 2015[.]" ALJ Morrison then concluded that DPS had shown by the preponderance of the

evidence that it had just cause to terminate Brewington for unacceptable personal conduct.

Brewington now appeals from ALJ Morrison's Final Decision.

II. Standard of Review

Section 150B-51 of our State's Administrative Procedure Act (APA) establishes the scope and standard of review that we apply to the final decision of an administrative agency. *Harris v. N.C. Dep't of Pub. Safety*, No. COA16-341, __ N.C. App. __, __, 798 S.E.2d 127, 133, 2017 WL 900037 (Mar. 7, 2017). The APA authorizes this Court to affirm or remand an ALJ's final decision, N.C. Gen. Stat. § 150B-51(b) (2015), but such a decision may be reversed or modified only

> if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or [ALJ];
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

Id. The particular standard applied to issues on appeal depends upon the nature of the error asserted. "It is well settled that in cases appealed from administrative tribunals, questions of law receive *de novo* review, whereas fact-intensive issues such as sufficiency of the evidence to support an agency's decision are reviewed under the whole-record test." *N. Carolina Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 659, 599 S.E.2d 888, 894 (2004) (brackets, quotation marks and citation omitted).

To that end, we review *de novo* errors asserted under subsections 150B-51(b)(1)-(4). N.C. Gen. Stat. § 150B-51(c) (2015). Under the *de novo* standard of review, the reviewing court "considers the matter anew and freely substitutes its own judgment[.]" *Carroll*, 358 N.C. at 660, 599 S.E.2d at 895 (citation, internal quotation marks, and brackets omitted).

When the error asserted falls within subsections 150B-51(b)(5) and (6), this Court must apply the "whole record standard of review." N.C. Gen. Stat. § 150B-51(c) (2015). Under the whole record test,

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

Carroll, 358 N.C. at 660, 599 S.E.2d at 895 (internal citations and quotation marks omitted). " 'Substantial evidence' means relevant evidence a reasonable mind might accept as adequate to support a conclusion." N.C. Gen. Stat. § 150B-2(8c) (2015).

"In a contested case under the APA, as in a legal proceeding initiated in District or Superior Court, there is but one fact-finding hearing of record when witness demeanor may be directly observed." *Carroll*, 358 N.C. at 662, 599 S.E.2d at 896 (citation and internal quotation marks omitted). It is also well established that

> [i]n an administrative proceeding, it is the prerogative and duty of [the ALJ], once all the evidence has been presented and considered, to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence. The credibility of witnesses and the probative value of particular testimony are for the [ALJ] to determine, and [the ALJ] may accept or reject in whole or part the testimony of any witness.

City of Rockingham v. N.C. Dep't of Envt. & Natural Res., Div. of Water Quality, 224 N.C. App. 228, 239, 736 S.E.2d 764, 771 (2012). Our review, therefore, must be undertaken "with a high degree of deference" as to " '[t]he credibility of witnesses and the probative value of particular testimony[.]' " *N.C. Dep't of Pub. Safety v. Ledford*, __ N.C. App. __, __, 786 S.E.2d 50, 64 (2016) (citation omitted), *review allowed*, __ N.C. __, 792 S.E.2d 152 (2016). As our Supreme Court has explained, "the ALJ who conducts a contested case hearing possesses those institutional advantages that make it appropriate for a reviewing court to defer to his or her findings of fact." *Carroll*, 358 N.C. at 662, 599 S.E.2d at 896 (internal citation and quotation marks omitted).

III. Just Cause

Brewington's overarching argument on appeal is that ALJ Morrison erred in concluding that DPS had just cause to dismiss Brewington from employment. However, Brewington's attack on DPS's just cause determination, and on ALJ Morrison's consideration of it, takes many different forms. As such, we begin with an explanation of North Carolina's essential just cause principles.

Brewington was a career State employee subject to the North Carolina Human Resources Act. Our legislature has determined that "[n]o career State employee subject to the . . . Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause." N.C. Gen. Stat. § 126-35(a) (2015). Under the North Carolina Administrative Code, "just cause" for the disciplinary action taken may be established upon a showing of an employee's "unacceptable personal conduct." 25 NCAC 1J.0604(b)(2) (2016). Unacceptable personal conduct is defined, in pertinent part, as

> (a) conduct for which no reasonable person should expect to receive prior warning;
>
> . . .
>
> (d) the willful violation of known or written work rules; [or]
>
> (e) conduct unbecoming a state employee that is detrimental to state service[.]

25 NCAC 1J.0614(8) (2016).

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

In *Carroll*, our Supreme Court declared that every determination of whether a public employer's decision to discipline its employee was supported by just cause "requires two separate inquiries: first, whether the employee engaged in the conduct the employer alleges, and second, whether that conduct constitutes just cause for the disciplinary action taken." *Id.* at 665, 599 S.E.2d at 898 (citation, quotation marks, and

brackets omitted). "[T]he first of these inquiries is a question of fact . . . [and is] reviewed under the whole record test. . . . [T]he latter inquiry is a question of law . . . [and] is reviewed *de novo*." *Id.* at 665-66, 599 S.E.2d at 898.

This Court has addressed "the subject of commensurate discipline" in the context of unacceptable personal conduct and the just cause framework. *Warren v. N. Carolina Dep't of Crime Control & Pub. Safety*, 221 N.C. App. 376, 379, 726 S.E.2d 920, 923 (2012). After examining the flexible just cause standard enunciated in *Carroll*, the *Warren* Court determined that "not every instance of unacceptable personal conduct as defined by the Administrative Code provides just cause for discipline." *Id.* at 382, 726 S.E.2d at 925. The *Warren* Court then articulated a three-pronged approach to determine whether just cause exists to discipline an employee who has engaged in unacceptable personal conduct:

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

Id. at 382-83, 726 S.E.2d at 925.

IV. Discussion

A. Substantial Evidence to Support Just Cause Determination (Whole Record Test)

In her first challenge to ALJ Morrison's Final Decision, Brewington makes a series of arguments to support one principal assertion: that substantial evidence did not exist to justify her termination. We address each of Brewington's arguments in turn.

1. Brewington's Motion to Dismiss

[1] Brewington contends that ALJ Morrison erred when he denied Brewington's motion to dismiss at the close of DPS's evidence. This argument is based upon a single sentence taken from ALJ Morrison's comments on DPS's opposition to Brewington's motion: "I'm not entirely convinced you've shown just cause for her termination . . . ."

In focusing on this one sentence, Brewington fails to provide crucial context. The relevant exchange was as follows:

> Mr. McGuinness: The Petitioner would respectfully move to dismiss the case against her at this juncture, Your Honor. . . . Our position is simple. The totality of the evidence and the light most favorable to the Respondent does not establish just cause as a matter of law. Thank you.
>
> The Court: Do you want to comment on it?
>
> Ms. Strickland: I just want to state, Judge, I believe at this stage that we have shown just cause and the light most favorable to the Respondent's evidence and ask that you deny that motion.
>
> The Court: Well, you haven't gone -- you know, I'm not entirely convinced you've shown just cause for her termination, so therefore, you know, I want to hear from the Petitioner, really. I think in a case like this I deserve to. I'm having to hear this case and I'm not a polygraph or anything like that. You weigh the evidence and determine credibility you've been talking about.
>
> And there -- you know, I just deny your motion, and we'll take about 10 minutes.

A careful review of ALJ Morrison's brief ruling on Brewington's motion to dismiss reveals a measured approach. ALJ Morrison was not *entirely* convinced that DPS had shown just cause. Consequently, ALJ Morrison expressed to the parties that due to the nature of the case, Brewington's side of the story would be crucial to the credibility determinations he would invariably have to make. Given this context, we conclude that ALJ Morrison properly denied Brewington's motion to dismiss.

2. Challenges to ALJ Morrison's Findings of Fact

[2] Brewington next argues that the following findings of fact contained in ALJ Morrison's Final Decision were not supported by substantial

evidence: 11, 14, 15, 22, 23, 24, 28, 31, 32. Brewington also maintains that findings 23 and 24 contain speculation.

We first note that the majority of ALJ Morrison's findings are not challenged and therefore are conclusively established on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) ("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.") (citation omitted). In addition, because finding of fact 11 is the only finding that Brewington challenges with a specific argument, issues concerning the remaining challenged findings have been abandoned. N.C. R. App. P. 28(b)(6) (2015).

Finding of fact 11 reads as follows:

> During the lunch, Petitioner ordered two Special Mixed Drinks which contained alcohol. They were pink in color mixed drinks which were served in a "stemmed bowl-type glass -- goblet style." Petitioner drank one of the drinks while eating lunch with Collier and ordered the second one prior to Collier leaving the restaurant.

Brewington cites Sullivan's statement to the SBI, in which Sullivan stated "she had never served SA Brewington an alcoholic beverage." This quotation was contained in Brewington's Exhibits 1 (the EAC Report) and 14 (the SBI's summary of Sullivan's statement), both of which were offered into evidence before ALJ Morrison. Brewington then asserts that her "evidence on this point was direct and corroborated by two eye witnesses." We presume that the "two eyewitnesses" to whom Brewington refers are Sullivan and Mansfield. The EAC Report contained an excerpt of Mansfield's telephonic statement to the SBI, in which Mansfield indicated that no alcohol was ordered on 3 September 2014; that he did not remember consuming alcohol that day because he rarely did so; and that if he did consume alcohol, it would have been one beer. After citing this evidence, Brewington asserts that "DPS's evidence on [her alleged consumption of alcohol] is assumption, speculation, and inference, which is irrational to accept when nothing has disproved the direct evidence."

As an initial matter, we recognize a significant flaw in Brewington's argument: Exhibit 1 was only before ALJ Morrison in a limited capacity, and ALJ Morrison granted DPS's motion to exclude Exhibit 14 from evidence. When DPS objected to Exhibit 1 and moved to redact "hearsay statements"—presumably those of Sullivan and Mansfield—contained in the EAC Report, ALJ Morrison noted that he would "not find any facts based on [the report,]" and he overruled the objection. ALJ Morrison then

clarified that he would consider Exhibit 1 "for the fact that [Brewington] went through the grievance procedure and she appealed [to] the [EAC], but then it went to the Director of the SBI, and the Director of the SBI issued [inaudible]."

As to Exhibit 14, DPS argued that Sullivan's statement to the SBI should be excluded because she had not testified at the OAH hearing, and because her statement contained inadmissible hearsay.[4] ALJ Morrison excluded the exhibit from evidence, but he did not address the issue of hearsay in his ruling. Rather, ALJ Morrison explained that he would not allow Exhibit 14 into evidence because:

> What . . . concerns me about that is that -- the paragraphs -- she didn't remember if she served alcohol to Brewington, Liz, or Mike that day, but she said if alcohol was served, then Mike would have been the one drinking the alcohol that day.
>
> And that's -- I mean -- and plus if she was waiting on them, she's the one that gave them the ticket, the check, and took the credit card, you assume, and charged them for three beers and two mixed drinks. So I'm not going to allow that one in.

Thus, ALJ Morrison determined that Sullivan's statement was inconsistent and not credible.

Our review of ALJ Morrison's rulings on Exhibit 1 and Exhibit 14 reveals that his consideration, if any, of portions of Sullivan's and Mansfield's statements (as set forth in Exhibit 1) was extremely limited, and that he did not consider Sullivan's full statement (as set forth in Exhibit 14) at all. Because Brewington does not specifically challenge these rulings,[5] any issues related to those exhibits are abandoned. N.C. R. App. P. 28(b)(6). Therefore, Brewington's reliance on the aforementioned exhibits in challenging finding of fact 11 is misplaced.

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4. DPS's counsel did not expressly argue that the report should be excluded based upon hearsay grounds, but that was the clear implication. Furthermore, Brewington's counsel made arguments against excluding Sullivan's statement on hearsay grounds.

5. In at least two sections of her brief, Brewington does take issue with ALJ Morrison's decision to exclude Sullivan's statement from evidence. However, Brewington focuses on exceptions to the hearsay rule, and she does not make a specific, substantive argument as to why ALJ Morrison's exclusion of Exhibit 14 and the reasons he gave in support of that ruling were erroneous.

We now turn to the merits of Brewington's challenge to ALJ Morrison's findings. Brewington specifically takes issue with the portion of finding of fact 11 stating that she "ordered two Special Mixed drinks which contained alcohol" and then consumed them. The core of Brewington's argument, however, is that any finding that she consumed alcohol during lunch on 3 September 2014 is speculative at best and unsupported by substantial evidence. In other words, no evidence before ALJ Morrison *proved* that Brewington consumed alcohol. It bears repeating that " '[s]ubstantial evidence' means relevant evidence a reasonable mind might accept as adequate to support a conclusion." N.C. Gen. Stat. § 150B-2(8c). Thus, we are not required to determine whether the evidence proved that Brewington consumed alcohol, but whether it adequately supported ALJ Morrison's inference in this regard. This is a critical distinction. It also appropriate to note that "the 'whole record' test is not a tool of judicial intrusion; instead, it merely gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence." *Carroll*, 358 N.C. at 674, 599 S.E.2d at 903 (citation and quotation marks omitted). With these principles in mind, we conclude that the following constitutes substantial evidence in support of finding of fact 11.

Assistant Special Agent in Charge Cherry interviewed Collier on three occasions regarding her recollection of what occurred at the Sports Zone on 3 September 2014. According to the written summaries of those interviews, Collier observed Brewington order two " 'girly' fruity" cocktail-style drinks during lunch. The drinks, pinkish in color, were served in "goblet stemware glass[es]." Based on the drink's appearance, Collier assumed that it was an alcoholic beverage. Consequently, after reviewing the lunch bill, Collier informed Brewington that she would pay for the food but that her Pharmacy Board credit card could not be used to purchase alcohol. Brewington did not indicate that the drinks she had ordered were non-alcoholic. As Collier prepared to leave, a "white male" (Mansfield) arrived at the Sports Zone and sat down with Brewington. Collier's testimony at the OAH hearing was materially consistent with the account that she gave to Assistant Special Agent in Charge Cherry.

According to the written summary of Brewington's interview with SBI investigators, she: drank a Sprite Delight but did not consume any alcohol; indicated that "Mansfield met Collier just before she left"; doubted that she paid for anything that Mansfield ate or drank; stated that Mansfield "rarely" drank a beer or two; and did not recall if Collier had paid for the lunch. However, after she was shown her 3 September 2014 receipt from the Sports Zone, Brewington agreed that

her credit card was used to pay for two mixed drinks and three beers, though she maintained that she did not review her bill before leaving the Sports Zone.

In contrast, at the OAH hearing, Brewington testified that Mansfield arrived sometime in the middle of her meal with Collier, and that Mansfield ordered a beer when he sat down and ordered another beer during the meal. Brewington also recalled that Mansfield ordered some kind of mixed drink. Collier testified, however, that she did not recall any beer on the table, and if there had been, she would have remembered seeing it.

In assessing all of this record evidence, ALJ Morrison noted the inconsistencies between Brewington's interview and her testimony. ALJ Morrison also found Collier's testimony regarding the timing of Mansfield's arrival and whether Mansfield ordered any alcohol before Collier's departure to be more credible. Based on this assessment, ALJ Morrison found in finding of fact 23 that Brewington's testimony that Mansfield

> ordered and consumed all of the alcoholic beverages listed on the Sports Zone receipt . . . is not credible, in that it is not reasonable to believe that Mansfield ordered and/or consumed three beers and two mixed alcoholic drinks in the approximate 30 minute time period between 3:28 p.m. when Collier paid her bill and left the restaurant, and 3:57 p.m. when Petitioner paid her bill.

After carefully reviewing the record and the Final Decision, we conclude that finding of fact 11 as well as other findings stating that Brewington consumed alcohol during her lunch with Collier are supported by substantial evidence. Although evidence on the issue of Brewington's alcohol consumption was conflicting, it was for ALJ Morrison to resolve those conflicts, weigh the evidence, assess witness credibility, and draw inferences from the facts. *Carroll*, 358 N.C. at 674, 599 S.E.2d at 904. ALJ Morrison's resolution of the material conflicts in the evidence has a rational basis in the evidence presented, and we reject Brewington's argument to the contrary.

3. Conclusion of Law No. 8

[3] Brewington also challenges conclusion of law no. 8 in ALJ Morrison's Final Decision, which states: "The following, per G.S. 150B-2(8c), constitutes substantial evidence . . . that Petitioner consumed an alcoholic beverage during her September 14, 2014, lunch[.]" According to

Brewington, the nine subparagraphs listed in support of this conclusion are irrelevant, speculative, or favorable to Brewington.

After a careful review of Brewington's contentions, we conclude that it is unnecessary for us to address her individual attacks on each subparagraph listed in support of conclusion of law no. 8. Some of the subparagraphs were not material to the conclusion that Brewington consumed alcohol on 14 September 2014. In addition, the subparagraphs that are material to this conclusion are restatements of findings that ALJ Morrison made in the "Findings of Fact" section of the Final Decision. None of those findings have been successfully challenged, and ALJ Morrison's findings support the conclusion that Brewington consumed alcohol while on duty. As such, we reject her argument.

B. Brewington's Integrity Evidence (Whole Record Test)

[4] Brewington next argues that ALJ Morrison failed to consider "substantial testimony from seven witnesses and dozens of pages of exhibits" concerning her reputation for honesty and integrity. Beyond that, Brewington simply summarizes portions of testimony given by her character witnesses. This argument is without merit.

In the preamble to his Final Decision, ALJ Morrison specifically stated that:

> In making the FINDINGS OF FACT, the undersigned Senior Administrative Law Judge has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including, but not limited to the demeanor of the witness, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case.

Finding of fact 2 states, in part, that "[d]uring her career [Brewington] received very favorable performance ratings in the area of Integrity . . . and five character witnesses testified concerning her reputation for honesty." The rest of finding of fact 2 acknowledges that Brewington "received several written warnings for inadequate job performance and unacceptable personal conduct[,]" and that she was demoted in March 2015. ALJ Morrison's findings then addressed the material issues in the case: whether Brewington consumed alcohol on 3 September 2014 and

whether she was forthright with SBI agents during the internal investigation interview on 20 May 2015. Testimony from the character witnesses was relevant to these issues. But the probative value of the character testimony, if any, was for ALJ Morrison to determine, and he had the prerogative to "accept or reject [that evidence] in whole or part[.]" *City of Rockingham*, 224 N.C. App. at 239, 736 S.E.2d at 771.

Furthermore, the gravamen of Brewington's argument, as we understand it, is that ALJ Morrison did not consider this evidence. Yet the portions of the Final Decision cited above reveal that the character evidence *was* considered, though not to the extent (or to the positive effect) that Brewington would have preferred. ALJ Morrison assessed the credibility of the witnesses and considered evidence that bolstered as well as detracted from Brewington's reputation for honesty and integrity. In addition, ALJ Morrison noted at the OAH hearing that none of Brewington's character witnesses had any knowledge concerning the events of 3 September 2014. We cannot say that ALJ Morrison's findings concerning Brewington's character evidence were legally deficient.[6] Even assuming that ALJ Morrison should have made more extensive findings on this evidence, it would not require reversal of the Final Decision.

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6. In another section of her brief, Brewington repeats her argument that ALJ Morrison failed to properly consider her character evidence, including Brewington's past SBI performance evaluations—completed by her supervisors—in which she scored high integrity ratings. We reject this contention for the reasons stated above. Brewington further argues that Deputy Director Sutton engaged in an arbitrary and incomplete decision-making process because she did not consider Brewington's previous high integrity ratings before issuing a dismissal recommendation to Director Collier.

The record, however, belies any contention that Deputy Director Sutton's decision was arbitrary or based on inadequate methodology. Deputy Director Sutton testified that while she had no reason to dispute "a particular supervisor's findings" as to Brewington's integrity, the SBI's "personnel evaluation system . . . required subjectivity in that you have to be familiar with the employee[,]" and that in her experience, Brewington's reputation for honesty and integrity among her colleagues was "bad." Deputy Director Sutton further testified that the most appropriate considerations for her "extended beyond . . . the dimension of integrity" because her primary tasks were to investigate the allegations of on-duty alcohol consumption and whether dismissal would be an appropriate disciplinary action. In her discretion, Deputy Director Sutton determined that "given what [she] was trying to accomplish," she "did not feel that anything prior to the disciplinary actions and the [internal] investigation . . . would shed light on the current decision to be made." In sum, we reject Brewington's assertion that Deputy Director Sutton's dismissal recommendation was arbitrary and legally deficient under well-established just cause principles because of her decision not to consider Brewington's past evaluations for integrity.

C. Incomplete Fact Finding (Whole Record Test)

[5] Brewington next argues that ALJ Morrison failed to make sufficiently detailed findings of fact on all of the relevant issues before him. The centerpiece of Brewington's argument is a list of nine "areas of fact"—unsupported by specific arguments—"where there was significant evidence before the Court in Brewington's favor but where . . . ALJ [Morrison] made no findings[,]" including "[t]he admitted incompleteness of the [SBI's internal] investigation[, t]he admitted spoliation of evidence by the failure to record all evidence[,] . . . [t]he failure to consider the totality of all evidence[,] . . . [t]he failure to consider the admitted arbitrariness in [DPS's] investigation[,] . . . [and t]he failure to allow the statement of Martha Sullivan in the internal affairs file into evidence." In another section of Brewington's brief, she makes a similar argument, asserting that the findings of fact "in numerous areas lacked sufficient detail, were erroneous and [were] not predicated upon substantial evidence."

We reject these contentions for several reasons. To begin, the essence of this argument is simply that ALJ Morrison should have made more findings and drawn more inferences in Brewington's favor. Brewington also fails to explain how and when the SBI acknowledged deficiencies in or the arbitrariness of its investigation. Instead, Brewington cites the proposed Final Decision that her counsel submitted to ALJ Morrison following the contested case hearing. The proposed decision necessarily contains Brewington's *own* view of the record, and ALJ Morrison was not obligated to find facts based on it. Finally, this Court has recognized that administrative agencies and ALJs "need not make findings as to every fact which arises from the evidence and need only find those facts which are material to the settlement of the dispute." *Craven Reg'l Med. Auth. v. N. Carolina Dep't of Health & Human Servs.*, 176 N.C. App. 46, 60, 625 S.E.2d 837, 845 (2006); *see Collins v. N. Carolina Dep't of Health & Human Servs.*, 179 N.C. App. 652, 634 S.E.2d 641 (2006) (observing that an ALJ "is not required . . . to find facts as to all credible evidence" because "[t]hat requirement would place an unreasonable burden on the [ALJ,]" and that, instead, the ALJ "must find those facts which are necessary to support its conclusions of law").

D. Just Cause Factors Contained in the State Personnel Manual (*De Novo*)

[6] Brewington's next argument is that ALJ Morrison was required to make findings on each and every just cause factor set forth in Section 7 of the North Carolina Personnel Manual. According to Brewington,

our Supreme Court "embraced this approach" in *Wetherington v. N. Carolina Dep't of Pub. Safety*, 368 N.C. 583, 780 S.E.2d 543 (2015).

In *Wetherington*, a trooper with the North Carolina State Highway Patrol was dismissed for allegedly violating the agency's truthfulness policy. *Id.* at 584, 780 S.E.2d at 544. Critically, the trooper's commanding officer testified "at the OAH hearing . . . that he decided to dismiss petitioner not based upon consideration of the facts and circumstances of petitioner's conduct, but instead because of his erroneous view that any violation of the [Highway] Patrol's truthfulness policy must result in dismissal." *Id.* at 592, 780 S.E.2d at 547-48. In other words, the superior officer felt that he had no discretion in determining what sanction to impose for a violation of the agency's truthfulness policy, "apparently regardless of factors such as the severity of the violation, the subject matter involved, the resulting harm, the trooper's work history, or discipline imposed in other cases involving similar violations." *Id.* at 592, 780 S.E.2d at 548. The *Wetherington* Court, however, "emphasize[d] that consideration of these factors is an appropriate and necessary component of a decision to impose discipline upon a career State employee for unacceptable personal conduct[,]" and held that the trooper's termination was made under a misapprehension of the law:

> The approach employed by Colonel Glover in applying a fixed punishment of dismissal for any violation is antithetical to the flexible and equitable standard described in *Carroll* and is at odds with both the ALJ's and the SPC's finding of fact that Colonel Glover exercised discretion in reaching his decision to dismiss petitioner.
>
> Application of an inflexible standard deprives management of discretion. While dismissal may be a reasonable course of action for dishonest conduct, the better practice, in keeping with the mandates of both Chapter 126 and our precedents, would be to allow for a range of disciplinary actions in response to an individual act of untruthfulness, rather than the categorical approach employed by management in this case.
>
> As such, by upholding respondent's use of a per se rule of mandatory dismissal for all violations of a particular policy, the SPC failed to examine the facts and circumstances of petitioner's individual case as required by this state's jurisprudence.

Id. at 592-93, 780 S.E.2d at 548.

Although the primary holding in *Wetherington* was that public agency decision-makers must use discretion in determining what disciplinary action to impose in situations involving alleged unacceptable personal conduct, the Court did identify factors that are "appropriate and necessary component[s]" of that discretionary exercise. *Id.* at 593, 780 S.E.2d at 548.

Here, Brewington argues that ALJ Morrison failed to consider the factors set out in *Wetherington*.[7] After a careful review of ALJ Morrison's Final Decision, we conclude that the *Wetherington* factors were sufficiently addressed. ALJ Morrison's findings addressed the severity of the alleged misconduct (the SBI's alcohol consumption and truthfulness policies are mandatory), the subject matter, the resulting harm, and the positive and negative portions of Brewington's work history. ALJ Morrison did not make a specific finding on the discipline imposed in other cases involving similar violations, but his findings that Deputy Director Sutton "considered the totality of circumstances regarding this disciplinary issue" and spoke "to several SBI employees prior to recommending a decision to . . . Director Collier[,]" were sufficient. We also note that, by way of comparison, the issue in *Wetherington* was whether the trooper had lied about losing his "campaign hat," *id.* at 585, 780 S.E.2d at 544, whereas Brewington was accused of lying about drinking alcohol while on official duty. Accordingly, for the reasons stated above, we reject Brewington's argument on this issue.

E. Adequacy of the SBI's Internal Investigation *(De Novo)*

[7] Next, Brewington argues that the SBI's internal investigation into Collier's allegations was "defective because of inadequate methodology and effort[.]" Brewington's specific target is the summary of her internal investigation interview. Referring to the method that Special Agent in Charge Perry used to record the content of that interview as the SBI's "rough note interview process[,]" Brewington asserts that this interrogation technique produced a "cursory investigation" and led to the "spoliation of evidence." The essence of this argument is that Special Agent in Charge Perry's typewritten summary of Brewington's internal investigation interview was defective because the interview was not recorded on tape or video. According to Brewington, "a simple tape recorder would have preserved all evidence."

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7. Brewington's specific argument is that *Wetherington* indicates that an ALJ must address each and every factor listed in the State Personnel Manual concerning just cause for disciplinary action. We refuse to read such a bright line rule into the *Wetherington* decision. Nevertheless, it appears that the *Wetherington* factors are virtually identical to the ones listed in the State Personnel Manual.

We conclude that Brewington's contentions have no basis in law or fact. As Special Agent in Charge Perry explained at the OAH Hearing, SBI policy precludes agents from recording non-custodial interviews, such as ones that involve internal investigations. Brewington does not identify any laws requiring that internal investigations concerning law enforcement personnel actions be recorded in any specific fashion, and we are aware of none.

Furthermore, during the interview, Special Agent in Charge Perry—a veteran SBI agent and head of the SBI's Special Investigation Unit—took handwritten notes on Brewington's responses as she gave them. Assistant Special Agent in Charge Cherry, who was present during the entire interview, confirmed that Special Agent in Charge Perry's typewritten summary was an accurate reflection of Brewington's answers to the questions posed. Brewington fails to specify what evidence or information was lost or destroyed due to the method by which her interview was documented, and we decline to speculate on this issue. Accordingly, this argument is without merit.

F. Alleged Arbitrariness of the Internal Investigation and Brewington's Termination (Whole Record Test)

[8] Brewington's next argument is based on her disclosure to Special Agent in Charge Perry and Assistant Special Agent in Charge Cherry that she was prescribed certain medications for multiple medical conditions. Citing this Court's decision in *Bulloch v. N. Carolina Dep't of Crime Control & Pub. Safety*, 223 N.C. App. 1, 732 S.E.2d 373 (2012), Brewington contends that the SBI "should have used available testing to determine if [she] was experiencing a relevant medical, psychological, alcohol related or other issue." Brewington holds the position that the internal investigation and her eventual termination were arbitrary and capricious.

In *Bulloch*, the petitioner had been diagnosed with depression and bipolar disorder during his tenure with the North Carolina State Highway Patrol. *Id.* at 2, 732 S.E.2d at 376. Sometime after being taken off of his depression medication and placed on lithium to treat his bipolar condition, the petitioner's employment was terminated due to an incident during which he held his girlfriend's arm behind her back until she cried, threatened to kill himself, and then fired a round from his service weapon into his bedroom floor. *Id.* In the contested case hearing in the OAH, an ALJ concluded that just cause did not exist to support the petitioner's termination for unacceptable personal conduct because the decision was, *inter alia*, "arbitrary and capricious because it failed

to consider a known, underlying medical condition[.]" *Id.* at 3, 732 S.E.2d at 376 (internal quotation marks omitted). The State Personnel Commission (SPC) adopted this conclusion.

On appeal to this Court, the Department of Public Safety argued that the SPC's conclusion concerning the petitioner's medical condition was erroneous. The *Bulloch* Court recognized the general rule that whether just cause exists for termination depends "upon an examination of the facts and circumstances of each individual case." *Id.* at 7, 732 S.E.2d at 379 (citation omitted). The Court then concluded that the record as well as the relevant findings "clearly support[ed] the SPC's conclusion that the *underlying causes* of [the petitioner's] *conduct* were not fully considered by the Department before termination." *Id.* at 15, 732 S.E.2d at 383.

Unlike the situation in *Bulloch*, there is no indication that Brewington's medical conditions or the medicines she takes to control them were related to the conduct that *caused* her dismissal. Specifically, there is no suggestion that Brewington's medical conditions or medications resulted in her alleged consumption of alcohol while she was on duty or affected her ability to be forthright during the internal investigation. Consequently, *Bulloch* is inapposite and we reject Brewington's argument to the contrary.

G. Due Process of Law (*De Novo*)

[9] Brewington next argues that she was denied due process of law in two ways. First, Brewington contends that she was not given sufficient notice of the date of her alleged offense. Second, Brewington asserts that the EAC's refusal to allow her to present live witness testimony from Sullivan and Mansfield during her internal grievance hearing impeded her right to "present a defense." Once again, we are not persuaded.

It is well established that career State employees enjoy a property interest in continued employment. This property interest is created by state law, N.C. Gen. Stat. § 126-35(a), and is guaranteed by the Due Process Clauses of the Fifth and the Fourteenth Amendments to the United States Constitution. *Peace v. Employment Sec. Comm'n of N. Carolina*, 349 N.C. 315, 322, 507 S.E.2d 272, 277-78 (1998); *Leiphart v. North Carolina School of the Arts*, 80 N.C. App. 339, 348-349, 342 S.E.2d 914, 921, *cert. denied*, 349 S.E.2d 862, 318 N.C. 507 (1986); *Pittman v. Dep't Of Health And Human Servs.*, 155 N.C. App. 268, 272-73, 573 S.E.2d 628, 632 (2002), *overruled on other grounds* sub nom. *Pittman v. N. Carolina Dep't Of Health And Human Servs.*, 357 N.C. 241, 580 S.E.2d 692 (2003). "The touchstone of due process is protection of the individual against arbitrary action of government[.]" *Wolff v. McDonnell*,

418 U.S. 539, 558, 41 L. Ed. 2d 935, 952 (1974) (citation omitted). The doctrine of procedural due process restricts governmental actions that "deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332, 47 L. Ed. 2d 18, 31 (1976).

"The fundamental premise of procedural due process protection is notice and the opportunity to be heard." *Peace*, 349 N.C. at 322, 507 S.E.2d at 278 (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 84 L. Ed. 2d 494, 503 (1985)). "Moreover, the opportunity to be heard must be 'at a meaningful time and in a meaningful manner.' " *Id.* (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 14 L. Ed. 2d 62, 66 (1965)). This Court has summarized these essential requirements as follows:

> Under federal due process an employee's property interest in continued employment is sufficiently protected by a pre-termination opportunity to respond, coupled with post-termination administrative procedures. Further, the federal due process concern for fundamental fairness is satisfied if the employee receives oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. To interpret the minimal protection of fundamental fairness established by federal due process as requiring more than this . . . would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee.

Owen v. UNC-G, 121 N.C. App. 682, 686, 468 S.E.2d 813, 816 (1996) (internal citations and quotation marks omitted). However, these general federal due process protections must be satisfied in addition to the more specific notice requirements of N.C. Gen. Stat. § 126-35(a), which provides:

> No career State employee . . . shall be discharged . . . except for just cause. In cases of such disciplinary action, the employee shall, before the action is taken, be furnished with a statement in writing setting forth the specific acts or omissions that are the reasons for the disciplinary action and the employee's appeal rights.

This Court has held that the written notice required by section 126-35(a) must include a sufficiently particular description of the "incidents [supporting disciplinary action] . . . so that the discharged employee will know precisely what acts or omissions were the basis of his discharge."

Employment Security Comm. v. Wells, 50 N.C. App. 389, 393, 274 S.E.2d 256, 259 (1981). This "statutory requirement of sufficient particularity[,]" *Owens*, 121 N.C. App. at 687, 468 S.E.2d at 817, cannot be satisfied if the public employer fails to provide names, dates, or locations, as this information is necessary to allow the employee "to locate [the] alleged violations in time or place, or to connect them with any person or group of persons." *Wells*, 50 N.C. App. at 393, 274 S.E.2d at 259.

In the present case, it was initially reported that the incident at the Sports Zone occurred in July 2014. Furthermore, the letter notifying Brewington that she was the subject of an internal investigation incorrectly identified the date in question as being "in or around January 2015." Even so, Special Agent in Charge Perry explicitly dispelled any confusion concerning the date of the alleged offense when he notified Brewington that Collier's allegations pertained to the lunch that took place on 3 September 2014. Special Agent in Charge Perry made this clarification before questioning Brewington, and she neither asked for more time to prepare for the interview nor indicated that she was confused as to the date of the allegations. By the time that Brewington received the letter requiring her attendance at the pre-disciplinary conference, there was no confusion as to the date that corresponded to Collier's allegations. The notice given to Brewington concerning the date of the alleged conduct was not constitutionally infirm, as the initial erroneous dates did not impede her ability to respond at a meaningful time. Brewington's pre-termination due process rights were not compromised. Furthermore, because section 126-35(a)'s sufficient particularity requirement was met well before the pre-disciplinary conference occurred, Brewington's ability to fully prepare for the conference was not prejudiced.

Brewington's second argument is that she was deprived "of the procedural due process protection provided by the State's internal grievance system" when the EAC refused to allow live testimony from Mansfield and Sullivan. Given the statutory post-termination procedures afforded Brewington, we discern no due process violation of any kind. Precedent from our Supreme Court indicates that a career State employee's procedural due process rights, at least as they pertain to post-termination procedures, are fully protected by the opportunities to pursue a contested case hearing before an ALJ in the OAH and to obtain judicial review of the ALJ's Final Decision in the appellate division. *See Peace*, 349 N.C. at 327, 507 S.E.2d at 280-81 (observing that "[a] terminated State employee may avail himself not only of administrative review incorporating full discovery of information and an evidentiary hearing, but may also

obtain judicial review of the final agency decision[,]" and concluding "that this procedure fully comports with the constitutional procedural due process requirements mandated by the Fourteenth Amendment, and *no additional safeguards* are needed to avoid erroneous deprivation") (emphasis added). Moreover, nothing suggests that the denial of Brewington's request to present live testimony before the EAC deprived her of a fair hearing. Indeed, the SBI's written summaries of Mansfield's and Sullivan's statements *were considered* by the EAC and were cited in its memorandum recommending the reversal of Brewington's dismissal. Consequently, we conclude that the EAC hearing fully met procedural due process requirements.

Nonetheless, Brewington further contends that ALJ Morrison "erroneously did not admit [Sullivan's statement to the SBI] despite [the fact] that it was part of the investigation and admissible under [various exceptions to the rule against hearsay.]" As explained above, however, Sullivan's statement was not excluded from the OAH evidentiary record on hearsay grounds; rather, the statement was excluded due to ALJ Morrison's concerns over the credibility and probative value of the statement itself. Brewington does not specifically challenge this ruling on appeal, and even if she did, procedural due process concerns would not be implicated. The record reveals that while Brewington subpoenaed Sullivan to testify at the OAH proceeding, Sullivan did not appear at the contested case hearing. As such, Brewington was in no way denied the right to present a defense.

H. SBI Director's Failure to Testify at OAH Hearing (*De Novo*)

[10] Next, Brewington argues that Deputy Director Sutton's testimony at the OAH hearing was insufficient to establish which just cause factors were considered by Director Collier. More specifically, Brewington contends that because Director Collier—who was the ultimate decision-maker responsible for Brewington's dismissal—did not testify, "the ALJ and this Court were deprived of Director Collier's consideration, if any, of the required just cause factors[.]" We are not persuaded.

Our research reveals no absolute requirement that the person who makes the final decision to discipline a public employee must testify at a contested case hearing. Furthermore, if Director Collier had been unavailable to make the final determination upholding Brewington's dismissal, Deputy Director Sutton would have been authorized to make the decision herself. Deputy Director Sutton's testimony was also particularly relevant, as she was responsible for both reviewing the information concerning Brewington's alleged unacceptable personal conduct

and consulting with Director Collier to reach a decision in the matter. The 11 June 2015 letter informing Brewington of her dismissal, which was signed by Deputy Director Sutton on behalf of Director Collier, explained the specific considerations that led to the SBI's decision. Brewington's counsel was free to cross-examine Deputy Director Sutton on these issues, and he did so extensively. The record is replete with the factors that resulted in Brewington's dismissal, and the Final Decision reflects ALJ Morrison's consideration of them. As a result, ALJ Morrison was presented with all the information that was necessary to determine whether Brewington's actions constituted just cause for her dismissal. Brewington's argument is without merit.

V. Conclusion

In closing, we recognize that this case has raised concerns in the law enforcement community, a group worthy of all citizens' gratitude and respect. In its amicus brief, the Fraternal Order of Police contends that Brewington was deprived of fundamental due process protections when Mansfield and Sullivan were not allowed to testify at the EAC hearing, as well as when ALJ Morrison excluded Sullivan's statement from evidence in the contested case hearing. The Fraternal Order of Police also urges us to hold that the decision-maker of a public employer must consider all pertinent just cause factors contained in the State Personnel Manual before disciplining a public employee. We have addressed these issues above.

Even so, we acknowledge that this case involved accusations that ultimately had to be proved or disproved through a large body of conflicting evidence. ALJ Morrison was charged with making credibility determinations, drawing inferences, and finding material facts. After a careful review of the record, we conclude that ALJ Morrison's findings, which are supported by substantial evidence, support his conclusions that Brewington consumed alcohol while on duty and that she was untruthful during the SBI's internal investigation. We further conclude that, under the circumstances of this case, Brewington's violations of SBI policy constituted just cause for her dismissal based on unacceptable personal conduct. Accordingly, we affirm ALJ Morrison's Final Decision in its entirety.

AFFIRMED.

Judge HUNTER, JR. concurs.

Chief Judge McGee concurs by separate opinion.

McGEE, Chief Judge, concurring with separate opinion.

I fully concur in the result, but write separately to note that I disagree with the statement of law that "Section 150B-51 of our State's Administrative Procedure Act (APA) establishes the scope and standard of review that we apply to the final decision of an administrative agency." Although the majority opinion correctly cites *Harris v. N.C. Dep't of Pub. Safety*, __ N.C. App. __, __, 798 S.E.2d 127, 132 (2017), in support of this statement of law, I dissented from the majority opinion in *Harris*, and *Harris* is currently on appeal to our Supreme Court. As I more fully discussed in *Harris*, I believe N.C. Gen. Stat. § 126-34.02 provides "adequate procedure for judicial review" of the decision of the ALJ and, for this reason, N.C. Gen. Stat. § 150B-51 does not apply. *Id.* at __, 798 S.E.2d at 140-41 (citing N.C. Gen. Stat. § 150B-43 (2015)).

DR. EDWARD E. FULLER, SR., Plaintiff
v.
WAKE COUNTY, a Body Politic and Corporate, Defendant

No. COA16-869

Filed 20 June 2017

1. Immunity—governmental—transfer of non-profit EMS provider to county

Wake County satisfied its burden of establishing that its governmental immunity barred tort claims in a case that rose from an audit of a non-profit provider of Emergency Medical Services (EMS), the dissolution of the non-profit EMS, and the transfer of equipment to the Wake County. Plaintiff was the former treasurer of the non-profit EMS who contended that Wake County had engaged in a hostile commercial acquisition of the assets of a profitable business. The General Assembly had assigned Wake County the responsibilities of ensuring its citizens are provided with EMS and regulating EMS delivery and the County's activities were governmental.

2. Immunity—governmental—claim not pled and evidence not presented

There was no issue of material fact concerning governmental immunity where Wake County entered into an asset transfer

agreement with a non-profit Emergency Medical Services Provider and plaintiff contended that governmental immunity was waived as part of that agreement. Plaintiff never properly pled a breach of contract claim against Wake County and did not present evidence that Wake County breached the agreement or that plaintiff was a party to the agreement. Additionally, plaintiff did not cite legal authority supporting his theory.

3. Appeal and Error—preservation of issues—failure to raise below—successor-liability claims not pled

Plaintiff's claim against Wake County on successor-liability theories was not addressed on appeal where his complaint did not advance a claim under which common law successor liability might attach to Wake County, and the underlying complaint did not raise a claim on statutory successor-liability, despite plaintiff filing a notice of claims against assets a few days before the summary judgment hearing.

Appeal by plaintiff from order entered 24 March 2016 by Judge A. Graham Shirley in Wake County Superior Court. Heard in the Court of Appeals 8 February 2017.

Hicks McDonald Noecker LLP, by David W. McDonald and William E. Mitchell, for plaintiff-appellant.

Office of the Wake County Attorney, by Senior Deputy Wake County Attorney Roger A. Askew, Senior Assistant County Attorney Jennifer Jones, and Senior Assistant County Attorney Allison Pope Cooper, for defendant-appellee.

ELMORE, Judge.

This governmental immunity case concerns whether a county can face liability for making discretionary decisions relating to the manner by which it meets its statutorily delegated responsibilities to ensure its citizens are provided emergency medical services (EMS) and to regulate EMS within its jurisdiction.

Plaintiff Edward Fuller, Sr. served as volunteer treasurer of Six Forks Rescue Squad, Inc. (Six Forks), a non-profit EMS provider franchised by Defendant Wake County to provide EMS within a certain district as part of its county-wide EMS system. Six Forks was required by its franchise agreement to undergo annual audits and to submit those

reports to Wake County. In 2011, Wake County discovered that Six Forks had submitted a fraudulent audit report for fiscal year 2009 (FY2009). This discovery prompted the board of directors of Six Forks (Six Forks Board) to resolve to immediately cease Six Forks's EMS operations and temporarily transfer its emergency vehicles and medical supplies to Wake County; Wake County EMS and other contract providers assumed operational control of EMS delivery within Six Forks's district to ensure seamless provision of EMS to Wake County citizens. Subsequently, the Six Forks Board voted to voluntarily dissolve Six Forks and transfer eight ambulances and two trucks to Wake County, which accepted the vehicles into its county-wide EMS system. Wake County has assumed operational control of Six Forks's service district ever since.

The discovery of Six Forks's fraudulent FY2009 audit report also triggered a criminal investigation by the Raleigh Police Department (RPD), requested in part by the Internal Audit Director of Wake County. The investigation revealed questionable charges to Six Forks's business banking accounts, which were solely managed by its treasurer, Fuller, and its bookkeeper, Jill Cafolla. As a result, Fuller was charged with and arrested for allegedly embezzling $10,000.00 from Six Forks.

After Fuller's embezzlement charge was dismissed, he sued Wake County and ten fictitious defendants, alleging they falsely and maliciously accused him of embezzlement in order to trigger a publicized criminal investigation into Six Forks as a pretext to force an involuntary takeover. Fuller alleged that engineering such a hostile takeover served Wake County's alleged long-term stated goal to consolidate independent EMS providers into its county-wide EMS system. In response, Wake County raised the complete defense of governmental immunity and moved to dismiss Fuller's claims. After a hearing, the trial court entered an order dismissing Fuller's claims as to the fictitious defendants on grounds that they were barred by the statute of limitations. Wake County later moved for summary judgment on grounds of governmental immunity. After a hearing, the trial court entered an order awarding Wake County summary judgment, thereby dismissing Fuller's claims with prejudice.

On appeal, Fuller argues that (1) Wake County's actions were proprietary and, therefore, unshielded by governmental immunity; and (2) Wake County waived any immunity it might enjoy. Fuller also argues that (3) Wake County is liable to him as a transferee of Six Forks's assets under statutory and common law successor-liability theories. After careful review, we affirm the trial court's order.

I. Background

Since 1976, Wake County has issued Six Forks annual franchises to provide EMS to its citizens within a certain district as part of its county-wide EMS system. The franchise agreement required Six Forks to engage in annual audits and to submit those reports to the Wake County's Director of Budget and Management Services, Finance Officer, and EMS Director, no later than 1 October of each succeeding fiscal year.

In 2009, Fuller was elected by the Six Forks Board to serve as Six Forks's treasurer. In 2010, Wake County officials discovered that it did not have a budget from Six Forks or a copy of Six Forks's FY2009 audit report. At Wake County EMS Medical Director Brent Myers's request, around 16 June 2010, Cafolla sent a FY2009 audit report to Chief of Six Forks Daniel Cline, who then forwarded it to Wake County officials. In February 2011, Wake County was alerted that Six Forks failed to submit its FY2010 audit report and, after several unanswered requests, discovered that Fuller had failed to secure an auditor for FY2010.

In March 2011, Wake County Internal Audit Director John Stephenson met with Myers, Cline, and Fuller, to review Six Forks's cash projection in order to ensure its payroll and bill obligations would be met. During the meeting, Stephenson closely reviewed the FY2009 audit and opined that it reported a $65,000.00 profit but should have shown a $2,000.00 loss and contained a potentially fraudulent signature. Six Forks's FY2009 audit was then forwarded to and investigated by the North Carolina State Board of Certified Public Accountant Examiners, which confirmed the signature had been forged. In late April 2011, Stephenson alerted Fuller and Six Forks the FY2009 audit was a fake. On 1 May 2011, at President of Six Forks Ed Bottum's request, Fuller resigned as its treasurer.

On 2 May 2011, the Six Forks Board called an emergency meeting and resolved immediately to cease its EMS operations and to transfer its eight ambulances, two trucks, and medical supplies to Wake County for the next 30 days in order "to maintain seamless emergency medical care to the citizens of Wake County." Wake County EMS and a few other contract providers assumed operational coverage of Six Forks's service district and, around 21 June 2011, Six Forks and Wake County executed an asset transfer agreement to effectuate the transfer of Six Forks's emergency vehicles to Wake County. According to the agreement, Wake County accepted the vehicles, valued at $348,450.00, for $1 of consideration.

On 3 May 2011, according to police reports, Cline called the RPD and reported that Cafolla had submitted the fraudulent FY2009 audit, causing

Six Forks to disband. Soon after, Stephenson also reported the fraudulent FY2009 audit to the RPD and provided further information about the events leading up to its discovery. Noting Stephenson's request that Wake County would like the case investigated, the RPD commenced an investigation into the allegations of fraud at Six Forks revealing multiple non-business related expenses charged to Six Forks's business banking account at Coastal Federal Credit Union (CFCU), an account solely controlled and managed by Fuller and Cafolla. The expenses included two $5,000.00 checks written in early 2011 for undocumented purposes and charges totaling $9,825.36 to a debit card linked to Six Forks's business banking account at CFCU in 2009.

On 6 May 2011, as part of its investigation, RPD detectives met with Stephenson, who provided additional information about the incidents leading up to the discovery of the FY2009 audit, a binder of recorded expenses and box of financial information recovered from the Six Forks station, as well as copies of Six Forks's meeting minutes. According to police reports, the minutes from 12 October 2009 indicated that Fuller explained to the Six Forks Board that the $9,825.36 of charges to Six Forks's CFCU business account arose because the debit card was mistakenly linked to his son's personal CFCU banking account. Fuller explained that his son, Edward Fuller, Jr., believed the debit card was his and mistakenly incurred the charges to Six Forks's CFCU account. Stephenson told RPD he requested Six Forks's banking statements from CFCU and Wachovia but was only given limited information. RPD resolved to obtain search warrants to collect this information.

On 13 June 2011, an RPD investigating officer contacted a representative at CFCU to gather Six Forks's banking information and inquired as to whether Fuller's explanation of the debit card mix-up was possible. The CFCU representative opined that it was not and that the $9,825.36 had not been repaid into the account. RPD later discovered that, immediately before the debit card transactions started in May 2009, Fuller transferred $10,000.00 from the Six Forks CFCU business commercial checking account into a business basic checking account. Fuller deposited $9,242.14 from his personal CFCU banking account into the business basic checking account on 10 November 2009. RPD also discovered several miscellaneous withdrawals from and deposits to the Six Forks Wachovia and CFCU banking accounts by Cafolla. Between Fuller and Cafolla nearly $90,000.00 of unapproved transactions were identified. Subsequently, after conferring with an on-call assistant district attorney of the Wake County District Attorney's Office, RPD determined that Fuller and Cafolla should be charged with embezzlement.

On 24 July 2011, the Six Forks Board adopted a plan of Six Forks's dissolution and a distribution of its assets. On 22 September 2011, RPD arrested Fuller for allegedly embezzling $10,000.00 from Six Forks. On 10 October 2011, Six Forks delivered a victim impact statement to Wake County, stating that Fuller and Cafolla's actions caused its dissolution. According to Fuller, his charge and arrest were publicized by local news media, thereby causing him to be terminated from his long-time employment as Director of the Master of Business Administration program at Pfeiffer University. On some date unclear from the record, Fuller's embezzlement charge was dismissed.

On 17 September 2014, Fuller filed a complaint against Wake County and ten fictitious John Does, alleging they had falsely accused him of embezzlement in order to trigger a publicized criminal investigation indicating Six Forks had engaged in financial mismanagement as a pretext for compelling an involuntary takeover of Six Forks. In his complaint, Fuller alleged that, as early as 2007, Wake County expressed its long-term goal to take over independent EMS if "there is mismanagement of money internally or poor patient care" and to consolidate EMS delivery to its citizens. Fuller further alleged that in 2009, after discovering the debit card mix-up, he fully disclosed the situation to the Six Forks Board and reimbursed Six Forks the charges his son mistakenly accumulated on the Six Forks CFCU business banking account. Nonetheless, Fuller contended, Wake County falsely and maliciously accused him of embezzlement, citing the debit card incident, and indicated that Fuller was living with Cafolla, in order to initiate a publicized criminal investigation indicating Six Forks had engaged in financial mismanagement as a means to force an involuntary take over Six Forks.

In his 17 September 2014 complaint, Fuller advanced six tort claims against Wake County and the ten John Does: (1) malicious prosecution, (2) abuse of process, (3) false arrest, (4) false imprisonment, (5) intentional infliction of severe emotional distress, and (6) respondeat superior, seeking monetary damages from those defendants. On 19 March 2015, Wake County filed its answer, asserting Fuller's claims were barred by governmental immunity and the statute of limitations and filed a motion to dismiss Fuller's claims. After a hearing on Wake County's dismissal motion, the trial court entered a 13 July 2015 order dismissing the claims against the ten fictitious defendants on grounds that Fuller's claims were barred by statutes of limitation. On 23 November 2015, Wake County filed a motion for summary judgment, reasserting that Fuller's claims against it were barred by governmental immunity.

On 9 March 2016, Fuller filed a "notice of claim against assets" against Wake County under Chapter 55A of the North Carolina General Statutes (the North Carolina Nonprofit Corporation Act), alleging violations of N.C. Gen. Stat. § 55A-14-08 ("Unknown and certain other claims against dissolved corporation") by failing to notify Fuller of Six Forks's dissolution before transferring its assets essentially debt-free to Wake County.

On 15 March 2016, the trial court held a hearing on Wake County's summary judgment motion. Wake County argued it was shielded by governmental immunity from Fuller's claims because the provision of EMS is a governmental function, and it assumed operational control of EMS within Six Forks's service district in order to satisfy its statutory obligation to ensure its citizens are provided with EMS. Wake County also presented evidence establishing that, although it had purchased a public entity excess liability insurance policy, it did not waive its immunity with respect to Fuller's claims.

On 24 March 2016, the trial court entered an order awarding Wake County summary judgment and dismissing Fuller's case with prejudice. Fuller appeals.

II. Analysis

On appeal, Fuller argues the court erred by awarding Wake County summary judgment because Wake County (1) was engaged in a proprietary activity unshielded by governmental immunity and (2) waived any applicable governmental immunity by entering into the asset transfer agreement with Six Forks and by requiring under the franchise agreement that Six Forks purchase liability insurance and name Wake County as an insured on the policy. Fuller also argues the trial court erred because (3) Wake County was liable to him as a transferee of Six Forks's assets under statutory and common law successor-liability theories.

A. Standard of Review

This Court reviews *de novo* an order granting summary judgment. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citing *Forbis v. Neal*, 361 N.C. 519, 523–24, 649 S.E.2d 382, 385 (2007)). "Summary judgment is appropriate when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *Dawes v. Nash Cnty.*, 357 N.C. 442, 444, 584 S.E.2d 760, 762 (2003) (quoting N.C. Gen. Stat. § 1A-1, Rule 56(c)). A party is entitled to judgment as a matter of law "whenever the movant establishes a complete

defense to the [plaintiff's] claim.' " *Estate of Earley ex rel. Earley v. Haywood Cnty. Dep't of Soc. Servs.*, 204 N.C. App. 338, 340, 694 S.E.2d 405, 407 (2010) (reversing summary judgment on governmental immunity grounds) (quoting *Overcash v. Statesville City Bd. of Educ.*, 83 N.C. App. 21, 26, 348 S.E.2d 524, 528 (1986) (affirming summary judgment on governmental immunity grounds)). Governmental immunity is a "complete defense." *Craig ex rel. Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (noting that governmental "immunity is more than a mere affirmative defense, as it shields a defendant entirely from having to answer for its conduct at all in a civil suit for damages" (citing *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985)).

B. Governmental Immunity

[1] "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." ' " *Estate of Williams ex rel. Overton v. Pasquotank Cnty. Parks & Recreation Dep't*, 366 N.C. 195, 198, 732 S.E.2d 137, 140 (2012) (quoting *Meyer v. Walls*, 347 N.C. 97, 104, 489 S.E.2d 880, 884 (1997), *quoted in Evans ex rel. Hornton v. Hous. Auth. of City of Raleigh*, 359 N.C. 50, 53, 602 S.E.2d 668, 670 (2004)). A county is also generally immune from suit for intentional torts of its employees in the exercise of governmental functions. *See Edwards v. Akion*, 52 N.C. App. 668, 691, 279 S.E.2d 894, 896, *aff'd per curiam*, 304 N.C. 585, 586, 284 S.E.2d 518, 518 (1981). "Immunity applies to acts committed pursuant to governmental functions but not proprietary functions." *Bynum v. Wilson Cnty.*, 367 N.C. 355, 358, 758 S.E.2d 643, 646 (2014) (citing *Estate of Williams*, 366 N.C. at 199, 732 S.E.2d at 141). Governmental functions comprise county activity " 'which is discretionary, political, legislative, or public in nature and performed for the public good [on] behalf of the State rather than for itself . . . .' " *Id.* (quoting *Britt v. City of Wilmington*, 236 N.C. 446, 450, 73 S.E.2d 289, 293 (1952)). Proprietary functions comprise county activity which is " 'commercial or chiefly for the private advantage of the compact community . . . .' " *Id.* Whether a county enjoys governmental immunity "turns on whether the alleged tortious conduct of the county . . . arose from an activity that was governmental or proprietary in nature." *Estate of Williams*, 366 N.C. at 199, 732 S.E.2d at 141.

Here, the parties dispute the relevant activity for purposes of determining governmental immunity. Fuller contends Wake County's "hostile, commercial acquisition of the assets of an ongoing profitable business in an effort to expand an existing business operated by Wake County" constitutes the relevant activity. Wake County contends its operation of EMS

and ambulance service constitutes the relevant activity. The alleged tortious conduct of Wake County—fabricating false embezzlement charges against Fuller in order to trigger a publicized criminal investigation as a pretext for forcing an involuntary takeover of Six Forks—can be separated into two distinct categories: (1) Fuller's criminal investigation, i.e., Wake County Internal Audit Director John Stephenson providing information to the RPD regarding the FY2009 fraudulent audit and requesting that RPD investigate potential fraud at Six Forks; and (2) Wake County's consolidation of Six Forks into its county-wide EMS system, i.e., Wake County accepting Six Forks's EMS vehicles and directing Wake County EMS and other contract providers to assume operational control of Six Forks's service district. Because there are no individual-capacity claims against Stephenson or any other Wake County official or employee, only the latter category is properly under consideration. The relevant inquiry, then, is whether these county activities arose out of a function that was governmental or proprietary.

Acknowledging "the distinction may be difficult" our Supreme Court in *Estate of Williams* "set forth a three-step inquiry for determining whether an activity is governmental or proprietary in nature." *Bynum*, 367 N.C. at 358, 758 S.E.2d at 646 (citing *Estate of Williams*, 366 N.C. at 200–01, 732 S.E.2d at 141–42). "[T]he threshold inquiry . . . is whether, and to what degree, the legislature has addressed the issue." *Estate of Williams*, 366 N.C. at 200, 732 S.E.2d at 141–42. "[T]hat the legislature has designated [certain county] responsibilities as governmental is dispositive" of the issue of whether county activity arising from executing statutorily delegated responsibilities is immune from suit. *Bynum*, 367 N.C. at 360, 758 S.E.2d at 647 (construing *Estate of Williams* and holding that county's supervision, maintenance, and responsibility of county buildings were activities arising from a governmental function, since the General Assembly delegated that authority to county and, therefore, county was immune from alleged negligence in failing to maintain its building); *see also Bellows v. Asheville City Bd. of Educ.*, ___ N.C. App. ___, ___, 777 S.E.2d 522, 524 (2015) (relying on *Bynum* to hold that statutory delegation of authority to local board to maintain its school grounds dispositively established activity arising therefrom was governmental and, therefore, board was immune from tort liability arising from allegedly unsafe conditions on school grounds), *disc. rev. denied*, 368 N.C. 684, 781 S.E.2d 482 (2016). In reaching its holding, the *Bynum* Court cited to N.C. Gen. Stat. § 153A-169 (2013) ("The board of commissioners *shall* supervise the maintenance, repair, and use of all county property." (emphasis added)), and to N.C. Gen. Stat. §§ 153A-351, -352 (2013), which it interpreted as "requiring counties to perform duties

and responsibilities associated with enforcing State and local laws and ordinances relating to, *inter alia*, construction and maintenance of buildings." *Bynum*, 367 N.C. at 360, 758 S.E.2d at 647.

Here, the General Assembly has assigned Wake County the responsibilities of ensuring its citizens are provided with EMS and of regulating EMS delivery within its jurisdiction, functions which can only be performed by Wake County. *See* N.C. Gen. Stat. § 143-517 (2015) ("Each county *shall* ensure that emergency medical services are provided to its citizens." (emphasis added)); *see also* N.C. Gen. Stat. § 153A-250 (2015) (permitting counties to operate EMS or to franchise EMS within its jurisdiction, and granting counties broad powers to regulate EMS delivery). Wake County's decision that Wake County EMS and other contract providers assume operational control of Six Forks after its board resolved to cease its EMS operations, and Wake County's subsequent decision to accept the transfer of Six Forks's EMS vehicles for use by Wake County EMS after Six Forks's voluntary dissolution, were discretionary decisions satisfying Wake County's statutorily delegated responsibility to ensure its citizens are provided with EMS and to regulate those EMS within its jurisdiction. Applying *Bynum*, "that the legislature has designated these responsibilities as governmental is dispositive." 367 N.C. at 360, 758 S.E.2d at 647.

Assuming *arguendo* we needed to consider the next step in *Estate of Williams*, that the activities arose from functions that can only be performed by Wake County—ensuring its citizens are provided with EMS and regulating the manner by which those EMS are furnished—establishes that the activities are governmental. *See Estate of Williams*, 366 N.C. at 202, 732 S.E.2d at 142 ("[An] activity is necessarily governmental in nature when it can only be provided by a governmental agency or instrumentality.").

Accordingly, because Wake County's alleged tortious conduct of engineering an involuntary takeover of Six Forks arose from its statutorily delegated responsibilities to ensure its citizens EMS and to regulate EMS within its jurisdiction, governmental functions which can only be performed by Wake County, we hold that Wake County satisfied its burden of establishing that its governmental immunity barred Fuller's tort claims arising therefrom.

C. Waiver

[2] Fuller next contends that Wake County waived its immunity by entering into the asset transfer agreement with Six Forks and by requiring Six Forks as part of the franchise agreement to purchase liability

insurance and to designate Wake County as an insured on the policy. We disagree.

Generally, a county may waive its governmental immunity by (1) engaging in a proprietary activity; (2) entering into a valid contract, thereby consenting to be sued; or (3) purchasing liability insurance, but only to the extent of coverage. *See*, *e.g.*, *Howard v. Cnty. of Durham*, 227 N.C. App. 46, 49, 748 S.E.2d 1, 3 (2013) (recognizing that counties may waive immunity by entering into a contract); *see also* N.C. Gen. Stat. § 153A-435(a) (2015) (authorizing counties to waive immunity by purchasing insurance).

Initially, we note that Wake County had purchased two nearly identical public entity excess liability insurance policies spanning two policy periods and satisfied its burden at the summary judgment hearing to establish these policies did not waive its immunity as to Fuller's claims. We have repeatedly held that virtually identical language contained within the governmental immunity endorsement of Wake County's liability policies do not waive immunity for claims barred by governmental immunity. *See*, *e.g.*, *Bullard v. Wake Cnty.*, 221 N.C. App. 522, 527–28, 729 S.E.2d 686, 690 (holding county did not waive immunity through purchasing policy containing exact endorsement here), *disc. rev. denied*, 366 N.C. 409, 735 S.E.2d 184 (2012).

As to his first argument, Fuller appears to assert a contract theory of waiver, by which a county entering into a valid contract " 'implicitly consents to be sued for damages on the contract in the event it breaches the contract.' " *AGI Assocs. v. City of Hickory, N.C.*, 773 F.3d 576, 579 (4th Cir. 2014) (alteration omitted) (quoting *Smith v. State*, 289 N.C. 303, 320, 222 S.E.2d 412, 424 (1976)). Yet Fuller never properly pled a breach of contract claim against Wake County, and neither presented evidence that Wake County breached that contract, nor, importantly, that Fuller was a party thereto. *See Howard*, 227 N.C. App. at 50, 748 S.E.2d at 3 (concluding that, to show a county waived immunity under contract theory of waiver, the plaintiff must properly plead a valid contract between the plaintiff and the county). Additionally, we note that Fuller has failed to cite any legal authority to support his theory that Wake County waived its immunity by entering into the asset transfer agreement with Six Forks. *See Moss Creek Homeowners Ass'n v. Bissette*, 202 N.C. App. 222, 233, 689 S.E.2d 180, 187 (2010) ("[I]t is the duty of appellate counsel to provide sufficient legal authority to this Court, and failure to do so will result in dismissal. N.C. R. App. P. 28(b)(6). Thus, because the [appellants] have failed to cite any legal authority whatsoever in support of their argument . . . , we conclude this issue does not warrant appellate

review." (citing *Pritchett & Burch, PLLC v. Boyd*, 169 N.C. App. 118, 609 S.E.2d 439, 443, *disc. rev. dismissed*, 359 N.C. 635, 616 S.E.2d 543 (2005); *Hatcher v. Harrah's N.C. Casino Co.*, 169 N.C. App. 151, 159, 610 S.E.2d 210, 214–15 (2005)). Accordingly, we overrule this argument.

As to his second argument, Fuller has failed to cite any relevant legal authority to support his contention that the franchise agreement between Wake County and Six Forks, which required Six Forks to purchase general liability insurance and to name Wake County as an insured, constituted waiver. Nonetheless, Fuller appears to be asserting a purchase of liability insurance waiver theory.

"The State and its governmental units cannot be deprived of the sovereign attributes of immunity except by a plain, unmistakable mandate of the [General Assembly]." *Irving v. Charlotte-Mecklenburg Bd. of Educ.*, 368 N.C. 609, 611, 781 S.E.2d 282, 284 (2016) (quoting *Orange Cnty. v. Heath*, 282 N.C. 292, 296, 192 S.E.2d 308, 310 (1972)). "In the absence of statutory authority a municipality has no power to waive its governmental immunity." *Heath*, 282 N.C. at 294, 192 S.E.2d at 310 (citing *Stephenson v. City of Raleigh*, 232 N.C. 42, 47, 59 S.E.2d 195, 199 (1950)). A statute operating to waive governmental immunity "must not only be strictly construed, but also be given its plain meaning and enforced as written, so long as its language is clear and unambiguous." *Irving*, 368 N.C. at 615, 781 S.E.2d at 286 (citations omitted). Relevant here, N.C. Gen. Stat. §153A-435(a) authorizes a county to waive its immunity and provides in pertinent part: "*Purchase* of insurance pursuant to this subsection waives the county's governmental immunity, to the extent of insurance coverage, for any act or omission occurring in the exercise of a governmental function." (Emphasis added.)

Although Six Forks's liability insurance policy neither was presented to the trial court nor included in the appellate record, the franchise agreement requiring the policy makes clear that such a policy was purchased, if at all, by Six Forks, and not by Wake County. Additionally, we note the franchise agreement explicitly provided: "Nothing in this [indemnification] provision is intended to affect or abrogate [Wake] County's governmental immunity . . . ." Strictly construing the plain language of N.C. Gen. Stat. § 153A-435's immunity waiver to apply to insurance policies actually purchased by the county, we hold that Fuller failed to establish a genuine issue of material fact that Wake County waived its immunity in this respect.

Because Fuller presented no genuine issue of material fact that Wake County waived its immunity by entering into the asset transfer

agreement or by requiring Six Forks to purchase liability insurance and to name Wake County as an insured, the trial court properly awarded Wake County summary judgment.

D. Successor Liability

[3] Fuller next contends that Wake County is liable to him as a transferee of Six Forks's assets under two distinct successor-liability theories: that Wake County is statutorily liable under the North Carolina Nonprofit Corporation Act and liable under common law as survivor of a de facto merger with Six Forks.

Although Fuller's 17 September 2014 complaint advanced six tort claims against Wake County, on 9 March 2016, Fuller attempted to advance a Chapter 55A claim against Wake County under section 55A-14-08 of the North Carolina Nonprofit Corporation Act, merely six days before the hearing on Wake County's summary judgment motion on immunity grounds. During this hearing, Fuller argued his statutory and common law theories of successor liability. Subsequently, the trial court entered its order awarding Wake County summary judgment and dismissing Fuller's case with prejudice.

In his underlying complaint, Fuller never advanced a claim against Six Forks pursuant to which a common law theory of successor liability might attach to Wake County. *See*, *e.g.*, *Bailey v. Handee Hugo's*, *Inc.*, 173 N.C. App. 723, 727–28, 620 S.E.2d 312, 316 (2005) ("Necessary parties must be joined in an action." (citing *Crosrol Carding Devs.*, *Inc. v. Gunter & Cooke*, *Inc.*, 12 N.C. App. 448, 451, 183 S.E.2d 834, 837 (1971)). Fuller never filed a motion to amend his complaint to include any successor-liability claim. *See* N.C. Gen. Stat. § 1A-1, Rule 15 (2015) (mandating that after responsive pleadings have been filed, "a party may amend his pleading *only* by leave of court or by written consent of the adverse party" (emphasis added)); *see also Wells v. Cumberland Cnty. Hosp. Sys.*, *Inc.*, 150 N.C. App. 584, 589, 564 S.E.2d 74, 78 (2002) (" 'A party is bound by his pleadings and, unless withdrawn, amended, or otherwise altered, the allegations contained in all pleadings ordinarily are conclusive as against the pleader.' " (quoting *Davis v. Rigsby*, 261 N.C. 684, 686, 136 S.E.2d 33, 34 (1964)). Nor did Fuller move the court to order a separate trial of any non-tort claim. *See* N.C. Gen. Stat. § 1A-1, Rule 42(b)(1) (2015) ("The court may in furtherance of convenience or to avoid prejudice . . . *upon timely motion* order a separate trial of any claim . . . , or of any separate issue . . . ." (emphasis added)).

Although Fuller attempted to advance a statutory successor-liability claim by filing a "notice of claim against assets" against Wake County

just six days before the summary judgment hearing, Fuller's underlying complaint contained no causes of action pertaining to these assets, made no mention of those assets, and did not purport to be an action filed under Chapter 55A. *See Lawyers Title Ins. Corp. v. Langdon*, 91 N.C. App. 382, 387, 371 S.E.2d 727, 731 (1988) ("[A party] cannot seek a monetary judgment against two corporate defendants in his original complaint, then amend the complaint to include an action to enforce a lien against individuals, non-parties to the original complaint, whose property interest had never been a subject of the suit."). Further, Fuller failed to cite any case law supporting his position that Wake County can face liability under Chapter 55A as a transferee of Six Forks's assets, nor have any cases been disclosed by our research.

Accordingly, because Fuller never properly pled these two successor-liability claims below, we decline to address the merits of these arguments.

III. Conclusion

Because the alleged tortious conduct of Wake County arose from its statutory obligations to ensure its citizens are provided EMS and to regulate EMS within its jurisdiction, both of which are governmental functions, Wake County established that it was entitled to summary judgment as a matter of law, and Fuller raised no genuine issue of material fact that Wake County was acting in a proprietary manner. Wake County established that it had not waived its immunity, and Fuller presented no genuine issue of material fact to the contrary. Finally, because Fuller failed to plead properly his successor-liability claims below, we decline to address these arguments on appeal. Accordingly, we affirm the trial court's order.

AFFIRMED.

Judges DILLON and ZACHARY concur.

GLOVER v. DAILEY

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

DAVID K. GLOVER, JR. AND ASHLEY L. GLOVER, PLAINTIFFS
v.
CHARLES E. DAILEY AND SHERMA R. DAILEY, DEFENDANTS

No. COA16-1108

Filed 20 June 2017

1. Evidence—testimony of purported expert—cause of mold in house

The trial court did not err in a bench trial by finding that the opinion of a purported expert on mold was based on insufficient facts or data where there were two conflicting opinions about the source of the mold in plaintiff's house and the trial court found that the opinion was based on insufficient facts as a matter of credibility, not admissibility.

2. Real Property—mold in residence—cause—insufficient evidence

The trial court did not err in a bench trial by finding that there was insufficient evidence that a leak in 2008 caused a mold problem in plaintiff's house. The evidence that connected the 2008 leak with the mold growth was testimony that the trial court did not find credible. There was other testimony that the mold growth was caused by some sort of water loss, but the witness could not conclude that the 2008 water loss was the source.

3. Fraud—negligent misrepresentation—sale of house—no reasonable reliance

In an action growing out of the discovery of mold in a house, the trial court did not err by dismissing plaintiff's claim for negligent misrepresentation in the disclosure document. Although defendants failed to disclose a prior insurance claim, they specifically noted prior water issues, including the existence of water underneath the house, that had been remedied. Plaintiffs chose to forego a mold test, and plaintiffs took no action for nineteen months, despite a later report of concealed subsurface water, until mold was discovered in the house.

4. Unfair Trade Practices—homeowner exception—relocation service

The homeowner exception to unfair and deceptive trade practices claims applied to defendants' sale of their house even though they had listed their home with a relocation service after one of the defendants accepted a job transfer. Defendants exercised their

option to sell the property on the open market, and there was no evidence that they were in the business of buying and selling property.

Appeal by plaintiffs from judgment entered 20 July 2016 by Judge G. Wayne Abernathy in Durham County Superior Court. Heard in the Court of Appeals 19 April 2017.

Pinto Coates Kyre & Bowers, PLLC, by Jon Ward and Adam L. White, for plaintiffs-appellants.

Arroyo Law Practice, by Shauna A. Guyton, for defendants-appellees.

ELMORE, Judge.

After purchasing their home, David and Ashley Glover (plaintiffs) incurred significant expenses in mold remediation, restoration, and repair. They filed an action against the former homeowners, Charles and Sherma Dailey (defendants), for fraud, negligent misrepresentation, and unfair and deceptive trade practices. Plaintiffs alleged that defendants failed to disclose a prior insurance claim to repair water damage in the master bedroom, which plaintiffs maintain was the source of the mold growth. After a bench trial, the trial court dismissed plaintiffs' claims against defendants. We affirm.

I. Background

In May 2005, defendants purchased a single-family home located at 9 Avonlea Court in Durham. The first-floor master bedroom is on the right side of the house. The garage, laundry room, and kitchen are on the left side. The house is situated on a low-lying lot relative to an adjacent property.

In March 2008, Mrs. Dailey noticed a thin trickle of water—no wider than a pencil—running down the wall in the master bedroom. Defendants contacted Nationwide Insurance to inspect and repair the leak. The trial court found that "[t]he leak was probably caused by debris which accumulated against or in the area of the flashing where the one-story bedroom roof butted against the two-story wall of the house." Portions of the dry wall, ceiling, and insulation were cut out, removed, and replaced. The wet carpet was pulled back and a portion of the padding underneath the carpet was also replaced. An antimicrobial agent was then applied and fans were used for twenty-four hours to complete the drying process. No mold was detected during the inspection and repair.

In July 2009, Mr. Dailey accepted an employment transfer to Atlanta. Defendants listed their home for sale with the help of Altair Global Relocation. Altair offered to purchase defendants' home at a guaranteed price while granting defendants the option to sell to another buyer for 120 days.

Defendants completed a two-page property disclosure form regarding the condition of the property. On the first page, defendants responded "No" when asked if "Insurance/individual claims have been asserted against the Property to remedy any physical condition of the Property." Mrs. Dailey understood the question to be couched in current terms, as in "something that was currently going on or something that had gone on, like, within the last couple of weeks or months." On the second page of the disclosure form, defendants responded "Yes" when asked if "Draining, flooding, moisture, mold, water penetration, and/or sewer malfunctions previously and/or currently affect any portion of the interior and/or exterior of the Property," and if "Previous corrections have been performed or current problems exist with drainage, flooding, moisture, mold, water penetration, and/or sewer malfunctions on the Property." Defendants underlined the foregoing portions to clarify their responses and included an explanation thereof: (1) "Had excess water around front and side of house. Re-worked drain and pipes front and side"; (2) "Pipe from crawl space outside damaged Centex replaced no further issues [sic]. Had water under house briefly. No [sic] corrected." Altair signed and acknowledged the disclosure form as the buyer.

On 17 December 2009, Lindsley Waterproofing, Inc. performed a property inspection at defendants' request. The inspection revealed problems with "a foundation drain and coatings." According to the inspection report, "water intrusion had been going on for a long time" but mold and fungus were not detected. Mr. Lindsley indicated that either exterior or interior waterproofing was necessary. Mrs. Dailey testified that she had the exterior waterproofing performed but did not know who made the repairs or how much they cost.

Shortly thereafter, plaintiffs became interested in the property. On 12 January 2010, plaintiffs contracted with Altair, acting on behalf of defendants, to purchase the property. The contract included a $10,000.00 repair contingency. The contract addendum and paperwork related to the purchase referenced both Altair and defendants as the sellers.

On 15 January 2010, plaintiffs obtained a professional home inspection of the property. The inspection report identified several issues, including standing water and poor drainage in the back yard. No mold

test was performed. Plaintiffs sent their repair requests to defendants, which were completed before closing on 13 February 2010.

About two years later, on 12 March 2012, Lindsley Waterproofing, Inc. performed another inspection, this time for plaintiffs. Mr. Lindsley noted in his report that the property had "concealed water (subsurface)." He informed plaintiffs that "concealed water results in damp walls, damp soil, and an excessively humid crawlspace; and that lends itself to mold infestation." Despite Mr. Lindsley's report, plaintiffs took no action for nineteen months until Mrs. Glover found black mold in the laundry room and kitchen.

In September 2013, plaintiffs contacted Cathy A. Richmond of LRC Indoor Testing and Research to conduct a mold investigation in the kitchen and laundry room. The trial court accepted Richmond as an expert in the field of environmental testing and mold. During her investigation, Richmond found Stachybotrys and Chaetomium in the air inside the home. Each genus usually requires water to grow and has the potential to release mycotoxins which can cause respiratory problems. Richmond suspected that "somewhere, somehow, sometime" the mold "got into the ductwork." She was aware of the Nationwide claim but, even without evidence of another active water loss, she could not conclude within a reasonable degree of scientific certainty that the 2008 water loss caused the mold growth.

After Richmond's inspection, plaintiffs retained David W. Cotton of AdvantaClean to perform mold remediation. At his deposition, plaintiffs tendered Cotton as an expert in mold and water remediation. Cotton testified that he took an air sample and found Stachybotrys in the first and second floor of the home. He did not detect any moisture intrusion but did find that the HVAC system was contaminated with mold. Based upon his review of the Nationwide claim, Cotton opined that the 2008 water loss caused the mold growth. His deposition transcript was admitted into evidence but Cotton did not testify at trial and the court did not explicitly accept him as an expert.

On 12 November 2015, plaintiffs filed a complaint against defendants alleging fraud, negligent misrepresentation, and unfair and deceptive trade practices based on defendants' failure to disclose the Nationwide claim in the property disclosure form. The parties stipulated to a trial without a jury, which was held at the 5 July 2016 Civil Session of the Durham County Superior Court. Before trial, the court ruled that defendants were the "sellers" and plaintiffs had not failed to join Altair as a necessary party. At the close of the evidence, the trial court granted

defendants' motion for directed verdict on the unfair and deceptive trade practices claim because, as "homeowners selling their personal residence," defendants are not subject to unfair and deceptive trade practice liability.

After the bench trial, the court entered a judgment dismissing plaintiffs' remaining claims, concluding that plaintiffs failed to prove fraud and negligent misrepresentation by a preponderance of the evidence.[1] Most notably, the court found Cotton's opinion regarding the source of the mold to be "without factual basis, speculative, and not credible" because "his opinion was based upon insufficient facts or data." As to the disclosure form, the court found that defendants had no intent to deceive and "they believed the question regarding an insurance claim applied to current conditions." In light of the other disclosures made by defendants and the house inspection report, the court could not find that "plaintiffs were justified in relying on the disclosure regarding insurance claims," or that any reliance on the disclosure form "proximately cause[d] plaintiffs' damages." Plaintiffs timely appeal.

II. Discussion

During a bench trial, "the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." N.C. Gen. Stat. § 1A-1, Rule 52(a)(1) (2015). In its role as the fact-finder, "the trial judge considers 'the credibility of the witnesses and the weight to be given their testimony.' " *Terry's Floor Fashions, Inc. v. Crown Gen. Contractors, Inc.*, 184 N.C. App. 1, 10, 645 S.E.2d 810, 816 (2007) (quoting *Knutton v. Cofield*, 273 N.C. 355, 359, 160 S.E.2d 29, 33 (1968)). " 'If different inferences may be drawn from the evidence, the trial judge determines which inferences shall be drawn and which shall be rejected.' " *Id.* (quoting *Knutton*, 273 N.C. at 359, 160 S.E.2d at 33).

We review the resulting judgment from a bench trial to determine whether the findings of fact are supported by competent evidence, and whether the conclusions of law are "proper in light of such facts." *Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992) (citation omitted). While an appellant may challenge "the sufficiency of the evidence" supporting the findings of fact, N.C. Gen. Stat. § 1A-1, Rule 52(c) (2015), we are bound by the trial court's findings so long as "there is some evidence to support" them—even if "the

1. The judgment also noted that plaintiffs' claim for unfair and deceptive trade practices was dismissed at the close of the evidence.

evidence might sustain findings to the contrary,' " *Chicago Title Ins. Co. v. Wetherington*, 127 N.C. App. 457, 460, 490 S.E.2d 593, 596 (1997) (quoting *In re Montgomery*, 311 N.C. 101, 110–11, 316 S.E.2d 246, 252–53 (1984)). We review the trial court's conclusions of law *de novo*. *Shear*, 107 N.C. App. at 160, 418 S.E.2d at 845 (citation omitted).

A. Cotton's Opinion Testimony

[1] First, plaintiffs argue that the trial court erred in finding that Cotton's opinion was based upon insufficient facts or data. Because defendants raised no objection to his deposition testimony, plaintiffs contend that the trial court had no need to assess the facts or data utilized by Cotton and, by doing so, the court created a "backdoor *Daubert* challenge" which prejudiced plaintiffs.

The trial court was presented with two differing opinions regarding the source of the mold. Cotton opined in his deposition that the 2008 water loss caused the mold growth, while Richmond could not conclude the same within any reasonable degree of scientific certainty. As the fact-finder, the trial court was tasked with assigning weight and credibility to the testimony. Faced with conflicting opinions, the court had to determine which was more credible. It found that Cotton's opinion was not credible because of his failure to consider

> the reports of standing water, water intrusion under the house, the fact Mr. Lindsley found concealed ground water and wet soil, the fact no mold was ever found in the master bedroom, [ ] the fact that the plaintiffs lived in the house over three and a half years prior to discovering mold, and the fact the kitchen floors were cupped as a result of moisture.

As the findings demonstrate, and as defendants point out, the trial court found that Cotton's "opinion was based upon insufficient facts or data" as a matter of credibility—not admissibility. Accordingly, plaintiffs' argument regarding Rule 702 and the purported "backdoor *Daubert* challenge" is unavailing.

B. Findings Regarding Cause of the Mold

[2] Next, plaintiffs argue that the trial court erred in finding that plaintiffs offered no credible evidence that the 2008 water loss caused the mold.

Cotton's testimony, which the court did not find credible, was the only evidence that directly connected the 2008 water loss with the mold

growth. Richmond agreed that "some sort of water loss" caused the mold growth inside the home. Although she did not discover evidence of an active water loss during her investigation, she did allude to signs of water loss in the kitchen:

> Q: Okay. In the absence of having any other information about any other sort of water loss, could you opine that [the 2008] water loss, if there was no other water loss, was the source of this mold?
>
> A: Well, the day we were there, everything was dry, but the floors were cupped. Something caused those floors to be cupped. You know, they don't just cup on their own. And, generally, water is the source of cupping.
>
> THE COURT: That's because—it could be an overflowing dishwasher, couldn't it? A dishwasher running, it floods.
>
> THE WITNESS: It can be caused from that, yes.
>
> THE COURT: That doesn't cause the mold in that case, does it?
>
> THE WITNESS: Well, it doesn't per se. But the mold—we have mold everywhere. You know, it's in houses, it's under our floors. And when we get the water in there, that causes it to grow.
>
> Now, how it got into the ductwork, you know, the air keeps circulating through our ductwork, and there was a duct right under that kitchen sink.

Ultimately, however, Richmond could not conclude that the 2008 water loss was the source of the mold: "I would have to investigate where that loss occurred, where the water came down, and I would have to know that information before I could say that." Her testimony, which the trial court found credible, supports the findings of fact.

C. Negligent Misrepresentation

[3] Next, plaintiffs challenge the trial court's conclusion that plaintiffs failed to prove negligent misrepresentation by a preponderance of the evidence. Plaintiffs argue that defendants' response to the insurance claim question simply amounts to a false statement, and "there is nothing to absolve [defendants] of liability." In addition, plaintiffs contend that the trial court erred as a matter of law by considering defendants' "purported mindset, which is irrelevant to the negligent misrepresentation claim."

"The tort of negligent misrepresentation occurs when a party justifiably relies to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care." *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 206, 367 S.E.2d 609, 612 (1988) (citations omitted); *see also Simms v. Prudential Life Ins. Co. of Am.*, 140 N.C. App. 529, 532, 537 S.E.2d 237, 240 (2000) (articulating elements of negligent misrepresentation).

Relevant to the element of "reasonable care," the trial court found credible "defendants' testimony that they believed the question regarding an insurance claim applied to current conditions." The court particularly noted the "wording" of the questions on the disclosure form. The question at issue—whether "Insurance/individual claims have been asserted against the property to remedy any physical condition of the property"—may reasonably be susceptible to defendants' interpretation when compared to the more specific temporal language in the very next question—whether "The property *has previously and/or is affected currently* by household pet conditions." (Emphasis added.)

Regardless of whether defendants failed to exercise reasonable care in the preparation of the disclosure form, the evidence supports the trial court's findings that plaintiffs' reliance on defendants' representation was neither justified nor a proximate cause of plaintiffs' damages. As previously discussed, the trial court did not find credible Cotton's opinion that the 2008 water loss caused the mold growth. Although defendants failed to disclose the Nationwide claim, they specifically noted the prior water issues on the property in the disclosure form, including the existence of water underneath the house which had not been remedied. Plaintiffs nevertheless elected to forego a mold test as part of the home inspection. And despite Mr. Lindsley's report of concealed subsurface water, which lends itself to mold infestation, plaintiffs took no action for nineteen months until Mrs. Glover discovered mold in the laundry room and kitchen. Because the evidence supports the findings that elements of negligent misrepresentation were absent, the trial court did not err in dismissing plaintiffs' claim against defendants.

D. Unfair and Deceptive Trade Practices

[4] Finally, plaintiffs argue that the trial court erred in dismissing their claim for unfair and deceptive trade practices based on the "homeowner exception" despite evidence that defendants were not the "sellers."

Chapter 75 of our General Statutes prohibits "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." N.C. Gen. Stat. § 75-1.1(a) (2015).

As the statutory language indicates, "to prevail on a cause of action for unfair and deceptive trade practices, a plaintiff must show that the matter was in or affecting commerce." *MacFadden v. Louf*, 182 N.C. App. 745, 746, 643 S.E.2d 432, 433 (2007). Under the established homeowner exception, "private homeowners selling their private residences are not subject to unfair and deceptive practice liability." *Davis v. Sellers*, 115 N.C. App. 1, 7, 443 S.E.2d 879, 883 (1994) (citations omitted); *see also Birmingham v. H&H Home Consultants & Designs, Inc.*, 189 N.C. App. 435, 440, 658 S.E.2d 513, 517 (2008) ("[T]he North Carolina appellate courts created a 'homeowner exception' to the unfair and deceptive acts or practices statute which exempts private homeowners selling their personal residence from the purview of the statute."); *Rosenthal v. Perkins*, 42 N.C. App. 449, 454, 257 S.E.2d 63, 67 (1979) ("It is clear from the cases involving violation of the Unfair Trade Practices Act that the alleged violators must be engaged in a business, a commercial or industrial establishment or enterprise." (citations omitted)).

The trial court found that defendants were the "sellers" in part because they exercised their option to sell the property on the open market rather than to Altair. At the very least, the references to defendants as "sellers" in the property disclosure form and contract to purchase is competent evidence which supports the trial court's finding. The record contains no evidence that defendants were in the business of buying and selling residential property. As private homeowners selling their personal residence, therefore, defendants "are not subject to unfair and deceptive practice liability." *Davis*, 115 N.C. App. at 7, 443 S.E.2d at 883. The trial court properly dismissed plaintiffs' cause of action under the homeowner exception.

III. Conclusion

Based on the foregoing, we conclude that the trial court properly dismissed plaintiffs' claims against defendants. Although different inferences may be drawn from the evidence in the record, there is evidence to support the trial court's findings of fact, and its findings of fact support its conclusions of law. The trial court's order is affirmed.

AFFIRMED.

Judges INMAN and BERGER concur.

BRUCE JUSTUS AS ADMINISTRATOR OF THE ESTATE OF PAMELA JANE JUSTUS, PLAINTIFF
v.
MICHAEL J. ROSNER, M.D.; MICHAEL J. ROSNER, M.D., P.A.; FLETCHER HOSTPITAL, INC., D/B/A PARK RIDGE HOSPITAL; ADVENTIST HEALTH SYSTEM; AND ADVENTIST HEALTH SYSTEM SUNBELT HEALTHCARE CORPORATION, DEFENDANTS

No. COA15-1196

Filed 20 June 2017

1. Medical Malpractice—motion to set aside verdict—grossly inadequate—mitigation of damages—pain and suffering

The trial court acted within its discretion in setting aside a jury verdict based on N.C.G.S. § 1A-1, Rule 59(a)(6) and (7) in a medical malpractice case where defendant doctor performed two surgeries on a patient who failed to return to his care for complications related to the surgeries but instead sought medical treatment from other doctors. The evidence of mitigation of damages was insufficient to justify the verdict, and the jury's initial damages award that did not include compensation for pain and suffering must have been decided under the influence of passion and prejudice.

2. Trials—amended judgment—new trial—improperly changing jury's damages verdict

The trial court erred in a medical malpractice case by entering an amended judgment that changed the jury's damages verdict from $1.00 to $512,162.00. instead of granting a new trial on damages only. N.C.G.S. § 1A-1, Rule 59(a) does not allow a trial judge presiding over a jury trial to substitute its opinion for the verdict and change the amount of damages to be recovered.

3. Medical Malpractice—contributory negligence defense—directed verdict

The trial court did not err in a medical malpractice case by granting plaintiff estate administrator's motion for a directed verdict on defendant doctor's contributory negligence defense where the conduct of the patient (smoking) after the first of two surgeries occurred after the doctor's negligent acts that caused the patient's neck injury.

4. Costs—expert witness fees—medical malpractice—abuse of discretion standard

The trial court did not abuse its discretion in a medical malpractice case by awarding costs in the amount $175,547.59 against

defendant doctor. Although defendant pointed out that three experts testified against other defendants found to be not liable or negligent, and not against him, defendant failed to establish that ordering payment of these expert fees was an abuse of discretion.

Judge TYSON concurring in part and dissenting in part.

Appeal by defendants Michael J. Rosner, M.D., and Michael J. Rosner, M.D., P.A. from orders and amended judgment entered 3 March 2015 by Judge Zoro J. Guice, Jr., in Henderson County Superior Court. Heard in the Court of Appeals 7 June 2016.

The Law Offices of Wade Byrd, P.A., by Wade E. Byrd, for plaintiff-appellee.

Wyrick Robbins Yates & Ponton LLP, by Tobias S. Hampson and K. Edward Greene, for defendant-appellants.

BRYANT, Judge.

Where the trial court was within its discretion to set aside the jury verdict on the ground it was grossly inadequate, we affirm in part the trial court order granting plaintiff relief; however, where the trial court acted outside its authority in altering the verdict and thereafter amending the judgment, we vacate the amended judgment and remand for a new trial on damages. Where defendant was not entitled to an instruction on contributory negligence, we affirm the trial court's directed verdict as to that defense. Where the trial court acted within its statutory and discretionary authority in awarding costs to plaintiff, we affirm.

On 21 October 2014, the Honorable Zoro Guice, Jr., Judge presiding in Henderson County Superior Court, entered judgment in accordance with jury verdicts finding defendant Michael J. Rosner, M.D. and Michael J. Rosner, M.D., P.A., negligent and liable to plaintiff Bruce Justus as Administrator of the Estate of Pamela Jane Justus.[1,2] The jury found that

1. Fourteen issues were submitted to the jury addressing the liability of Michael J. Rosner, M.D.; Michael J. Rosner, M.D., P.A.; Fletcher Hospital, Inc. d/b/a Park Ridge Hospital; Adventist Health System; and Adventist health System Sunbelt Healthcare Corporation. All issues related to liability of the hospital and healthcare system and corporation for injury, wrongful death, fraud, or conspiracy as to Pamela Justus were answered in the negative. The jury also determined that Dr. Rosner was not liable for wrongful death as to Pamela Justus.

2. Hereinafter, the opinion will refer to Bruce Justus as "plaintiff."

plaintiff was entitled to recover $512,162.00 for personal injury, but that that amount should be reduced by $512,161.00 (resulting in a nominal $1.00 award) "because of Pamela Justus's unreasonable failure . . . to avoid or minimize her damages." Within ten days, plaintiff filed a motion to alter or amend the judgment pursuant to N.C. R. Civ. P. 59(a)(5), (7) and Rule 59(e). On 3 March 2015, Judge Guice entered an order granting plaintiff's motion to amend the 21 October 2014 judgment and also a corresponding amended judgment which struck the jury's verdict on mitigation of damages and awarded plaintiff $512,162.00. Dr. Michael J. Rosner and Michael J. Rosner, M.D., P.A., appeal this order, the amended judgment, and an order awarding costs.[3]

As the 3 March 2015 order and amended judgment from which defendant appeals contain relevant facts (and procedural history), we set them out herein in relevant part:

FINDINGS OF FACT

> 1. On June 12, 2003, Plaintiffs [sic] filed [this] action alleging medical malpractice by Defendant Michael J. Rosner, M.D.
>
> 2. The charges of medical malpractice against Dr. Rosner ar[o]se from his performance of two neurosurgical procedures on decedent Pamela Jane Justus.
>
> . . . .
>
> 4. The following evidence was presented at trial and was uncontroverted:
>
> a. On June 27, 2000, Dr. Rosner performed a laminectomy on Pamela Justus.[4]
>
> b. On February 6, 2001, after Mrs. Justus reported increased pain, Dr. Rosner performed a second surgery

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3. On 2 December 2015, this Court granted a consent motion to dismiss Fletcher Hospital, Inc. d/b/a Park Ridge Hospital, Adventist Health System, and Adventist Health System Sunbelt Healthcare Corporation from the appeal of this case. The remaining defendants, Dr. Michael J. Rosner and Michael J. Rosner, M.D., P.A., are hereinafter referred to as "defendant."

4. At trial, a laminectomy was described as a "procedure [to] remove a portion of the vertebral bone to make more space in the spinal canal for the spinal cord."

(a laminectomy, craniectomy/craniotomy, tonsillar resection, and placement of a bovine pericardium).

c. Mrs. Justus last saw Dr. Rosner on March 21, 2001.

d. On May 29, 2001, in response to her report of severe pain, nausea and other post-operative symptoms, Dr. Rosner's office advised Mrs. Justus to return to see Dr. Rosner for a repeat MRI and re-evaluation, but she declined, stating that she was afraid to come back to Dr. Rosner again, and also that she lacked insurance because her husband had been laid off from work.

e. Thereafter, Mrs. Justus repeatedly consulted with physicians in an effort to obtain treatment for her continuing neck, head and back pain. For example, she saw Dr. Charles Buzzanell in July and August 2001; a neurologist at Wake Forest University Baptist Medical Center in August and September 2001; Dr. Lesco Rogers on September 25, 2001; Dr. Shashidhar Kori at Duke University Medical Center on September 25, 2001, and neurosurgeon Dr. Regis Haid from November 2003 through January 2004.

f. In February 2004, Mrs. Justus visited Carolina Neurosurgery and Spine Associates in Charlotte, North Carolina, for corrective surgery; and, in April 2004, she had surgery done to correct her inability to support her head.

g. On numerous occasions from 2004 through 2011, Mrs. Justus sought and received further medical care related to her head and neck.

h. In late 2011, Mrs. Justus had another corrective back and neck surgery performed by Dr. Coric of Carolina Neurosurgery and Spine Associates.

i. Mrs. Justus died on September 20, 2012.

5. Dr. Rosner contended at trial that Mrs. Justus unreasonably failed to mitigate her damages.

6. To support the foregoing defense, Dr. Rosner called four neurosurgical experts (Drs. Michael Seiff, Donald Richardson, Peter Jannetta, and Konstantin Slavin) to testify on his behalf.

7. These neurosurgical experts testified that Mrs. Justus' condition could have been ameliorated had she promptly sought follow-up care from Dr. Rosner.

8. Based upon the Court's opportunity to observe the evidence as it was presented and the attendant circumstances, together with the demeanor of Dr. Rosner's neurosurgical experts and considering all of their testimony in context, this Court finds that the overall impression created by these witnesses (and thus communicated to the jury) is that Mrs. Justus had an obligation to return specifically to *Dr. Rosner*; and that, by failing to do so, she allowed her condition to worsen.

9. That Dr. Rosner elicited this testimony from four different experts, moreover, intensified its cumulative impact upon the jury.

10. There was no evidence presented that [Mrs.] Justus unreasonably delayed trying to have her problems diagnosed and corrected.

11. On the contrary, her attempts to mitigate her damages were reasonable and all that could be expected.

12. Given the uncontested evidence that [Mrs.] Justus promptly and persistently made diligent efforts to obtain treatment from other physicians after she terminated her relationship with Dr. Rosner, no reasonable person could conclude that she failed to exercise reasonable care to mitigate her damages.

13. Nevertheless, Dr. Rosner's mitigation defense was submitted as Issue #12 to the jury.

14. On September 24, 2014, the jury returned a verdict on [sic] favor of Plaintiffs against Dr. Rosner.

15. The jury found that Mrs. Justus sustained damages in the amount of Five Hundred Twelve Thousand One Hundred Sixty-[Two] Dollars ($512,16[2].00).

16. The foregoing sum reflected only Mrs. Justus' medical bills; it included no damages for pain and suffering.

17. Based upon its finding in Issue #12 that Mrs. Justus had unreasonably failed to mitigate her damages,

the jury reduced the foregoing damage award to One Dollar ($1.00).

18. Given the uncontroverted evidence that Mrs. Justus experienced severe pain and suffering (e.g., nausea, tremors, and imbalance) as a result of the procedures performed by Dr. Rosner, and that, even had she allowed Dr. Rosner to continue to treat her, she would have endured at least some of these symptoms, the jury's finding of *no* damages for pain and suffering is inadequate.

19. In addition, given the absence of evidence that Mrs. Justus unreasonably failed to mitigate her damages, the damage award as reduced by the jury's finding on Issue #12 is inadequate for that reason as well.

20. Furthermore, the amount of the jury's mitigation finding—i.e., that Mrs. Justus' condition was almost *entirely her own fault* (except for $1.00)—vastly exceeds, and is grossly disproportionate to, the extent to which, according to Dr. Rosner's neurosurgical experts, her condition could have been ameliorated had she timely sought follow-up care.

. . . .

CONCLUSIONS OF LAW

1. Patients have no legal obligation to seek medical treatment from any particular health care provider.

2. Mrs. Justus therefore had no duty to return to Dr. Rosner, rather than to other health care providers.

3. The testimony by Dr. Rosner's neurosurgical experts suggesting that Mrs. Justus had a duty to return specifically to Dr. Rosner was inaccurate and misleading.

4. The misleading effect of the foregoing testimony was compounded by its repetition from four different expert witnesses.

5. Dr. Rosner presented no legally competent evidence sufficient to support a finding that Mrs. Justus unreasonably failed to mitigate her damages.

6. This Court committed prejudicial error in submitting Issue #12 [(mitigation of damages defense)] to the jury.

7. The jury's $1.00 damage award is manifestly inadequate.

> 8. The jury appears to have made its initial damage finding ($512,16[2].00) under the influence of passion or prejudice, for the finding entirely omits any sum for pain and suffering despite the uncontroverted evidence that Mrs. Justus experienced severe pain and suffering.
>
> 9. The jury also appears to have reduced its damage finding ($512,161.00) under the influence of passion or prejudice; specifically, the cumulative impact of misleading testimony from multiple experts.
>
> 10. Even aside from the lack of evidence to support *any* mitigation finding at all, the influence of passion or prejudice is further manifested in the grossly excessive *amount* of the jury's mitigation finding.
>
> Based on the foregoing Findings of Fact and Conclusions of Law, it is therefore **ORDERED, ADJUDGED AND DECREED** as follows:
>
> 1. Plaintiffs' Motion to Alter or Amend Judgment is hereby GRANTED.
>
> 2. The judgment entered on October 21, 2014 is hereby AMENDED by changing the amount of damages from One Dollar ($1.00) to Five Hundred Twelve Thousand One Hundred Sixty-Two Dollars ($512,162.00).

Following the detailed order granting plaintiff's motion to amend, the trial court entered an amended judgment. The amended judgment reads, in relevant part, as follows:

> Pursuant to the Court's "Order Granting Plaintiff's Motion To Alter or Amend Judgment", the Judgment entered on October 21, 2014 is hereby amended as follows: . . . IT IS HEREBY **ORDERED, ADJUDGED and DECREED**, that the Plaintiff, Billy Bruce Justus, as Administrator of the Estate of Pamela Jane Justus, shall have and recover from the Defendants, Michael J. Rosner, MD and Michael J. Rosner, MD, PAs [sic] the sum of **Five Hundred Twelve Thousand One Hundred Sixty-Two [$512,162.00] Dollars with interest at the legal rate of eight (.08) percent per annum from the date of the filing of the complaint, June 12, 2003 until paid.**

(Emphasis added).

On appeal, defendant argues the trial court erred by (I) setting aside a valid jury verdict on the issue of Pamela Justus's failure to mitigate damages. Alternatively, he argues the court erred by (II) entering an amended judgment instead of granting a new trial on all issues, including (III) allowing a defense of contributory negligence. Defendant further argues (IV) the trial court's award of costs must be reversed.

I

[1] Defendant first contends plaintiff's motion to amend the judgment was an invalid motion and, thus, the trial court erred in considering it. Defendant further contends the trial court compounded the error by setting aside the damages verdict and concluding as a matter of law that the trial court itself had committed prejudicial error by submitting Issue #12—mitigation of damages—to the jury.

"Motions to amend judgments pursuant to N.C.G.S. § 1A-1, Rule 59 are addressed to the sound discretion of the trial court, and will not be disturbed on appeal absent an abuse of that discretion." *Trantham v. Michael L. Martin, Inc.*, 228 N.C. App. 118, 127, 745 S.E.2d 327, 335 (2013) (citation omitted).

> [W]e note that the trial judges of this state have traditionally exercised their discretionary power to grant a new trial in civil cases quite sparingly in proper deference to the finality and sanctity of the jury's findings. We believe that our appellate courts should place great faith and confidence in the ability of our trial judges to make the right decision, fairly and without partiality, regarding the necessity for a new trial. Due to their active participation in the trial, their first-hand acquaintance with the evidence presented, their observances of the parties, the witnesses, the jurors and the attorneys involved, and their knowledge of various other attendant circumstances, presiding judges have the superior advantage in best determining what justice requires in a certain case. Because of this, we find much wisdom in the remark made many years ago by Justice Livingston of the United States Supreme Court that "there would be more danger of injury in revising matters of this kind than what might result now and then from an arbitrary or improper exercise of this discretion." *Insurance Co. v. Hodgson*, 10 U.S. (6 Cranch) 206, 218 (1810). Consequently, an appellate court should

> not disturb a discretionary Rule 59 order unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice.

Worthington v. Bynum, 305 N.C. 478, 487, 290 S.E.2d 599, 605 (1982). Our Supreme Court recognized a basis for such discretion in that

> [t]he judge is not a mere moderator, but is an integral part of the trial, and when he perceives that justice has not been done[,] it is his duty to set aside the verdict. His discretion to do so is not limited to cases in which there has been a miscarriage of justice by reason of the verdict having been against the weight of the evidence (in which, of course, he will be reluctant to set his opinion against that of the twelve), but he may perceive that there has been prejudice in the community which has affected the jurors, possibly unknown to themselves, but perceptible to the judge—who is usually a stranger— . . . but which has brought about a result which the judge sees is contrary to justice.

Id. at 483, 290 S.E.2d at 603 (citing *Bird v. Bradburn*, 131 N.C. 488, 489, 42 S.E. 936, 937 (1902)).

Pursuant to North Carolina General Statutes, section 1A-1, Rule 59,

> [a] new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds:
>
> . . . .
>
> (5) Manifest disregard by the jury of the instructions of the court;
>
> (6) Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice;
>
> (7) Insufficiency of the evidence to justify the verdict or that the verdict is contrary to law;
>
> (8) Error in law occurring at the trial and objected to by the party making the motion, or
>
> (9) Any other reason heretofore recognized as grounds for new trial.

N.C. Gen. Stat. § 1A-1, Rule 59(a) (2015). A Rule 59(e) "motion to alter or amend must be based on grounds listed in Rule 59(a)." *Smith v Johnson*, 125 N.C. App. 603, 606, 481 S.E.2d 415, 417 (1997) (citation omitted).

Mitigation of Damages

Defendant challenges the trial court's authority to amend the 21 October 2014 judgment pursuant to Rule 59(a)(7) ("Insufficiency of the evidence to justify the verdict or that the verdict is contrary to law"). Defendant contends the trial court erred in setting aside the verdict, where the mitigation of damages issue was supported by the evidence presented at trial and properly submitted to the jury. Further, defendant argues that where evidence on an issue is admitted before the jury, no challenge to the jury instruction on the issue is made, and the jury verdict is not contrary to law, a trial court is without authority to amend the judgment. We disagree, as Rule 59(a)(7) allows for amendment of the judgment or a new trial based on "[*i*]nsufficiency *of the evidence to justify the verdict* or that the verdict is contrary to law." *Id.* (emphasis added).

> Rule 59(a)(7) authorizes the trial court to grant a new trial based on the "insufficiency of the evidence to justify the verdict." N.C.G.S. § 1A-1, Rule 59(a)(7). We have previously indicated that, in this context, the term "insufficiency of the evidence" means that the verdict "was against the greater weight of the evidence." *Nationwide Mut. Ins. Co. v. Chantos*, 298 N.C. 246, 252, 258 S.E.2d 334, 338 (1979). The trial court has discretionary authority to appraise the evidence and to " 'order a new trial whenever in his opinion the verdict is contrary to the greater weight of the credible testimony.' " *Britt v. Allen*, 291 N.C. 630, 634, 231 S.E.2d 607, 611 (1977) (quoting *Roberts v. Hill*, 240 N.C. 373, 380, 82 S.E.2d 373, 380 (1954)). Like any other ruling left to the discretion of a trial court, the trial court's appraisal of the evidence and its ruling on whether a new trial is warranted due to the insufficiency of evidence is *not* to be reviewed on appeal as presenting a question of law. *Id.* at 635, 231 S.E.2d at 611. As we stated in *Worthington*:
>
> > It has been long settled in our jurisdiction that an appellate court's review of a trial judge's discretionary ruling either *granting* or *denying* a motion to set aside a verdict and order a new trial is *strictly limited* to the determination of

> whether the record affirmatively demonstrates an abuse of discretion by the [trial] judge.
>
> 305 N.C. at 482, 290 S.E.2d at 602 (emphasis added). [Our Supreme] Court has long recognized this standard for appellate review of trial court orders granting new trials. *See, e.g.*, *Dixon v. Young*, 255 N.C. 578, 122 S.E.2d 202 (1961); *Caulder v. Gresham*, 224 N.C. 402, 30 S.E.2d 312 (1944); *Bird v. Bradburn*, 131 N.C. 488, 42 S.E. 936 (1902); *Brink v. Black*, 74 N.C. 329 (1876). . . . " '[A]n appellate court should not disturb a *discretionary* Rule 59 order unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice.' " *Anderson v. Hollifield*, 345 N.C. 480, 483, 480 S.E.2d 661, 663 (1997) (quoting *Campbell v. Pitt County Mem'l Hosp., Inc.*, 321 N.C. 260, 265, 362 S.E.2d 273, 275 (1987)) (emphasis added).
>
> The trial court's discretion to grant a new trial arises from the inherent power of the court to prevent injustice. *Britt*, 291 N.C. at 634, 231 S.E.2d at 611. . . .
>
> . . . .
>
> . . . It is impossible to place precise boundaries on the trial court's exercise of its discretion to grant a new trial. However, we emphasize that this power must be used with *great care and exceeding reluctance.* This is so because the exercise of this discretion sets aside a jury verdict and, therefore, will always have some tendency to diminish the fundamental right to trial by jury in civil cases which is guaranteed by our Constitution.

In re Buck, 350 N.C. 621, 624–26, 516 S.E.2d 858, 860–61 (1999).

Thus, the inherent power of the trial court to try and prevent injustice by setting aside a jury verdict is fully supported in our jurisprudence.[5] For the foregoing reasons, we review defendant's challenges to the trial court's actions for abuse of discretion. *See id.*

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5. To be clear, the trial court's order which substantially changed or altered the jury verdict by replacing it with the trial court's own verdict does constitute error. *Cf. Baker v. Tucker*, 239 N.C. App. 273, 278, 768 S.E.2d 874, 877–78 (2015) ("[Rule 59(a)] specifically provides that '[o]n a motion for a new trial in an action tried *without a jury*, the court may open the judgment if one has been entered . . . and direct the entry of a new judgment.' " (quoting N.C.R. Civ. P. 59(a)); *see also Handex of the Carolinas, Inc. v. Cnty. of Haywood*,

First, in reviewing defendant's challenge to the portion of the trial court's order regarding mitigation of damages, we note defendant's challenge to Finding of Fact 9 (finding "Dr Rosner elicited [misleading] testimony from four different experts [which] intensified its cumulative impact upon the jury") as "not accurate" and to Finding of Fact 12 (finding that "Pamela Justus made prompt and diligent efforts to obtain treatment for her injuries" and "no reasonable person could conclude that Pamela Justus failed to exercise reasonable care to mitigate her damages") as "not supported by the evidence." We contrast the two challenged findings with the trial court's Finding of Fact 8, in which the court stated the testimony and demeanor of the expert witnesses created an impression communicated to the jury that by Pamela's failure to return specifically to Dr. Rosner, she allowed her condition to worsen. Indeed, Finding of Fact 8 and other unchallenged findings support the trial court's conclusions that because Pamela Justus had no duty to return specifically to Dr. Rosner for medical treatment, cumulative expert testimony that said otherwise was so misleading the jury should never have been instructed on a "mitigation of damages" defense. Thus, the jury verdict—that "Plaintiff's actual damages be reduced [by $512,161.00] because of Pamela Justus's unreasonable failure . . . to avoid or minimize her damages"—was set aside by the trial court upon its determination that, given misleading evidence adduced at trial, it was error to submit the mitigation of damages instruction to the jury.

On this point, defendant contends the legal question before this Court is "[whether] a failure to follow-up with treatment or otherwise comply with a physician[']s instructions constitute failure to mitigate damages." Here, defendant proposes an inquiry that implicates factual evidence adduced at trial, jury instructions as to mitigation of damages, and the trial court's reasoning for setting aside the verdict. Defendant's contention—that a failure to follow up with treatment or otherwise comply with a physician's instructions may constitute failure to mitigate—is much broader than the narrower issue the trial court reviewed, which was whether the jury considered only the expert testimony that failure to follow up with Dr. Rosner (as opposed to seeking treatment from other medical providers) constituted unreasonable failure to mitigate damages.

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168 N.C. App. 1, 22, 607 S.E.2d 25, 38 (2005) (noting that, in the event of a clerical error on a jury verdict sheet, where the trial court sets aside or amends a verdict pursuant to Rule 59 after the jury has been discharged, there must be some evidence that all jurors are in agreement that the verdict sheet did not represent their intentions); *see also infra* Issue II.

On failure to mitigate damages, the trial court instructed the jury as follows:

> A person injured by the negligent conduct of another is nonetheless under a duty to . . . seek treatment to get well and to avoid or minimize the harmful consequences of her injury. . . . If you find that a healthcare provider advised [Pamela] to follow up her care and treatment, you would not necessarily conclude that Pamela Justus acted unreasonably in declining such advice. In determining whether [her] conduct was reasonable you must consider all the circumstances as they appeared to [her] at the time she chose not to follow the . . . advice. These may include the financial condition of [Pamela], the degree of risk involved, the amount of pain involved, the chances for success . . . .

Thus, it appears the trial court instructed the jury on the narrow question of whether failure to follow up with Dr. Rosner constituted an unreasonable failure to mitigate damages.

At trial, there was significant testimony regarding extensive medical treatment, including additional procedures performed on Mrs. Justus over the ten years following the two surgeries performed by Dr. Rosner. As previously indicated, there was also significant testimony from experts, who indicated Ms. Justus's failure to follow-up with Dr. Rosner contributed to her severe kyphosis. For example, Dr. Seiff gave the following testimony:

> A. . . . When you develop a post-laminectomy kyphotic deformity, you do so gradually. You don't wake up one morning and all of a sudden your chin is on your chest. It's a gradual response to – it's a complication of a multilevel laminectomy, but that's one of the risks of the surgery. They don't happen often, but they happen. . . . [I]t doesn't happen overnight.
>
> So the fact that hers was chin on chest was because it went unaddressed for about three years before the time she presented to [Dr.] Coric. If she had been following up, as she should have, it would have been detected that she was developing a post-laminectomy kyphotic deformity and she would have had the appropriate surgery much sooner than when she presented with a chin-on-chest deformity.

We acknowledge defendant's observation that evidence of record exists that Pamela's actions and health conditions—i.e., obesity, diabetes, smoking—may constitute evidence sufficient to support an instruction on failure to mitigate damages, but we take no position on whether those actions and health conditions in fact constitute sufficient evidence to support a reduction in damages. However, defendant will have an opportunity to present and argue these matters in a mitigation defense in a new damages trial. Defendant can also address the issue it presented as a legal one (although we reject it as such in this appeal): whether failure to follow up with treatment or otherwise comply with a physician's—or specifically Dr. Rosner's—instructions could constitute unreasonable failure to mitigate damages. We do hold that the trial court's actions, in determining evidence of mitigation of damages was insufficient to justify the verdict, did not amount to an abuse of discretion. As "the test is one of reasonableness, and depends upon the circumstances of the particular case," *Radford v. Norris*, 63 N.C. App. 501, 503, 305 S.E.2d 64, 65 (1983), the trial court, having observed the evidence presented, the parties, the witnesses, the jurors, and the attorneys, is in the better position to "determin[e] what justice requires . . . ." *Worthington*, 305 N.C. at 487, 290 S.E.2d at 605.

Pain and Suffering

Plaintiff's motion to alter or amend the judgment and the trial court's order granting his motion were also directed against the jury's finding that Pamela Justus suffered damages totaling $512,162.00, and that total did not include compensation for pain and suffering.

The question presented as to this issue is whether the court was within its discretion to determine that the initial damages award of $512,162.00 was given under the influence of passion or prejudice as it omits any sum for pain and suffering.

> The law is well settled in this jurisdiction that in cases of personal injuries resulting from [a] defendant's negligence, the plaintiff is entitled to recover the present worth of all damages naturally and proximately resulting from [the] defendant's tort. The plaintiff, *inter alia*, is to have a reasonable satisfaction for actual suffering, physical and mental, which are the immediate and necessary consequences of the injury. . . . Generally, mental pain and suffering in contemplation of a permanent mutilation or disfigurement of the person may be considered as an element of damages, and it would seem that the weight of authority is to that effect.

Robertson v. Stanley, 285 N.C. 561, 565, 206 S.E.2d 190, 193 (1974) (citation omitted). "[I]n order to find an abuse of discretion in this context, the evidence as to damages must be *clear, convincing and uncontradicted*." *Hughes v. Rivera-Ortiz*, 187 N.C. App. 214, 219, 653 S.E.2d 165, 169 (2007) (citation omitted).

The jury was given the following instruction with regard to what plaintiff was entitled to recover for damages:

> The plaintiff may also be entitled to recover actual damages. . . .
>
> Actual damages are the fair compensation to be awarded to a person for any past injury proximately caused by the negligence of another. In determining the amount, if any, you award the plaintiff, you will consider the evidence you have heard as to each of the following types of damages:
>
> Medical expenses, *pain and suffering*, scars or disfigurement, partial loss of use of part of the body, and permanent injury until the time of death.
>
> . . . .
>
> Damages for personal injury also include fair compensation for the actual past physical pain and mental suffering experienced by Pamela Justus as a proximate result of the negligence of the defendant.

(Emphasis added).

Based on its post-verdict findings, the trial court drew the following conclusions:

> 9. The jury also appears to have reduced its damage finding ($512,161.00) under the influence of passion or prejudice; specifically, the cumulative impact of misleading testimony from multiple experts.
>
> 10. . . . [T]he influence of passion or prejudice is further manifested in the grossly excessive amount of the jury's mitigation finding.

On this record, we hold that the trial court acted within its discretion to determine that the jury's initial damages award for $512,162.00 did not include compensation for pain and suffering, and that its reduction of the damages award from $512,162.00 to $1.00 for failure to mitigate damages was excessive. *See Anderson v. Hollifield*, 345 N.C. 480, 483, 480

S.E.2d 661, 663 (1997) ("A '*discretionary* order pursuant to [N.C.]G.S. 1A-1, Rule 59 for or against a new trial upon any ground may be reversed on appeal only in those exceptional cases where an abuse of discretion is clearly shown.' " (alterations in original) (quoting *Worthington*, 305 N.C. at 484, 290 S.E.2d at 603)).

For completeness of addressing each of defendant's arguments, we agree that Rule 59(a)(8), which requires a moving party to object at trial to the alleged error of law, cannot serve as a basis to grant relief to plaintiff. On the other hand, Rule 59(a)(6) provides that "inadequate damages appearing to have been given under the influence of passion or prejudice" is grounds for a new trial. *See* N.C.G.S. § 1A-1, Rule 59(a)(6). Even though the trial court did not make a specific Rule 59(a)(6) "finding," its conclusion that the jury's verdict #11 of damages in the amount of $512,162.00 (which included no sum given for pain and suffering) in conjunction with verdict #12 reducing that award by $512,161.00 for failure to mitigate damages, must have been decided under the influence of passion or prejudice, and it appears to be a Rule 59(a)(6) finding. Having decided that the trial court acted within its discretion to set aside the jury verdict based on Rule 59(a)(6) and (7), we need not further address other subsections of the rule.[6]

II

[2] Defendant argues in the alternative that the trial court erred in entering a post-verdict amended judgment instead of granting a new trial. We agree. However, contrary to defendant's argument, we reverse and remand for a new trial on damages only.

Rule 59(a) provides that where "[e]xcessive or inadequate damages appear[] to have been given under the influence of passion or prejudice; [or] . . . [the evidence is i]nsufficien[t] . . . to justify the verdict," "[a] new trial may be granted to all or any of the parties and on all or part of the issues." N.C.G.S. § 1A-1, Rule 59(a)(6) and (7); s*ee also Cicogna v. Holder*, 345 N.C. 488, 490, 480 S.E.2d 636, 637 (1997) (stating that "it is within the discretion of this Court whether to grant a new trial on all issues[, and that] [i]f the issue which was erroneously submitted did not affect the entire verdict, there should not be a new trial on all issues"; ordering a new trial on the issue of damages only); *Robertson*, 285 N.C. at 568–69, 206 S.E.2d at 195 ("As a condition to the granting of a partial

6. Though enumerated in plaintiff's motion for a new trial or, alternatively, amending the judgment, the trial court made no findings of fact pertinent to subsection (a)(5) of Rule 59.

new trial, it should appear that the issue to be tried is distinct and separable from the other issues, and that the new trial can be had without danger of complications with other matters." (citation omitted)); *Snead v. Holloman*, 101 N.C. App. 462, 400 S.E.2d 91 (1991) (granting a new trial on the issue of damages where the trial court erred in failing to submit to the jury the issue of mitigation of damages).

In its order, the trial court granted plaintiff's motion for relief from the jury verdict, but did not address plaintiff's request for a new trial. Instead, the court ordered that its earlier judgment (21 October 2014) entered in accordance with the jury verdicts be amended. The trial court's amended judgment, however, changed the jury's damages verdict from $1.00 to $512,162.00, and thereby improperly ordered relief beyond the scope authorized by Rule 59(a). A trial judge has the authority and discretion to set aside a jury verdict and grant a new trial—in whole or in part—under Rule 59; however, that rule does not allow a trial judge presiding over a jury trial to substitute its opinion for the verdict and change the amount of damages to be recovered.

We agree with defendant that "[e]ven if the trial court had grounds to set aside the jury verdict, the trial court nevertheless erred in entering the Amended Judgment striking the jury's answer to the singular issue of mitigation of damages" and imposing a new verdict. *See Bethea v. Kenly*, 261 N.C. 730, 732, 136 S.E.2d 38, 40 (1964) (per curiam) ("It is a cardinal rule that the judgment must follow the verdict, and if the jury have given a specified sum as damages, the court cannot increase or diminish the amount, except to add interest, where it is allowed by law and has not been included in the findings of the jury." (citations omitted)); *see also Circuits Co. v. Commc'ns, Inc.*, 26 N.C. App. 536, 540, 216 S.E.2d 919, 922 (1975) ("[W]e do not agree that the court acted properly or with authority when it entered an order, '[i]n its discretion, as an alternative to ordering a new trial' [pursuant to Rule 59], eliminating the 'bill back' item of $8,168.51 and reducing the verdict to $12,626.30 . . . . We find nothing in the new Rules of Civil Procedure which would grant to the court the authority to modify the verdict by changing the amount of the recovery." (citations omitted)); *accord WRI/Raleigh, L.P. v. Shaikh*, 183 N.C. App. 249, 257, 644 S.E.2d 245, 249 (2007) (interpreting the holding in this Court's *Circuits Co.* opinion as finding error where the trial court modified the amount of the judgment awarded to conform with the trial court's instructions after determining that the jury had disregarded the instructions). Accordingly, we reverse the portion of the trial court's 3 March 2015 order purporting to grant plaintiff relief by amending the damages award of the 21 October 2014 judgment, and vacate the corresponding amended judgment.

Furthermore, as discussed in Issue I, the trial court's finding that the reduction of the damage award from $512,162.00 to $1.00 was grossly excessive, as well as the court's determination that the personal injury award compensating plaintiff only for Pamela's medical expenses but not for pain and suffering was indicative of an award influenced by passion or prejudice, was properly within its discretion and afforded the trial court authority to grant plaintiff relief from the judgment pursuant to Rule 59(a). *See* N.C.G.S. § 1A-1, Rule 59(a) (authorizing the grant of a new trial "on all or part of the issues" should the damage award appear to be inadequate); *see also Cicogna*, 345 N.C. at 490, 480 S.E.2d at 637 (ordering a new trial on the issue of damages after reasoning that "[i]f the issue which was erroneously submitted did not affect the entire verdict, there should not be a new trial on all issues"); *Snead*, 101 N.C. App. 462, 400 S.E.2d 91 (granting a new trial on the issue of damages). Rule 59(a) authorizes a new trial limited to issues that do not affect the entire verdict, such as, in this case, damages. Accordingly, we remand this matter to the trial court for a new trial on the issue of damages only. Defendant is not restricted from presenting any evidence which bears on plaintiff's alleged damages and Pamela Justus's failure to mitigate her damages.

III

[3] Alternatively, defendant again argues that should this Court vacate the trial court's amended judgment, but not reinstate the 21 October 2014 judgment, the appropriate remedy is a new trial on all issues, so as to allow defendant to pursue a defense of contributory negligence. Thus, defendant now challenges the trial court's grant of plaintiff's motion for a directed verdict on defendant's contributory negligence defense. We overrule defendant's argument.

"A motion . . . for a directed verdict under G.S. 1A-1, Rule 50(a) tests the legal sufficiency of the evidence to take the case to the jury and support a verdict . . . ." *Manganello v. Permastone, Inc.*, 291 N.C. 666, 670, 231 S.E.2d 678, 680 (1977) (citations omitted).

> In passing upon the motion, the court must consider the evidence in the light most favorable to the non-moving party, taking all evidence which tends to support his position as true, resolving all contradictions, conflicts and inconsistencies in his favor and giving him the benefit of all reasonable inferences. The motion may be granted only if the evidence is insufficient, as a matter of law, to support a verdict for the non-moving party. The same test is apposite

> whether considering a Rule 50(a) motion directed at the plaintiff's claim or at the defendant's counterclaim.

Eatman v. Bunn, 72 N.C. App. 504, 506, 325 S.E.2d 50, 51–52 (1985) (citations omitted). "Indeed, a directed verdict on the ground of contributory negligence is only proper when . . . no other reasonable inference can be drawn from the evidence." *Stanfield v. Tilghman*, 342 N.C. 389, 394, 464 S.E.2d 294, 297 (1995) (citation omitted). "We review the grant of a motion for directed verdict *de novo*." *Smith v. Herbin*, ___ N.C. App. ___, ___, 785 S.E.2d 743, 745 (2016) (citation omitted). "In reviewing the trial court's ruling on appeal, the scope of review is limited to those grounds argued by the moving party before the trial court." *Wilburn v. Honeycutt*, 135 N.C. App. 373, 374, 519 S.E.2d 774, 775 (1999) (citation omitted); *accord Jernigan v. Herring*, 179 N.C. App. 390, 393, 633 S.E.2d 874, 877 (2006).

> Contributory negligence, as its name implies, is negligence on the part of the plaintiff which joins, simultaneously or successively, with the negligence of the defendant alleged in the complaint to produce the injury of which the plaintiff complains. . . . Contributory negligence by the plaintiff can exist only as a co-ordinate or counterpart of negligence by the defendant as alleged in the complaint.

Jackson v. McBride, 270 N.C. 367, 372, 154 S.E.2d 468, 471 (1967) (citations omitted). "Contributory negligence occurs either before or at the time of the wrongful act or omission of the defendant." *Miller*, 273 N.C. at 239, 160 S.E.2d at 74 (citation omitted). "[I]n order for a contributory negligence issue to be presented to the jury, the defendant must show that plaintiff's injuries were proximately caused by his own negligence." *Cobo v. Raba*, 347 N.C. 541, 545, 495 S.E.2d 362, 365 (1998) (a medical malpractice case) (citation omitted).

At trial, defendant's arguments advocating for an instruction on contributory negligence centered around evidence that Pamela Justus smoked following her first surgery with Dr. Rosner.

> We know that nicotine prevents fusions from healing. We know she was told about this. She smoked through her first fusion, and it failed her. Basically, an S-deformity of her neck increased.
>
> . . . .
>
> This is not on Dr. Rosner. This one is on the patient.

After hearing the argument referencing testimony of the effects of smoking on a potential full recovery, the trial court granted plaintiff's motion for a directed verdict and dismissed defendant's defense of contributory negligence.

In his brief to this Court contending the directed verdict should be reversed, defendant notes opinions wherein an injured plaintiff failed to follow doctor instructions, and as an almost direct result, the disease the plaintiff was fighting failed to be diagnosed or appropriately treated. *See McGill v. French*, 333 N.C. 209, 424 S.E.2d 108 (1993) (holding the issue of contributory negligence was for the jury where the plaintiff contributed to his worsening systems by failing to follow his physician's instructions, denying the physician the opportunity to treat the plaintiff); *Katy v. Capriola*, 226 N.C. App. 470, 742 S.E.2d 247 (2013) (holding the issue of contributory negligence was for the jury where the plaintiff failed to seek medical attention as her condition deteriorated). However, these cases are distinguishable from the instant case.

In both *McGill* and *Katy*, the patients failed to follow directions given by a treating physician and as a result, the conditions for which the patients reported to their respective physicians went untreated. *See McGill*, 333 N.C. 209, 424 S.E.2d 108; *Katy*, 226 N.C. App. 470, 742 S.E.2d 247. Here, Pamela Justus reported to Dr. Rosner for severe, debilitating headaches. Dr. Rosner then performed two surgeries for which he lacked a medical indication, compromising the ligaments and muscle that stabilized Pamela's head and creating the physical condition that led to Pamela's post-laminectomy kyphosis or S-deformity. Even if we set aside evidence that Dr. Rosner's surgeries were without medical indication, the conduct defendant points to as evidence of Pamela's contributory negligence occurred not before or contemporaneous with but following Dr. Rosner's negligent acts that caused injury.

Viewing the evidence in the light most favorable to defendant, there is no evidence Pamela Justus contributed to the negligent conduct that damaged her neck. *See Miller*, 273 N.C. at 239, 160 S.E.2d at 74; *Jackson*, 270 N.C. at 372, 154 S.E.2d at 471; *see also Andrews v. Carr*, 135 N.C. App. 463, 521 S.E.2d 269 (1999) (holding that even if the plaintiff's post-surgery conduct contributed to his injuries, his conduct could not constitute contributory negligence as it occurred subsequent to the negligent medical care); *Powell v. Shull*, 58 N.C. App. 68, 293 S.E.2d 259 (1982) (holding the plaintiff's failure to keep follow-up appointments with the defendant physician did not amount to contributory negligence as the plaintiff's actions could not have decreased or lessened the injury caused by the physician's negligence). Therefore, we affirm the trial

court's directed verdict on contributory negligence, and accordingly, defendant's argument is overruled.

IV

[4] Lastly, defendant challenges the trial court's lump sum award of costs in the amount $175,547.59 against defendant. Defendant contends the trial court failed to provide sufficient detail as to what the award was to reimburse, and if the amounts awarded were reasonable. We agree in part.

Pursuant to General Statutes, section 6-20,

> [i]n actions where allowance of costs is not otherwise provided by the General Statutes, costs may be allowed in the discretion of the court. Costs awarded by the court are subject to the limitations on assessable or recoverable costs set forth in G.S. 7A-305(d), unless specifically provided for otherwise in the General Statutes."

N.C. Gen. Stat. § 6-20 (2015). Pursuant to 7A-305,

> [t]he following expenses, when incurred, are assessable or recoverable, as the case may be. The expenses set forth in this subsection are complete and exclusive and constitute a limit on the trial court's discretion to tax costs pursuant to G.S. 6-20:
>
> (1) Witness fees, as provided by law.
>
> . . . .
>
> (10) Reasonable and necessary expenses for stenographic and videographic assistance directly related to the taking of depositions and for the cost of deposition transcripts.
>
> (11) Reasonable and necessary fees of expert witnesses solely for actual time spent providing testimony at trial, deposition, or other proceedings.

N.C. Gen. Stat. § 7A-305(d)(11) (2015).[7]

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7. "Subject to the specific limitations set forth in G.S. 7A-305(d)(11), an expert witness, other than a salaried State, county, or municipal law-enforcement officer, shall receive such compensation and allowances as the court, or the Judicial Standards Commission, in its discretion, may authorize." N.C. Gen. Stat. § 7A-314(d) (2015).

"When read together, it is clear that costs require statutory authorization and that section 7A-305 or any other statute may authorize costs." *Peters v. Pennington*, 210 N.C. App. 1, 25, 707 S.E.2d 724, 741 (2011).

> [T]he standard of review applicable to the taxing of costs . . . [is a] combination of the two standards: Whether a trial court has properly interpreted the statutory framework applicable to costs is a question of law reviewed de novo on appeal. The reasonableness and necessity of costs is reviewed for abuse of discretion.

Khomyak v. Meek, 214 N.C. App. 54, 57, 715 S.E.2d 218, 220 (2011) (citation omitted). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Manning v. Anagnost*, 225 N.C. App. 576, 581, 739 S.E.2d 859, 862 (2013) (citation omitted).

"If a category of costs is set forth in section 7A–305(d), 'the trial court is required to assess the item as costs.' Subsection (d)(11) therefore requires a trial court to assess as costs expert fees for time spent testifying at trial." *Peters*, 210 N.C. App. at 25–26, 707 S.E.2d at 741 (quoting *Springs v. City of Charlotte*, 209 N.C. App. 271, ——, 704 S.E.2d 319, 328 (2011)).

Attached to plaintiff's motion for costs, plaintiffs provided that the total for court reporting and videography bills for disposition was $89,789.84, and for trial experts $85,757.75. The sum of those two amounts equals $175,547.59, the amount the court awarded. The trial court did not award attorney's fees ($2,530,474.27), paralegal fees ($668,175.00), or "Additional Expert Witness Fees" ($458,089.30). Defendant points out that three experts—Arthur Caplan, Ph.D; Brian Currie, M.D.; and David Barton Smith—did not testify against Dr. Rosner, the party against whom plaintiff prevailed; rather, those experts testified against trial defendants found to be not liable or negligent. However, defendant fails to establish that ordering payment of these expert fees was an abuse of discretion. *See generally Parton v. Boyd*, 104 N.C. 422, 424 (104 N.C. 310, 311), 10 S.E. 490, 491 (1889) ("The court gave judgment against the plaintiff for costs, and the presumption is, nothing to the contrary appearing, that it did so in the exercise of its discretionary authority. . . . To [reverse for abuse] . . . would be to substitute the discretion of this Court for that of the court below."). Therefore, we hold the award is properly within the trial court's discretion. Accordingly, defendant's argument is overruled.

AFFIRMED IN PART; REVERSED IN PART; VACATED IN PART; AND REMANDED.

Judge INMAN concurs.

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

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

I concur with that portion of the majority's opinion, which holds the trial court is without authority under Rule of Civil Procedure 59 to substitute its opinion for the jury's verdict on plaintiff's damages and to alter the amount of damages to be recovered, and reverses the trial court's order. I also concur with that portion of the majority's opinion, which holds the trial court did not err by granting plaintiff's motion for directed verdict on defendant's contributory negligence defense.

I also find reversible error in the trial court's ruling under Rule 59 and write separately. I disagree with the majority's holding that the trial court did not commit reversible error under Rule 59 when it erroneously set aside the jury's verdict on the issue of Pamela's failure to mitigate her damages.

I also disagree with and dissent from that portion of the majority's opinion which upholds the order requiring defendant to pay as recoverable costs, fees for plaintiff's three non-testifying experts. Their testimonies were directed against the hospital defendants, which were acquitted by the jury, and did not pertain to Dr. Rosner's standard of care or alleged acts of negligence. The trial court possessed no statutory authority to order these fees to be assessed against Dr. Rosner as costs. I respectfully dissent.

I. Ruling on Plaintiff's Rule 59 Motion

The trial court's order does not specifically state which subsections of Rule 59 it relied upon to set aside the jury's one dollar final award. However, it is apparent from the language of the order that the trial court purportedly granted relief from the jury's verdict pursuant to subsections (a)(6) and (7) of Rule 59, which provide:

> (a) Grounds. — A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds:
>
> . . . .
>
> (6) Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice;

> (7) Insufficiency of the evidence to justify the verdict or that the verdict is contrary to law[.]

N.C. Gen. Stat. § 1A-1, Rule 59 (a)(6) and (7) (2015).

It also appears the trial court also relied, at least in part, upon subsection (a)(8) of the Rule, which provides a new trial may be granted due to an "[e]rror in law occurring at the trial *and objected to* by the party making the motion." N.C. Gen. Stat. § 1A-1, Rule 59(a)(8) (emphasis supplied). The trial court concluded that it had "committed prejudicial error in submitting Issue #12 to the jury," because Dr. Rosner "presented no legally competent evidence sufficient to support a finding that Mrs. Justus unreasonably failed to mitigate her damages."

A. Relief under Rule 59(a)(8) for Error of Law at Trial

The trial court erred and its order must also be reversed to the extent the court relied upon subsection (a)(8) of Rule 59 to set aside the jury's verdict. Subsection (a)(8) requires plaintiff to have objected: (1) at trial to the evidence when admitted at trial; (2) to the trial court's jury instructions; and, (3) to submission of Issue #12 to the jury. Plaintiff failed to object to any and all three actions. *See id.*

The trial court set aside the jury's verdict, at least in part, based upon a purported error of law, which occurred at trial. Any purported "error of law" in giving the mitigation of damages instruction and submitting Issue # 12 to the jury cannot serve as any basis for Rule 59 relief, where plaintiff failed to object at any point at trial when the testimony was admitted and after the jury was instructed, considered the issue, and reached a verdict. *See id.*

B. Pain and Suffering

To support the granting of relief under subsection (a)(6) of Rule 59 ("[e]xcessive or inadequate damages appearing to have been given under the influence of passion or prejudice"), the trial court found and concluded:

> 16. The foregoing sum [$512,162.00] reflected only Mrs. Justus' medical bills; it included no damages for pain and suffering.
>
> . . . .
>
> 18. Given the uncontroverted evidence that Mrs. Justus experienced severe pain and suffering (e.g., nausea, tremors, and imbalance) as a result of the procedures performed

> by Dr. Rosner, and that, even had she allowed Dr. Rosner to continue to treat her, she would have endured at least some of these symptoms, the jury's finding of no damages for pain and suffering is inadequate.
>
> . . . .
>
> 8. The jury appears to have made its initial damage finding ($512,16[2].00) under the influence of passion or prejudice, for the finding entirely omits any sum for pain and suffering despite the uncontroverted evidence that Mrs. Justus experienced severe pain and suffering.

Fifteen different allegations of negligence related to Dr. Rosner's performance of the surgeries were submitted to the jury. The verdict sheet simply required the jury to answer "yes" or "no" to the question: "Was Pamela Justus injured by the negligence of the defendant, Michael J. Rosner, M.D.?" It is unknown upon which theory or theories of negligence the jury relied upon in answering "yes" to this question.

Plaintiff's counsel argued to the jury that Pamela had endured pain and suffering for eleven years, but did not present any evidence of a dollar amount of her pain and suffering. The trial court instructed the jury to consider the evidence as to each of the following types of damages: medical expenses, pain and suffering, scars or disfigurement, partial loss of use of part of the body, and permanent injury until the time of death.

Without objection, the trial court further instructed: "The total of all damages are to be awarded in one lump sum." Pursuant to the trial court's instruction, the jury returned a lump sum damages verdict, and appears to have considered, but awarded zero dollars for pain and suffering. Although the jury was not asked to differentiate its damages award, plaintiff testified the amount of Pamela's medical expenses was $512,162.03, three cents more than the amount of the jury's original verdict.

The trial court substitutes its judgment for that of the jury's without knowing which theory or theories of negligence the jury's verdict relies upon. Included in the list of fifteen theories of negligence submitted to the jury are acts by Dr. Rosner which would not necessarily cause the jury to award any damages for pain and suffering, even where evidence was presented that Pamela experienced pain and suffering after the surgeries. The trial court abused its discretion by presuming the jury's finding of negligence was definitively linked to pain and suffering. Neither plaintiff nor the trial court shows any basis to set aside the jury's verdict.

C. Failure to Mitigate

> The rule in North Carolina is that an injured plaintiff, whether his case be tort or contract, must exercise reasonable care and diligence to avoid or lessen the consequences of the defendant's wrong. If he fails to do so, for any part of the loss incident to such failure, no recovery can be had.

Radford v. Norris, 63 N.C. App. 501, 502-03, 305 S.E.2d 64, 65 (1983) (citation and quotation marks omitted) (emphasis supplied). "This doctrine has generally been held to *preclude recovery* for those consequences of the tort-feasor's act which could have been avoided by acting as a reasonable prudent man in following medical advice." *Id.* (emphasis supplied).

Without any objection, the trial court instructed the jury consistent with the law as follows:

> A person injured by the negligent conduct of another is nonetheless under a duty to use that degree of care which a reasonable person would use under the same or similar circumstances to avoid or minimize the harmful consequences of her injury. A person is not permitted to recover for injuries she could have avoided by using means which a reasonably prudent person would have used to cure her injury or alleviate her pain.
>
> However, a person is not prevented from recovering damages she could have avoided unless her failure to avoid those damages was unreasonable.
>
> If you find that a healthcare provider advised the plaintiff to follow up in her care and treatment, you would not necessarily conclude that Pamela Justus acted unreasonably in declining such advice. In determining whether Pamela Justus' conduct was reasonable, you must consider all of the circumstances as they appeared to Pamela Justus at the time she chose not to follow the healthcare provider's advice.
>
> These may include the financial condition of the plaintiff, the degree of risk involved, the amount of pain involved, the chances for success, the benefits to be obtained from the procedures and treatment, the availability of alternate procedures and treatment, or

> the knowledge [or] lack of knowledge of the plaintiff Pamela Justus.

The jury was clearly instructed they were to determine and reach a verdict on whether Pamela had failed to use reasonable care to avoid or minimize the harmful consequences of her injury. The jury was further instructed on various factors to consider in deciding whether Pamela acted reasonably to seek medical treatment for her worsening symptoms and kyphosis. Whether Pamela unreasonably declined to seek appropriate medical treatment to mitigate her damages was the sole factual issue for the jury to determine under the court's mitigation instruction.

Consistent with the court's instruction and again without objection, Issue #12 was submitted to the jury, which required the jury to determine: "By what amount, if any, should the plaintiff's actual damages be reduced because of Pamela Justus's unreasonable failure, if any, to avoid or minimize her damages?"

In support of its order setting aside the jury's verdict, the trial court also found and concluded: (1) Pamela had no duty to return to Dr. Rosner, as opposed to other healthcare providers; (2) the testimony of Dr. Rosner's four experts suggested Pamela had a duty to return specifically to Dr. Rosner, which was cumulative, inaccurate, and misleading; (3) Dr. Rosner therefore presented "no legally competent evidence" sufficient to support a finding that Pamela unreasonably failed to mitigate her damages; (4) no evidence was presented that Pamela unreasonably delayed trying to have her problems diagnosed and corrected; and, (5) the jury appears to have reduced its damage award based upon the cumulative impact of the misleading testimony of Defendant's experts.

The plaintiff's failure to mitigate damages in a medical malpractice suit and the consequences of her actions, and lack thereof, is a proper area of expert medical testimony and is solely a fact determinative issue. Where conflicting evidence exists of whether the plaintiff undertook reasonable measures to mitigate her damages and follow medical advice or seek treatment, the plaintiff's actions in mitigation of damages is a jury question. *See id.* at 502-03, 305 S.E.2d at 65.

"It is the jury's function to weigh the evidence and to determine the credibility of witnesses." *Anderson v. Hollifield*, 345 N.C. 480, 483, 480 S.E.2d 661, 664 (1997). "The jury's function as trier of fact must be given the utmost consideration and deference before a jury's decision is to be set aside." *Di Frega v. Pugliese*, 164 N.C. App. 499, 510, 596 S.E.2d 456, 464 (2004) (citations and quotation marks omitted).

Plaintiff presented evidence regarding her course of action and the medical treatment Pamela sought and received after her refusal to return to Dr. Rosner. The record clearly shows Pamela presented to numerous physicians for her continued head and neck pain, and neurological symptoms after her refusal to return to Dr. Rosner in May 2001. She was evaluated and treated by other physicians as early as July of 2001.

Dr. Rosner also presented un-objected to and properly admitted expert testimony and other evidence that plaintiff's "chin to chest" deformity was the result of her failure to timely receive follow-up treatment from Dr. Rosner or another neurosurgeon.

It is the function of the jury to weigh the admitted testimony and evidence, determine its credibility, and decide the extent, if any, Pamela failed to mitigate damages. It was solely the function of the jury to determine whether Pamela's post-surgery medical treatment and conduct was "reasonable" in light of the circumstances. *See Anderson*, 345 N.C. at 483, 480 S.E.2d at 664.

Plaintiff's argument, and the trial court's order, on mitigation of damages is premised upon the claim that the jury believed Pamela had an affirmative duty to specifically return to Dr. Rosner. This un-substantiated premise and the set aside of the jury's verdict is reversible error.

The expert witnesses *did not state* and the jury was *not instructed* that Pamela was required to return specifically to Dr. Rosner. Plaintiff and the trial court placed their own emphasis upon the questions and answers posed to Dr. Rosner's experts.

The transcript shows the jury heard substantial amounts of evidence regarding Pamela's post-surgery course of action, which focused on the lapse of time in obtaining the proper treatment for the "chin to chest" deformity. For example, Dr. Seiff testified, "[s]o the fact that hers was chin on chest was because it went unaddressed for about three years before the time she presented to Dr. Coric."

When viewed in light of all of the other evidence, the un-objected to testimonies of defendant's medical experts on areas within their expertise does not support the trial court's decision to set aside the jury's verdict. *Di Frega*, 164 N.C. App. at 510, 596 S.E.2d at 464. None of the expert witnesses testified Pamela's return specifically to Dr. Rosner was the only way of mitigating her damages, or that Pamela was under any duty to return specifically to Dr. Rosner.

The jury heard all of the evidence presented from both sides regarding Pamela's post-surgery actions and medical treatment. The jury

weighed the evidence, determined credibility of the witnesses, made an award, and reduced the verdict amount by all but one dollar for Pamela's failure to mitigate her damages.

The evidence presented to the jury was more than sufficient to support the jury's finding that Pamela unreasonably failed to avoid, minimize or mitigate her damages. In light of all the testimony, Dr. Rosner's expert witnesses' testimonies were not so "misleading" to allow or compel the trial court to set aside the verdict on the mitigation of damages issue.

The trial court's order, which aside the jury's verdict was based upon the court's notion that Dr. Rosner's expert witnesses had misled the jury by stating Pamela had a duty to return for follow up care specifically to Dr. Rosner, is error. The trial court's order on this issue is properly reversed. The jury's verdict and award of damages is based upon properly admitted expert testimonies, within the realm of their expertise, and other evidence, without any objections from plaintiff.

II. Award of Costs for Non-Testifying Experts

N.C. Gen. Stat. § 6-20 (2015) allows for assessment of costs in a civil action "in the discretion of the court." Any costs awarded "are subject to the limitations on assessable or recoverable costs set forth in [N.C. Gen. Stat. §] 7A-305(d), unless specifically provided for otherwise in the General Statutes." *Id.*

Prior to 2007, N.C. Gen. Stat. § 7A-305(d) set forth a list of expenses, which "when incurred, are also assessable or recoverable, as the case may be[.]" N.C. Gen. Stat. § 7A-305(d) (2005). In 2007, the General Assembly amended the statute to remedy a conflict between N.C. Gen. Stat. §§ 6-20 and 7A-305(d). *See* 2007 N.C. Sess. Laws 212.

N.C. Gen. Stat. § 7A-305(d), as amended, states "the expenses set forth in this subsection *are complete and exclusive and constitute a limit on the trial court's discretion* to tax costs pursuant to G.S. 6-20." (emphasis supplied). The statute specifically lists and defines those items, which the trial court has the power to lawfully assess as costs. *Id.*

This list was amended to include "[r]easonable and necessary fees of expert witnesses solely for actual time spent providing testimony at trial, deposition, or other proceedings." N.C. Gen. Stat. § 7A-305(d)(11) (2015). Our Supreme Court has stated this statute does not require the party seeking the costs to show the expert witness testified subject to a subpoena. *Lassiter v. N.C. Baptist Hosps., Inc.*, 368 N.C. 367, 379, 778 S.E.2d 68, 76 (2015).

As the majority's opinion recognizes, the trial court's order of costs in the amount of $175,547.59 includes expenses listed in plaintiff's spreadsheet under the categories "Experts at Trial" ($85,757.75) and "All Court Reporting & Videography Bills for All Depositions" ($89,789.84). Both categories include expenses plaintiff incurred for the testimonies of Dr. Arthur Caplan, Dr. Brian Currie, and Dr. David Barton Smith.

However, all of these three witnesses limited their trial testimonies and opinions solely to criticisms against the hospital defendants and not against Dr. Rosner.

I disagree with the majority opinion's review of this issue of award of costs under an abuse of discretion standard. As our Supreme Court explained in *Lassiter*:

> As a result of the fact that an award of costs is an exercise of the statutory authority, if the statute is misinterpreted, the judgment is erroneous. In other words, when the validity of an award of costs hinges upon the extent to which the trial court properly interpreted the applicable statutory provisions, the issue before the appellate court is one of statutory construction, which is subject to de novo review.

Id. at 375, 778 S.E.2d at 73 (brackets, quotation marks, and citations omitted).

Here, the trial court misinterpreted N.C. Gen. Stat. § 7A-305(d)(11) and awarded costs for three of plaintiff's expert witnesses, who offered testimonies directed against actions by the hospital defendant, which was acquitted by the jury, and did not testify to Dr. Rosner's standard of care or alleged acts of negligence. *See id.* On *de novo* review, the award on costs should be reversed and this issue remanded for a new hearing.

III. Conclusion

The trial court properly granted plaintiff's motion for directed verdict on defendant's contributory negligence defense.

The trial court abused its discretion under subsections (a)(6), (7) and (8) of Rule 59 by setting aside a valid jury's verdict on the issue of damages, where expert testimonies and other evidence was properly admitted, without objection, to permit the jury to conclude Pamela failed to mitigate her damages and enter its award.

The trial court also acted without statutory authority to assess Dr. Rosner to pay costs for plaintiff's three expert witnesses' fees,

whose testimonies did not pertain to Dr. Rosner's standard of care or alleged negligence.

I vote to vacate the trial court's order on plaintiff's rule 59 motion, and remand to the trial court for reinstatement of the jury's verdict. I also vote to reverse the trial court's award on costs and remand for a new hearing, and for entry of an order, which does not include costs for any expert who did not specifically testify regarding Dr. Rosner's standard of care or alleged acts of negligence. I concur in part and respectfully dissent in part.

SIA GROUP, INC., PLAINTIFF
v.
CLIFFORD G. PATTERSON, DEFENDANT

No. COA16-1137

Filed 20 June 2017

Appeal and Error—interlocutory orders and appeals—preliminary injunction—substantial right—customer list—trade secrets—ability to earn living

An appeal was dismissed as not affecting a substantial right where it involved a preliminary injunction that limited defendant's use of plaintiff's customer list (defendant was a former employee). The injunction did not prevent defendant's use of his skill and talents or destroy his ability to earn a living.

Appeal by defendant from a preliminary injunction entered 3 October 2016 by Judge John E. Nobles, Jr. in Onslow County Superior Court. Heard in the Court of Appeals 22 February 2017.

Crossley McIntosh Collier Hanley & Edes, PLLC, by Norwood P. Blanchard, III, for plaintiff-appellee.

Poyner Spruill, LLP, by Andrew H. Erteschik and Kevin M. Ceglowski, for defendant-appellant.

BERGER, Judge.

Clifford G. Patterson ("Defendant") appeals from a preliminary injunction entered on October 3, 2016 by Judge John E. Nobles, Jr. in

Onslow County Superior Court. Defendant has failed to establish this Court's jurisdiction because he is unable to show that the preliminary injunction deprived him of a substantial right. We therefore dismiss this appeal as interlocutory.

Factual History

Plaintiff, SIA Group, Inc. ("SIA"), is an insurance agency, which solicits, sells, and services insurance and related financial products. SIA hired Defendant in December 2002 as a "sales executive" to sell and service "property, casualty, and other incidental insurance coverages" for commercial clients. When Defendant was hired by SIA, he signed an employment agreement ("the Agreement"), which included non-solicitation and non-disclosure covenants. For two years following Defendant's departure from SIA, the Agreement's non-solicitation covenant barred Defendant from soliciting or accepting business for himself in totum from those who were current or prospective SIA clients for the three years prior to his departure from SIA, and from "divert[ing] or attempt[ing] to divert" current or prospective SIA clients to an SIA competitor. The Agreement's non-disclosure covenant barred Defendant from "divulg[ing], disclos[ing], or communicat[ing]" any confidential information which related to SIA's business, acted in SIA's detriment, competed with SIA, or attempted to adversely affect a relationship between SIA and its current or prospective clients.

In 2011, Defendant was promoted to a corporate position and a team leader position at SIA. Through these positions, Defendant gained "complete access to all . . . confidential files of . . . SIA Group's customers and prospects, not just the customers that [Defendant] himself serviced or solicited." In February 2016, SIA modified its compensation structure. This upset Defendant because he believed his performance as one of SIA's top salesmen should generate more income. On March 24, 2016, without the knowledge or consent of SIA, Defendant emailed an SIA customer list of approximately 300 client names, addresses, phone numbers, and email addresses from his SIA email address to his personal email address. In May 2016, Defendant resigned from SIA and took a position with an SIA competitor, BB&T Insurance Services, Inc.

Procedural History

On June 29, 2016, SIA filed suit against Defendant for breach of contract alleging Defendant had violated the non-solicitation and non-disclosure covenants in the Agreement. SIA also filed a motion for a preliminary injunction to prevent Defendant from further violating the covenants.

On October 3, 2016, the trial court issued a preliminary injunction against Defendant. In its order, the trial court found that Defendant had "solicit[ed] business [while working for SIA's competitor] from the clients he formerly serviced while working for SIA" and concluded "it [was] appropriate to limit [the preliminary injunction] to just those specific customers listed in the 'customer list' " that Defendant emailed to himself in March 2016. Pursuant to the preliminary injunction, Defendant could not solicit or accept SIA clients who were on the customer list or disclose "confidential information of any kind, nature, or description relating to SIA Group's business," which included, but was not limited to, the customer list. It is from this preliminary injunction that Defendant timely appealed.

Analysis

Defendant argues that this Court must address this interlocutory appeal because the trial court's order issuing the preliminary injunction affects a substantial right. He argues that the preliminary injunction affects his right to earn a living; that this right is a substantial right; and that the substantial right doctrine, therefore, confers jurisdiction on this Court. We disagree and dismiss Defendant's appeal.

"A trial court's ruling on a motion for preliminary injunction is interlocutory." *Bessemer City Express, Inc. v. City of Kings Mountain*, 155 N.C. App. 637, 639, 573 S.E.2d 712, 714 (2002) (citing *Rug Doctor, L.P. v. Prate*, 143 N.C. App. 343, 345, 545 S.E.2d 766, 767 (2001)). "The appeals process is designed to eliminate the unnecessary delay and expense of repeated fragmentary appeals, and to present the whole case for determination in a single appeal from a final judgment." *Stanford v. Paris*, 364 N.C. 306, 311, 698 S.E.2d 37, 40 (2010) (citation and quotation marks omitted). Therefore, "interlocutory appeals are discouraged except in limited circumstances," *Id.*, and, "[a]s a general rule, there is no right of appeal from an interlocutory order." *Larsen v. Black Diamond French Truffles, Inc.*, ___ N.C. App. ___, ___, 772 S.E.2d 93, 95 (2015).

"For appellate review to be proper, the trial court's order must: (1) certify the case for appeal pursuant to N.C. R. Civ. P. 54(b); or (2) have deprived the appellant of a substantial right that will be lost absent review before final disposition of the case." *Bessemer City Express*, 155 N.C. App. at 639, 573 S.E.2d at 714 (citing N.C. Gen. Stat. §§ 1–277(a) and 7A–27(d)(1) (2001)). In this case, the trial court's order was not certified for immediate appeal; nor does it affect a substantial right.

To establish that a court order affects a substantial right, appellant must show that "the right itself [is] substantial; and . . . the deprivation

of that substantial right . . . potentially work[s] injury to the party if not corrected before appeal from final judgment." *Id.*, 573 S.E.2d at 714 (citation, quotation marks, and brackets omitted). North Carolina courts "have recognized the inability to practice one's livelihood and the deprivation of a significant property interest to be substantial rights." *Id.* at 640, 573 S.E.2d at 714 (citations omitted). However, "[n]ot every order which affects a person's right to earn a living is deemed to affect a substantial right." *A & D Environmental Services, Inc. v. Miller*, ___ N.C. App. ___, ___, 776 S.E.2d 733, 735 (2015). "Rather, whether such an order affects a substantial right depends on the extent that a person's right to earn a living is affected." *Id.* at ___, 776 S.E.2d at 735.

This Court has previously held a preliminary injunction affects an individual's substantial right to earn a living when the "preliminary injunction . . . effectively *prevents* a person from [engaging in] 'a realistic opportunity to use his own skill and talents,' " but not where the injunction "merely *limits* a person's ability to earn a living." *Id.* at ___, 776 S.E.2d at 735-36 (citations omitted) (emphasis in original). Accordingly, this Court found that a defendant-employee's substantial right to earn a living was not impacted by a preliminary injunction that "d[id] not prevent [the d]efendant from working in [the p]laintiff's industry, but . . . limit[ed] [the defendant's] activities by not allowing him to call on or service a narrowly defined group of customers" in that industry. *Id.* at ___, 776 S.E.2d at 736. In *A & D Environmental Services*, this Court did not find it had jurisdiction to address the merits of an appealed preliminary injunction that barred the defendant from soliciting or servicing individuals with whom he had previously conducted business. *Id.* at ___, 776 S.E.2d at 736. This Court explained the preliminary injunction's restrictive scope was not so large that it left "very few, if any, viable prospects or customers for a defendant to call on." *Id.* at ___, 776 S.E.2d at 736 nn.1-2. *See Consolidated Textiles v. Sprague*, 117 N.C. App. 132, 134, 450 S.E.2d 348, 349 (1994) (holding that a defendant's substantial right, that of earning a living, was not impacted where a preliminary injunction enforcing a covenant not to compete barred the defendant from contacting the plaintiff's "customers actively solicited within the year prior to [the defendant's] resignation" because it "appear[ed] to only restrict him from contacting approximately three hundred customers—a fraction of the thousands that remain[ed] available" (citations omitted)).

In the case *sub judice*, from the time when Defendant separated from SIA to the issuance of the preliminary injunction, Defendant sold insurance policies to "numerous" clients he serviced while employed at SIA and earned over $180,000.00 in commissions from the newly-generated

policies. Before the injunction was issued, Defendant was neither "prevented" nor "limited" from soliciting, accepting, or generating business in the insurance industry. Only after the preliminary injunction's issuance was Defendant restricted from soliciting or accepting business from the approximately 300 SIA clients contained in the customer list, exclusive of those clients who named Defendant as their broker of record.

Therefore, the preliminary injunction does not prevent or "destroy" Defendant's ability to earn a living or sustain a livelihood. *See Copypro, Inc. v. Musgrove*, 232 N.C. App. 194, 197, 754 S.E.2d 188, 191 (2014) ("[W]hen the entry of an order [for] . . . a preliminary injunction has the effect of destroying a party's livelihood, [it] affects a substantial right. . . ." (citation omitted)). Its terms "merely limits [Defendant's] activities by not allowing him to [solicit or passively accept business from] a narrowly defined group of customers." *A&D Environmental Services*, ___ N.C. App. at ___, 776 S.E.2d at 736. Defendant continues to have a "realistic opportunity to use his own skill and talents" to generate new client relationships outside the customer list on which the preliminary injunction focuses. *Id.* at ___, 776 S.E.2d at 735 (citations and quotation marks omitted). Defendant did not establish that the trial court's preliminary injunction affected his ability to earn a living to the extent at which it affects a substantial right. "Because it is the appellant's burden to present appropriate grounds for this Court's acceptance of an interlocutory appeal, and Defendant[has] not met [his] burden, Defendant['s] appeal must be dismissed." *Larsen*, 241 N.C. App. at 79, 772 S.E.2d at 96 (citation, quotation marks, and brackets omitted). Furthermore, we will not grant Defendant's petition for a writ of certiorari to address the merits of this appeal at this stage of litigation.

Conclusion

As Defendant has failed to establish that the trial court's preliminary injunction affected a substantial right, we have no appellate jurisdiction to consider this interlocutory appeal. We also deny Defendant's petition for a writ of certiorari. Accordingly, we must dismiss.

DISMISSED.

Judges CALABRIA and HUNTER, JR. concur.

STATE OF NORTH CAROLINA, PLAINTIFF
v.
ROBERT EARL ALSTON, DEFENDANT

No. COA16-966

Filed 20 June 2017

1. Drugs—identification of illegal substances—officer's internet comparison—admission plain error

It was plain error for the trial court to admit the testimony of a detective who made a visual identification of pills seized from defendant through a website without submitting the pills for chemical analysis.

2. Drugs—maintaining a dwelling for keeping or selling controlled substances—evidence sufficient

The trial court did not err by not dismissing a charge of maintaining a dwelling for keeping or selling drugs. The combination of a detective's observations and the discovery of drugs and the means of selling them in the house, as well as other evidence, created a set of circumstances in which a reasonable juror could find that defendant maintained a dwelling for keeping or selling controlled substances.

Appeal by defendant from the judgment entered 7 June 2016 by Judge Alma L. Hinton in Halifax County Superior Court. Heard in the Court of Appeals 9 March 2017.

Gillette Law Firm, PLLC, by Jeffery William Gillette, for defendant-appellant.

Attorney General Roy Cooper, by Assistant Attorney General Shawn Maier, for the State.

MURPHY, Judge

Robert Earl Alston ("Defendant") appeals from the judgment below in which a jury found him guilty of maintaining a dwelling for keeping or selling controlled substances, and possession of OxyCodone and Alprazolam.[1] Defendant argues that the trial court committed plain error

1. Defendant does not appeal his convictions for possession of a firearm by a felon, possession of drug paraphernalia, or possession of marijuana up to one half ounce.

when it allowed, without objection, Deputy Danny Radford ("Deputy Radford") to give his opinion as to the identity of three pills found at Defendant's home, when the deputy was not tendered as an expert and the basis of his identification was a visual inspection and comparison using a website.

Factual Background

Over several days in 2015, Detective Cory Dixon ("Detective Dixon") of the Roanoke Rapids Police Department and City-County Drug Task Force received "a lot of complaints" about "different traffic leaving Defendant's residence" in Roanoke Rapids, North Carolina. Detective Dixon began surveillance of Defendant's residence, and observed Defendant go in and out of his home "three or four times during the day", as well as "several people come up to the residence and stay there for a short stint of time and leave," which indicated to him evidence of illegal drug trade. Detective Dixon then sent a confidential source to Defendant's residence and observed the confidential source purchase a controlled substance.

Armed with this knowledge, Detective Dixon obtained and executed a warrant on Defendant's residence in the early morning hours of 2 April 2015. There, officers found Defendant and an unnamed female. Defendant was in his bed. Police located the following items in their respective locations:

a. Bedroom nightstand next to Defendant – a Schedule I controlled substance, a .25 caliber Raven Arms pistol, marijuana, a glass jar that had the odor of marijuana inside of it, and Garcia y Vega cigar wrappers;

b. Kitchen – digital scales, sandwich bags;

c. Kitchen drawer – the same Schedule I controlled substance, an Oxycodone pill, and two (2) Alprazolam pills; and

d. Living room – a marijuana roach in the ashtray, and a security camera set up to observe his front yard.

At trial, Deputy Radford of the City-County Task Force testified that he identified the Alprazolam pills using the website drugs.com.

On 2 April 2015, Defendant was charged with felony possession of a firearm by a felon, misdemeanor possession of marijuana paraphernalia, felony possession of a schedule I controlled substance, misdemeanor simple possession of a schedule II controlled substance, felony maintaining a dwelling for keeping or selling controlled substances,

misdemeanor possession of marijuana up to one half ounce, and misdemeanor simple possession of a schedule III controlled substance. On 7 August 2015, Defendant was indicted. On 7 June 2016, he was convicted of these charges, save for felony possession of a schedule I controlled substance, which was dismissed by the trial court due to a fatal variance in the proof.

Analysis

Defendant makes two arguments on appeal to this Court. First, he asserts that the trial court committed reversible error when it denied Defendant's motion to dismiss the charge of maintaining a dwelling for lack of sufficient evidence. Second, he argues that the trial court committed plain error when it allowed Deputy Radford to opine as to the type of pills found at Defendant's home, where the basis of his identification was a visual inspection and comparison of the pills with a website.

I. Identification of the Pills

[1] Defendant claims that the trial court committed plain error in allowing Officer Radford to identify the pills found in Defendant's residence as Alprazolam and Oxycodone.

"In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(a)(4); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007), *cert. denied*, 555 U.S. 835, 172 L. Ed. 2d 58 (2008).

Plain error arises when the error is "so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citing *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)). "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) (citing *State v. Faison*, 330 N.C. 347, 411 S.E.2d 143 (1991)).

Identification of controlled substances by visual inspection by a layperson is insufficient and identification testimony should rely on chemical analysis. *State v. Llamas-Hernandez*, 363 N.C. 8, 8, 673 S.E.2d 658, 658 (2009). Detective Radford was not submitted as an expert witness, and identified the Oxycodone and Alprazolam through the use of drugs.com, rather than the use of an expert or scientific analysis. Even if

Detective Radford was an expert witness, his testimony would fail under *State v. Brunson*, 204 N.C. App. 357, 693 S.E.2d 390 (2010). In *Brunson*, Ms. Dewell, an expert chemist, used "visual identification and the use of a Micromedics database of pharmaceutical preparations to determine that the pills found . . . were an opium derivative, hydrocodone." *Id.* at 360, 693 S.E.2d at 393. Here, the State through Detective Radford has committed the same error in failing to provide any actual chemical analysis, and thus defendant has not been provided with a fair trial.

Normally, it would not be plain error for the State to use a website to identify the pills, on the theory that the State could have presented evidence of the lab analysis if the Defendant had objected. However, here the State only submitted the "hard brown material" and "brown rock like substance" to the NC State Crime laboratory. The pills were not submitted for lab analysis, and so the state would not have been able to present any chemical analysis of the pills even if Defendant had objected to the identification of the pills based on a visual inspection.

We hold that the admission of the identification of the Oxycodone and Alprazolam was plain error, and we vacate and remand for a new trial on the charges of possession of Schedule II and III controlled substances.

II. Maintaining a Dwelling

[2] Defendant argues that the he has preserved the right to *de novo* review of his motion to dismiss the charges for maintaining a dwelling for keeping or selling controlled substances

"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)). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

Under N.C.G.S. § 90-108(a)(7), the State must prove that Defendant "(1) knowingly or intentionally kept or maintained; (2) a building or other place; (3) being used for the keeping or selling of a controlled substance." *State v. Frazier*, 142 N.C. App. 361, 365, 542 S.E.2d 682, 686 (2001) (citing *State v. Allen*, 102 N.C. App. 598, 608, 403 S.E.2d 907, 913-914 (1991)). In the present case, Defendant disputes the third element of the offense.

"The determination of whether a building or other place is used for keeping or selling a controlled substance will depend on the 'totality of the circumstances.' " *State v. Frazier*, 142 N.C. App. 361, 366, 542 S.E.2d 682, 686 (quoting *State v. Mitchell*, 336 N.C. 22, 34, 442 S.E.2d 24, 30 (1994)). In the present case, the State collected and presented at trial the Schedule I controlled substance, marijuana, a glass jar that had the odor of marijuana inside of it, Garcia y Vega cigar wraps, a marijuana roach, digital scales, sandwich bags, and a security camera set up in Defendant's living room that observed the front yard. The State also located an illegal handgun in the constructive possession of Defendant, a convicted felon. Particularly compelling is the evidence that Detective Dixon observed traffic at the residence over several days consistent with illegal drug trade, and observed a confidential source successfully buy a controlled substance from Defendant's residence.

The combination of Detective Dixon's observations, the recent purchase of drugs from Defendant's residence, the discovery of drugs as well as the means to package and sell them in the home, the handgun in the constructive possession of a felon, and the security camera monitoring the front yard all create a set of circumstances in which a reasonable juror could find Defendant maintained his dwelling for the purposes of keeping and selling controlled substances.[2] Accordingly, the trial court's failure to dismiss this charge does not constitute error.

Conclusion

For the reasons stated above, we vacate Defendant's convictions for simple possession of schedule II and III controlled substances and remand this case to the trial court for the correction of the judgment entered against Defendant in light of our decision. We find the Defendant received a fair trial free of error in regards to his conviction for maintaining a dwelling for keeping or selling controlled substances.

VACATE IN PART; NO ERROR IN PART.

Judges Stroud and Dillon concur.

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2. For purposes of our analysis, we have eliminated from our consideration the presence of the alleged OxyCodone or Alprazolam.

STATE v. CLONTS

[254 N.C. App. 95 (2017)]

STATE OF NORTH CAROLINA
v.
SAM BABB CLONTS, III

No. COA16-566

Filed 20 June 2017

1. Witnesses—unavailable witness—deployed naval corpsman—deposition testimony—sufficiency of findings of fact—subpoena

The trial court erred in an assault case by finding a deployed Navy corpsman "unavailable" and allowing her to testify by video deposition. The trial court failed to make sufficient findings of fact to support its conclusion of unavailability where the State failed to produce evidence that a subpoena sent to the witness reached its destination or was timely.

2. Witnesses—unavailable witness—deployed naval corpsman—deposition testimony—sufficiency of findings of fact—judicial notice—United States Navy rules—subpoena—service of process

The Court of Appeals took judicial notice of rules concerning requests for the return of naval service members to the United States and the service of process on members of the Navy and concluded the trial court erred in an assault case by finding a deployed Navy corpsman "unavailable." There was no record evidence that the State attempted a timely subpoena of the witness for the trial date or that it complied with the naval rules in its attempted method of service. The trial court's refusal to continue the trial until after the witness returned was an important consideration; the analysis is not confined to a specific trial date, but to whether the witness was unavailable whenever the trial might have taken place, considering all relevant factors, rights, and policy considerations.

3. Evidence—unavailable witness—Rule 804—sufficiency of findings—deployed naval corpsman

The trial court erred in an assault with a deadly weapon with intent to kill inflicting serious injury case by finding a deployed Navy corpsman unavailable and allowing her to testify by video deposition where there was insufficient evidence that the State had been unable to procure her attendance by process or other reasonable means under N.C.G.S. § 8C-1, Rule 804(a)(5). The State failed to demonstrate that it made a good faith effort to obtain the witness's presence at trial.

4. Constitutional Law—right to confrontation—deposition testimony in lieu of live testimony—unavailable witness for limited period

The trial court violated defendant's right to confrontation in an assault case by allowing a deployed Navy corpsman to testify by video deposition. Although defendant had been afforded the ability to cross-examine the witness *before* trial, that fact had no bearing on the witness's unavailability *at trial* for Confrontation Clause purposes Also, courts have been reluctant to find that a witness is unavailable for Confrontation Clause purposes when the witness is unavailable for a only a limited period of time.

5. Constitutional Law—right to confrontation—at trial—defense of another

The trial court erred in an assault case by concluding that the State proved beyond a reasonable doubt that the denial of defendant's constitutional right to confront a key witness in front of the jury had no prejudicial effect on the jury's rejection of defendant's "defense of another" defense.

6. Constitutional Law—right to confrontation—at trial—intent to kill

The trial court erred in an assault case by concluding that the State proved beyond a reasonable doubt that the denial of the right to confront a key witness in front of the jury had no prejudicial effect on the jury's decision regarding defendant's intent to kill. The jury could have determined, with the help of the witness's testimony, that defendant was not legally justified in shooting the victim three times but never formed a specific intent to kill his best friend.

7. Constitutional Law—right to confrontation—at trial—impeachment

The State in an assault case did not prove beyond a reasonable doubt that the denial of defendant's constitutional right to confront a key witness in front of the jury had no prejudicial effect. The not-fully-impeached evidence might have affected the reliability of the fact-finding process at trial, or the jury might have accepted defendant's testimony.

8. Jury—jury instructions—failure to instruct—imperfect self-defense—imperfect defense of others—invited error

The trial court did not err in an assault case by not instructing the jury on imperfect self-defense and imperfect defense of others.

Defendant did not request the instructions and agreed that the defenses were not legally available.

Judge TYSON dissenting.

Appeal by Defendant from judgment entered 19 June 2015, and orders entered 19 June 2015 and 29 February 2016, by Judge Jeffrey P. Hunt in Superior Court, Mecklenburg County. Heard in the Court of Appeals 9 January 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Kathleen N. Bolton, for the State.

Hale Blau & Saad Attorneys at Law, P.C., by Daniel M. Blau, for Defendant.

McGEE, Chief Judge.

I. *Factual Basis and Trial*

A. 28 July 2014

Sam Babb Clonts, III ("Defendant") shot Aaron Brandon Allen ("Allen") on the evening of 28 July 2014. Defendant and Allen became friends while training together prior to deployment to Afghanistan; Defendant was in the Navy and Allen was in the Marine Corps. During their time together in Afghanistan, they became "almost like brothers." Allen left the military in 2011 and moved back to Mint Hill, North Carolina. Defendant left the military in early 2014, and moved into Allen's house in Mint Hill ("the house"). Denise Kathleen Whisman-Vazquez ("Whisman")[1] stopped in Mint Hill on 28 July 2014 to visit Defendant, a friend from the Navy, while on her way to Jacksonville.

The following alleged facts are taken from: (1) a video interview Defendant gave to police the night of 28 July 2014, which was played for the jury at the 16 June 2015 trial; (2) deposition testimony given by Whisman on 23 March 2015; and (3) Allen's testimony at trial. We present the relevant statements and testimony from all three individuals because the similarities and differences between their statements are particularly relevant to our review.

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1. On 25 February 2014, Whisman still went by her maiden name "Vazquez," but we will use Whisman throughout this opinion because she is referred to as "Ms. Whisman" throughout the record and transcripts.

Defendant and Whisman were having drinks at Whisman's hotel when Defendant texted Allen and asked Allen to join them. Whisman had never met Allen, but she had heard a lot about him from Defendant, and testified: "In fact, I [honestly] believed they were brothers." Allen left work at approximately 6:30 p.m. and joined Defendant and Whisman at the hotel. All three possessed valid concealed carry permits and were armed. Allen visited with Defendant and Whisman before he left to return home in his Jeep. Shortly thereafter, Defendant drove Whisman in her Jeep back to the house, and stopped on the way to purchase beer. At the house, Allen joined Defendant and Whisman on the porch and all three drank some beers.

All three continued to drink and things were, according to Allen, "happy go lucky, joking around" until later in the night, when Whisman stated that she wanted to go back to her hotel. Defendant stated that, because he was planning to drive Whisman back to her hotel that night, he had stopped drinking at approximately 9:30 p.m., but that Whisman was intoxicated at the time she asked to leave the house.

Allen testified concerning Whisman: "She was happy throughout the whole night, obviously became more and more intoxicated throughout the night, and she wanted to leave." Allen testified that because of Whisman's condition, he "asked her to stay, stick around. I told her she could sleep [anywhere in the house], just stay here. She agreed." According to Allen, after the first time he asked Defendant and Whisman not to leave, they all "continued to drink and laugh and joke and have fun." Allen testified that only later did Whisman again state her desire to leave, and that "[Defendant] and [ ] Whisman decided they were going to go jump in [Whisman's] Jeep." Allen believed at the time Whisman attempted to leave that she was impaired, but that Defendant was not impaired. However, Allen did not want Defendant to drive anywhere at that time because Defendant had been drinking. Neither Whisman nor Defendant corroborated Allen's testimony concerning this initial encounter.

Whisman testified that, after a few hours of drinking at the house, she wanted to return to her hotel room. When she told Defendant and Allen that she wanted to leave, Defendant "was cool with it. And I guess [Allen] was okay with it until it was a reality, and then he wasn't okay with it anymore." She testified that Allen did not want either her or Defendant to drive because they had both been drinking, but that Defendant had stopped drinking earlier "because he was going to drive back to the hotel, and so he got into the driver's side."

Defendant stated that once Whisman told him she wanted to leave, Defendant told Allen goodbye and got into the driver's seat of Whisman's Jeep, while Whisman got into the front passenger seat. After Defendant started the Jeep, Allen came "storming out," and the mood of the evening, which had up until then been jovial, changed dramatically. Defendant said that Allen was screaming at them and "it was bad." Defendant had the Jeep in reverse, ready to leave, when Allen approached the Jeep and told Defendant to "turn off the f*cking truck." Defendant claimed Allen was "irrational." At this point, Defendant stated that Whisman "started to freak, quite literally."

According to Whisman's testimony, after she said she wanted to leave she got into the passenger side of her Jeep, "[a]nd then [Allen] . . . walked over . . . and was very angry and was trying to tell [Defendant] not to drive." Whisman testified that Allen yelled something like "where the f*ck do you think you're going." She said that Allen "seemed very agitated that we were leaving" and was yelling at Defendant; Defendant than "got out of [Whisman's] Jeep and tried to calm him down."

Allen testified that he may have told Whisman at some point in time that she was "not going to leave[,]" but that Whisman and Defendant attempted to leave anyway. Allen testified that he was by his porch when he heard the Jeep doors "open," so he "grabbed [his] gun, met them out there." Allen testified that Defendant and Whisman had their guns with them, too. He stated: "Why? I don't know. We just did."[2] Allen testified that it was not Defendant who was in the driver's seat; that it was Whisman who was going to drive Defendant back to the hotel.

Allen testified that he went to the driver's side of Whisman's Jeep, reached into the vehicle, and retrieved the keys. He was not certain "if [he] pulled 'em out of the ignition or if [Defendant] handed 'em to me." Allen testified that he might have asked Whisman "What the f*ck are you doing?" Allen testified he threw Whisman's keys into the woods near his recycling container, whereupon Whisman "freaked out."

Defendant stated that, in response to Allen's behavior, he took the key out of the ignition, exited the Jeep, and tried to talk to Allen and calm him down. Defendant stated that Whisman then got out of the passenger seat, recovered a spare key from a bag in her Jeep, climbed into the driver's seat, and placed the spare key in the ignition.

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2. Defendant and Whisman were planning to drive back to the hotel at that time, and would naturally have their firearms with them. It is unclear why Allen thought he should take his gun to confront Defendant and Whisman at her Jeep.

Whisman testified that she made it clear to Allen that she wanted to leave, but "the more I said it, the more irritated [Allen] got, so I decided to get into the driver seat because I was bound and determined that I was going to leave." Whisman testified that, once she sat down, Allen "pulled me out of the driver seat of my Jeep, lifted me out of the driver seat of my Jeep, threw me up against a tree and was screaming at me" saying "how dare you try to leave." Whisman stated that Allen's hands were "[a]round my shoulders and neck." Whisman testified that she was terrified because she had been in "a situation like that before."

According to Defendant, after he had exited Whisman's Jeep and Whisman had gotten into the driver's seat, Allen "came up, shoved me out of the way, grabbed [Whisman] by the hair, [and] pulled her out onto the ground." Defendant stated that at first, while on the ground, Whisman was laughing, perhaps thinking that Allen was joking around. However, Whisman's laughing "infuriated" Allen, and he grabbed Whisman and "had her up against a tree, hand around her throat, faces nose to nose, asking her if she thought it was a f*cking joke." Defendant stated that at this point Whisman was "hysterical. I'm trying to break them up, but – it might be cowardly – but I knew that he would go off. And, with her in close proximity, that would not be a very good thing." Defendant stated that Whisman "got free" and started "backing away, down towards the pond."

According to Whisman, Defendant "got [Allen] away from me and was trying to calm me down[,]" then she walked around the side of the house while Defendant and Allen were still up at her Jeep. Whisman "just stood around on the side of the house. I was very upset and [Defendant] was calming [Allen] down." She testified that at one point Allen was "crouching and calling me basically like I was his dog, telling me that it was okay, come here, patting his leg."

Allen testified that he did not remove Whisman from her Jeep, that after he threw her keys she got out herself "and she took off screaming." According to Allen, "Whisman jumped out of the Jeep, took off running down . . . on the left side of the house. She screamed, 'Sam [Defendant], don't let him do this to me again.' " Allen testified that Whisman ran in back around his house "into the dark[.]" Allen also denied pushing Whisman up against a tree or screaming right in her face once she was out of her Jeep. Allen testified that at that point he disarmed himself by placing his weapon on his chicken coop because " '[o]bviously, for some reason she was afraid of me[,]' " then he moved toward Whisman and "tried to reason with her." However, Allen later testified that, after Whisman ran off, he remained standing by the chicken coop for a minute

then walked back to his porch. Allen told police investigators that he disarmed himself because Whisman was "screaming she was afraid for her life." The State introduced photographs of Allen's handgun and magazine on top of his chicken coop, which was positioned between his house and Whisman's Jeep.

Allen testified that Whisman screamed: "Sam [Defendant], don't let him do this to me again" either once or twice, but mainly she was screaming: " 'Help." Allen testified that he did not know what Whisman meant by: "Sam [Defendant], don't let him do this to me again." Allen denied clapping his hands together and calling for Whisman to come back like he was calling to a dog. Allen testified that Defendant went into the woods to find Whisman, and she eventually stopped screaming.

Defendant stated that he decided to go find Whisman, and he located her near the back of the house. He stated that he was going to walk Whisman to Allen's parent's house, which was nearby, "because I didn't have a vehicle to drive her out of there." Defendant walked Whisman around the house and back to the driveway "to get back to the road" to walk her to Allen's parent's house, but Allen came out and said: "No, you're not going anywhere. You need to go to sleep or we're gonna have a f*cking problem."

Allen testified that while Whisman was in his back yard, and

> after I announced that I had unloaded my gun and put it down, she still kept screaming. . . . I tried to reason with [her]. It had irritated me. [Defendant] had walked around the left side of the house to try to calm [her] down. I walked onto the deck. [ ] Whisman and [Defendant] walked around. I walked back out into the driveway. [Defendant] c[a]me up to the back end of my Jeep there.

Whisman testified that, after she walked beside the house, Defendant came down to where she was standing "and tried to calm me down. He walked me back up towards the front of the house [near] my Jeep. I got back into the passenger side of the Jeep, and [Allen] started screaming at [Defendant] again, and they walked over toward [Allen's] Jeep." Allen testified that he remembered Defendant meeting him at the rear of his Jeep, and remembered telling Defendant to: "Fix your bitch[,]" and "get her under control."

Defendant said Whisman was still hysterical, and Allen told her to "sit down" but she refused. Defendant stated that Allen then said to him "you and I are going to have some words," and that Allen got "in my face,

nose to nose, says why are you choosing this bitch over me, etc, etc." Defendant stated that he had his gun in his right-side waistband, so he kept his hands "firmly in [his] pockets" and he "wasn't going to move them." Defendant stated that he did this to be non-threatening, and out of fear that Allen might either take Defendant's gun away from him, or retrieve his own gun from the chicken coop.

Allen testified that he told Defendant: "You need to tell your bitch to shut up." He said he called Whisman a "bitch" twice. Allen testified that Defendant "chest-bumped" him and said " '[d]on't call her a bitch[,]' " so Allen gave Defendant a "right-hook . . . to the face[.]" Allen testified that he hit Defendant because Allen was just "trying to help" and Defendant was being "disrespectful" by bumping him in the chest. Allen testified that he was shorter than Defendant, but a physically "bigger guy," and that he knocked Defendant to the ground with "one punch." Allen testified that he turned to walk back to the house but Defendant pushed him in the back, so he turned and "I hit him again," and Defendant "went down."

Defendant stated that once he and Allen were at the rear of Allen's Jeep, Allen "chest pushed" Defendant a few times, and asked him "you want to go [meaning fight with Allen]?" Allen then hit Defendant with a closed fist two times to the left side of Defendant's face. Defendant said his hands remained inside his pockets and he did not retaliate, hoping that Allen would calm down and go inside the house. Defendant stated that Allen was "infuriated at this point[,]" and that Defendant had seen Allen in bar fights and "they're not pretty." Defendant stated about Allen: "I can't match him physically, I just can't." Defendant said that he fell backwards, but not down, in response to Allen's punches.

Whisman testified that Defendant's hands were at his sides when he was talking to Allen, and when Allen punched Defendant. Whisman did not believe Defendant had done anything to provoke Allen, or "make any type of aggressive gesture towards" him. Whisman saw Defendant fall against Allen's Jeep, but did not see Defendant fall to the ground. Whisman further stated that because she was getting out of her Jeep to try and assist Defendant, she did not know if Allen hit Defendant a second time. As Whisman was heading over to the two men, Defendant was not fighting back, and as she got near, Allen turned his attention to her.

Allen testified that, after the second time he hit Defendant, which knocked Defendant back to the ground, Whisman came up to him and said: " 'Don't hit him. Hit me.' " According to Allen, once Whisman approached him, "some words were exchanged," and "I got hit in . . . the

right side of my head [by Whisman.]" Allen testified that, in response: "I believe I had pushed [Whisman] twice." He testified that first he "gave [Whisman] a little shove to get a little bit of distance between us[,]" but she "stepped back into it" so he stepped toward her and gave her another stronger push with two hands. Allen testified that Defendant was behind him at this time, that after his second push of Whisman, she ended up "in the middle of [a] green patch" in his yard, but that she never fell to the ground.

According to Allen, after the second time he pushed Whisman: "I heard bang bang. All I remember is going down to my knees and then bang again, and that's the round that knocked me over." Allen testified that Defendant screamed Allen's name just before the first shot was fired. Allen testified that the last time he saw Whisman after having been shot, she was standing about fifteen to twenty feet away from him.

According to Defendant, after Allen punched him twice, Whisman was to Defendant's left and Allen then "changed targets" and "went after [Whisman] and had his hand around her throat again and leg-swept her onto the ground." He said this all happened very fast, and he heard a "smack" and Allen had Whisman on the ground. According to Defendant, Allen had "one hand full of [Whisman's] hair," and had his other arm drawn back and ready to strike downwards with a balled fist.

Defendant stated that "at this point [when Allen had Whisman on the ground] I decided that he was going to kill either of us, or at least seriously injure, so I made the split instant decision to defend myself and her." Defendant said he drew his weapon from his waistband, "lined up my sights, I screamed [Allen's] name" at least twice. "When I lined up my shot, because I did not want to hit her, I had his full frontal chest." Defendant stated that he wanted to make sure he did not hit Whisman, but as he fired Allen had turned to "deliver a strike" to Whisman so Allen's "back ended up to me[.]" Defendant stated that he was standing three to seven feet from Allen when he fired, and that his weapon jammed after the third shot.

Whisman testified concerning those final moments:

> [Defendant and Allen] were standing by [Allen]'s Jeep and I was watching them, and [Allen] hit [Defendant]. And [Defendant] was leaned up against the side of [Allen's] Jeep, and I got out of my Jeep to step between them. And while I was between them [Allen] was screaming at me, and he pushed me to the ground and I felt my ankle pop.

> And I buried my face in the ground and covered my head with my arms.
>
> . . . .
>
> [Defendant]'s back was to us when I stepped up between them because he was leaning against the Jeep, and [Allen] was facing [Defendant].
>
> Q. And you said that [Allen] shoved you, is that correct, of what happened next?
>
> A. Yes.
>
> Q. And with one hand, with two hands? How did he shove you?
>
> A. I believe he grabbed my shoulder and threw me to the ground.
>
> Q. And you said that you then fell to the ground and put your hands over your head; is that correct?
>
> A. Yes.
>
> Q. And what happened next?
>
> A. I was really afraid that he was going to – he was going to kill me, so I stayed in that position. And then I heard three rapid fired shots and I stood up and I thought it was me that was shot. And I looked behind me and [Allen] was on the ground calling Doc, Doc,[3] I've been hit; I can't feel my legs.

Whisman testified that, when Allen threw her to the ground, she landed so hard that her "glasses came off[,]" then Allen "came towards" her. Whisman stated that she covered her head because she "thought [Allen] was going to kick my face in." Whisman testified that she could not remember for certain if Allen was touching her when she heard the shots, but she did not believe he was. Whisman stated that the last thing she remembered seeing before the shots were fired was Allen "over the top of me." Whisman testified that she did not believe Allen would have stopped attacking her if Defendant had not intervened.

Defendant stated that, after the shooting, the "air [was let] out of the balloon. He was my friend again." Defendant was not certain Allen was

3. Allen often referred to Defendant as "Doc."

not a continuing threat, so he grabbed Whisman's arm and pulled her away to a safe distance, then called 911. Defendant said that Allen was crying, asked him to call 911, and asked Defendant to give him a hug. Defendant stated that he placed his weapon on the ground and went to Allen, found his wounds, and started administering first aid, which he continued doing until police arrived and took over.

Allen testified that he could not remember asking Defendant to "[g]ive me a hug" after he was shot, but that he did not doubt that he had said it. Whisman testified that, after the shooting, Defendant called 911 and told her to "go inside and get his med bag." Defendant then administered aid to Allen until the police arrived.

When Mint Hill Police Officer Joshua Kelly ("Officer Kelly") arrived at the scene of the shooting with two other officers, he first saw Defendant "administering first aid" to Allen. Defendant alerted Officer Kelly to the presence of his handgun seven to ten feet away by pointing and saying: " 'The weapon is over there.' " Defendant also pointed out where another handgun was located, and informed the officers that that weapon had not been fired. Officer Kelly testified that, after Defendant was arrested, he transported Defendant to jail, and that Defendant was not showing obvious signs of impairment.

Allen was taken to the hospital, where he remained for a "month and a half." The bullets remained in Allen's body, and he remained wheelchair-bound at the time of trial, unable to walk, with a diagnosis of permanent partial paralysis.

Mint Hill Police Detective Keith A. Mickovic ("Detective Mickovic") interviewed Defendant at the police department just before midnight on 28 July 2014. Defendant signed a waiver of his *Miranda* rights. Detective Mickovic testified, that after his nearly two hour interview with Defendant, he did not believe Defendant to be "in the least" intoxicated.

B. Pre-Trial Motions, Deposition of Whisman

Relevant to this appeal, Defendant notified the State that he would be pursuing a claim of defense of others. The State filed a "Motion to Depose Witness Prior to Trial" on 25 February 2015, claiming that Whisman was "an essential witness," that the "State intends to call the above-captioned matter for trial the week of June 14, 2015," and that Whisman would be "unavailable" to attend trial at that time because she was currently under orders of deployment lasting from 19 February 2015 until 31 December 2015. Arguing that the trial court "has the inherent authority 'to do all things that are reasonably necessary for the proper

administration of justice' and [ ] Whisman's testimony is essential for the proper administration of justice in the above-captioned case[,]" the State requested that "the certified transcript and/or video of the deposition . . . be admissible at trial in lieu of [ ] Whisman's live testimony, pursuant to NCGS § 804(b)(1), as well as NCGS § 8-85." In anticipation of Defendant's request that the trial be continued until Whisman's deployment ended, the State argued that her "currently-scheduled and past international deployments suggest that, even if the State were to wait until she returns from her currently-scheduled deployment, she will *always* be in danger of being deployed overseas yet again."

Defendant responded to the State's 25 February 2015 motion on 27 February 2015, opposing the request to allow a pre-trial video deposition of Whisman's testimony, and opposing being deprived of the right to confront Whisman in person at trial. Defendant argued that the 14 June 2015 date was the first time the matter had been scheduled for trial, that Defendant "would consent to a continuance of the trial until such time that Whisman is available[,]" and that Defendant "would further waive any speedy trial rights if the matter were continued." Defendant further argued that since Whisman had already been deployed – beginning 19 February 2015 – having her return to North Carolina during deployment for a deposition would not be any different than having her return for trial. Defendant argued that "the State does not have the authority to conduct pretrial depositions of witnesses" without Defendant's consent, citing our Supreme Court's opinion in *State v. Hartsfield*.[4] Defendant disputed the State's assertion that the trial court's "inherent authority 'to do all things that are reasonably necessary for the proper administration of justice' would . . . extend to allow the prosecution to take a deposition of one of its witnesses when resetting the trial date would resolve the

4. "There is no statute in North Carolina authorizing the taking of depositions to be used as evidence by the State in criminal prosecutions. This privilege is extended to the defendant in certain cases [N.C. Gen. Stat. § 8-74], but it may not be exercised by the State as a matter of right. With respect to the witnesses offered by the prosecution, the defendant has the right to demand their presence in the courtroom, to confront them with other witnesses, and to subject them to the test of a competent cross-examination where their bearing and demeanor may be observed by the jury. The defendant may not be required, against his will, to examine the State's witnesses in the absence of the jury. He 'is entitled to have the testimony offered against him given under the sanction of an oath, and to require the witnesses to speak of their own knowledge, and to be subjected to the test of a competent cross-examination.'" *State v. Hartsfield*, 188 N.C. 357, 359, 124 S.E. 629, 630 (1924) (citations omitted). We note that N.C. Gen. Stat. § 8-74 allows a defendant to depose a witness in certain circumstances when that witness's ability to attend trial is in question, but includes no corresponding provision providing the same authority to the State in a criminal trial.

issue." Defendant finally argued that to deprive him of his right to question Whisman in front of the jury, when she could be made available, violated his Sixth Amendment rights as guaranteed by the Confrontation Clause, as well as the corresponding rights guaranteed him by the North Carolina Constitution.

Judge W. Robert Bell heard the State's motion on 4 March 2015, and entered an order 9 March 2015. At the hearing, the State stated: "I don't see how the state can get this case done without having [Whisman] here." The trial court ruled that because Whisman would likely be deployed out of the country "[b]eginning in early April 2015 . . . until December 2015[,]" and because she would, after that date, remain "in danger of being deployed overseas again[,]" Whisman should be deposed the week of March 23 in case "she is 'unavailable' according to NCGS § 8C-1, Rule 804(a)(5) when the matter is called for trial."

Whisman was subpoenaed, returned to North Carolina from Camp Pendleton, in California, and was deposed 23 March 2015 in the presence of Judge Carl Fox. Defendant again objected to the taking of Whisman's deposition. Following the deposition, the following discussion occurred:

> [THE STATE]: Your Honor, at this time the State would ask this hearing be terminated and ask that [ ] Whisman be allowed to go back to serving our country.
>
> THE COURT: All right. Do you have any objection to releasing the witness?
>
> [DEFENDANT'S COUNSEL]: Well, we would in light of our objections to this proceeding. *If she's under a subpoena we would ask that she not be released from her subpoena.* [Emphasis added].
>
> THE COURT: Well, you do agree that this terminates the deposition, though.
>
> [DEFENDANT'S COUNSEL]: This terminates this proceeding, yes, Your Honor.
>
> THE COURT: All right. Then the Court notes the defendant's objection and the witness is released from her subpoena to go.
>
> [THE STATE]: Thank you, Your Honor.

The State filed "Notice of Intention to Admit Prior Testimony" on 22 May 2015, "because the State anticipate[d] Whisman being 'unavailable'

for trial[.]" Ten days *after* filing this notice, 1 June 2015, the State apparently deposited a subpoena in the mail, destination Darwin, Australia, demanding Whisman's appearance at trial. This matter came to trial on 15 June 2015, in front of Judge Jeffrey P. Hunt. The State filed a "Motion *in Limine*" that same day moving the trial court "to allow the State to introduce the transcript and/or video recording from former testimony of [Whisman], an unavailable yet critical witness, during trial pursuant to N.C.G.S. § 8C-1, Rule 804(b)(1)."

C. Trial

The State's motion *in limine* was heard the morning of 15 June 2015, the first day of Defendant's trial. The State did not argue any basis in support of its motion beyond that contained in its written motion. Defendant again objected, reiterating his belief that the State had no authority to depose its witness prior to trial without Defendant's consent, that "[a]s far as her unavailability, my understanding is that, if the request was made to her command to have her come, they would make arrangements[,]" that Defendant had objected to Whisman being released from subpoena after her deposition, but "she was released and we're here today[,]" and that "[a]ll we had to do was continue the trial . . . and she would be here." The trial court granted the State's motion based upon the following relevant findings:

> I'm going to enter the following order. That the matter came up on motion of the State to use – I believe it's 804. Is that the rule – to use 804, testimony in the form of a video of a – of an indispensable witness who's in the military. The Court heard argument of both sides regarding the availability or unavailability of said witness. The Court finds the witness is in the military and is stationed outside of the State of North Carolina currently. May be in Australia or whereabouts may be unknown as far as where she's stationed.

Based on these findings, the trial court ruled that Whisman was unavailable, and that Defendant's confrontation rights would not be violated by allowing the video of Whisman's deposition to be entered into evidence in lieu of her live testimony before the jury. Whisman did not appear at trial, and her video deposition testimony was entered into evidence in lieu of her live testimony. The evidentiary portion of Defendant's trial concluded on 18 June 2015.

Closing arguments were delivered on 19 June 2015. In its closing argument, the State focused primarily on the following evidence. Allen

was unarmed when Defendant shot him three times in the back, that "the crux of this entire case [was] did [Defendant] use excessive force" in response to Allen's actions, thus negating any claim of defense of other. The State argued: "Three shots to the back of an unarmed man who [D]efendant knew to be unarmed, excessive force." The State argued that, even if the jury believed Defendant's first shot was reasonable, the second and third shot were clearly excessive. The State argued that Defendant gave conflicting statements during his interview with Detective Mickovic concerning the moments right before he shot Allen. Specifically, the State argued that Defendant first said Allen had a handful of Whisman's hair, then that Allen was standing over Whisman when he was shot, and finally, that in his written statement Defendant said Allen had his hands around Whisman's throat.

The State conceded certain evidence from Whisman and Defendant, and thereby acknowledged that Allen had not been completely truthful in his own testimony. Specifically, the State argued:

> [W]e know when the ruckus started near [Whisman]'s Jeep, both [Whisman] and [D]efendant tell us that . . . Allen had [Whisman] up against the tree briefly. [D]efendant said that [Allen] had her by the throat. [Whisman] said it was sort of the shoulder/neck area. [ ] Allen did not say this happened, but, again, the two of them pretty quickly after this happened said that that's what happened, so I think you could reasonably assume that there was something like that going on.

The State informed the jury that it generally believed Whisman to be a credible witness. The State then went on to explain why it believed Whisman was screaming: "Sam [Defendant], don't let him do this to me again."

> Also on the stand, pretty significant, clearly she'd been through something like this. Remember, [ ] Allen testified he heard her saying, "Don't let him do this to me again." There's no dispute [ ] Allen had never met [ ] Whisman before. They had never met once. They talked on the phone maybe a couple times, if even that. *So she was clearly going somewhere in her own mind that was not having anything to do with [ ] Allen. We know that.* (Emphasis added).

The State argued that Whisman was not pleading with Defendant to prevent Allen from assaulting her again, but was reliving some incident in her past that made her unreasonably fearful that evening.

The State told the jury to focus on Defendant's intent, arguing: "You don't get to empty a weapon or attempt to empty a weapon in someone's back and say you weren't trying to kill them." The State focused on the elements of defense of another – whether it was "reasonable" for Defendant "to perceive this kind of harm based on the fact that [Allen] had touched [Whisman] three times[,]" and whether Defendant actually felt that Whisman was in imminent danger of death or great bodily harm. The State's theory on Defendant's motive to shoot Allen was revenge: "[W]as he really thinking I just got punched twice in the face and now I've got my chance? Because remember, right before he shot [ ] Allen he'd been punched twice in the face. Didn't hit back." The State further argued that firing three shots at Allen constituted excessive force and, therefore, prevented Defendant from being able to rely on defense of another.

In Defendant's closing, he focused on the testimony of Whisman, Defendant, Officer Kelly, and Detective Mickovic that Defendant was not intoxicated the night of 28 July 2014. "[Defendant] and [Whisman] go to the Jeep and [Defendant] is going to drive because he had stopped drinking and he says that and the officers said that he was sober. He was using common sense. That makes sense, he's the designated driver. His car is back at the hotel." Defendant focused on the fact that Allen's own rules were that you did not mess with guns when you'd been drinking, but that when Allen went out to confront Defendant and Whisman about leaving, he picked up his handgun and brought it with him. Defendant contended that, after Allen pulled Whisman out of her Jeep and onto the ground, she laughed, and this angered Allen, who then "takes her and puts her up against that tree and she freaks out." That once Defendant came to assist her, Whisman ran "into the night, the woods, and she's screaming, 'Don't let him do this to me again.' " Defendant recalled Allen's testimony that he didn't know what Whisman meant by "don't let him do this to me again," but suggests: "let's use our common sense. [Allen] pulls [Whisman] out of the car and puts her up against a tree. Maybe don't let [Allen] attack me again, does that make sense?"

Defendant argued that Defendant tried to remove Whisman from the scene, and thus end the altercation, but when they came around the other side of the house, Whisman "starts to scream again because [Allen] is waiting for them because he wants to stop them[.]" Defendant further argued:

> Some things everyone agreed on, [Allen] hit [Defendant], either they had chest-bumped or [Defendant] was like this trying to reason with his brother. [Whisman] comes to

> help [Defendant] because she's not going to sit there and watch her friend get hit. And [Allen] turns his attention to her, and he pushes her once according to her testimony, maybe twice according to [Allen], twice according to [Defendant], and she ends up on the ground. She is covering her head because she's afraid of what he is going to do. This man that she has never met has changed. Everything was fine until it's time to go. He assaults her when he pulls her from the Jeep and assaults her when he puts her up against the tree, and now it's even more vicious because he has punched and put [Defendant] on the ground and now it's her turn. The violence is escalating. And before he can inflict gross bodily injury, before he can kick her face and before he can kill her [Defendant] shoots three times.

Following the closing arguments, the trial court instructed the jury, *inter alia*, on assault with a deadly weapon with intent to kill inflicting serious injury, and on the lesser included offense of assault with a deadly weapon inflicting serious injury. Concerning the "intent to kill" element of assault with a deadly weapon with intent to kill inflicting serious injury,[5] the trial court instructed the jury: "The State must prove that [D]efendant had the specific intent to kill the victim." "You arrive at the intent of a person by such just and reasonable deductions from the circumstances proven as a reasonably prudent person would ordinarily draw therefrom." The trial court also instructed the jury on defense of another:[6]

> [You must] also consider whether [D]efendant's actions are excused and [D]efendant is not guilty because [D]efendant acted in defense of a third person. The State has the burden of proving from the evidence beyond a reasonable doubt that [D]efendant's action was not in defense of a third person. If the circumstances would have created a reasonable belief in the mind of a person of ordinary firmness that the assault was necessary or reasonably appeared to be necessary to protect a third person from imminent death or great bodily harm and the circumstances did reasonably create such a belief in [D]efendant's

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5. Absent a jury determination that Defendant intended to kill Allen, the most that the jury could have convicted Defendant of would have been assault with a deadly weapon inflicting serious injury.

6. Also known as "defense of a third person."

> mind at the time [D]efendant acted, such assault would be justified – such assault would be justified by defense of a third person. You the jury determine the reasonableness of [D]efendant's belief from the circumstances appearing to [D]efendant at the time.
>
> Now, a defendant does not have the right to use excessive force. [D]efendant had the right to use only such force as reasonably appeared necessary to [D]efendant under the circumstances to protect a third person from death or great bodily harm. In making this determination, you should consider the circumstances as you find them to have existed from the evidence, including the *size, age and strength of [D]efendant and the third person as compared to the victim, the fierceness of the assault, if any, upon the third person*, whether the victim had a weapon in the victim's possession *and the reputation, if any, of the victim for danger and violence.* (Emphasis added).

The jury found Defendant guilty of assault with a deadly weapon with intent to kill inflicting serious injury on 19 June 2015. Defendant filed a motion for appropriate relief ("MAR") on 29 June 2015, then filed an amended MAR on 15 December 2015, arguing that "the trial court erred by permitting the State to introduce a video deposition of a witness rather than calling that witness live at trial" in violation of Defendant's rights under the North Carolina and United States Constitutions, that the trial court erred by failing to instruct the jury on the doctrine of imperfect self-defense, and that there was insufficient evidence to have convicted Defendant. The trial court denied Defendant's MAR by order entered 29 February 2016. Defendant appeals.

II. *Analysis*

A. Whisman's "Unavailability"

[1] In Defendant's first argument, he contends the trial court erred by finding Whisman "unavailable" for the purposes of N.C. Gen. Stat. § 8C-1, Rule 804(a)(5), and allowing her deposition testimony to be presented instead of requiring her live testimony at trial. Defendant further argues that depriving him of his right to confront Whisman in front of the jury violated the Confrontation Clause of the Sixth Amendment of the United States Constitution, as well as his rights under Article I, Sections 19 and 23, of the North Carolina Constitution. Defendant also contends that the

trial court erred in denying that portion of his amended MAR based upon the above arguments. We agree.

1. Standards of review

Rule 804 of the North Carolina Rules of Evidence allows prior testimony of a witness to be introduced at trial in lieu of the live testimony of that witness in certain circumstances, including:

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

> (1) Former Testimony. – Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

N.C. Gen. Stat. § 8C-1, Rule 804(b) (2015). Our Supreme Court has discussed how Rule 804 limits when a witness may be declared "unavailable," and the State relied upon the following condition – (5) – to argue Whisman was unavailable:

> Under the Rules of Evidence, a witness is considered "unavailable" when that witness:
>
> . . . .
>
> (5) Is absent from the hearing and the proponent of [her] statement has been unable to procure [her] attendance . . . by process or other reasonable means.
>
> N.C.G.S. § 8C–1, Rule 804(a). Before a trial court may admit hearsay testimony under Rule 804(b), *it must find that at least one of the conditions listed in Rule 804(a) has been satisfied.*

State v. Nobles, 357 N.C. 433, 439–40, 584 S.E.2d 765, 771 (2003) (citation omitted) (emphasis added). In the present case, although the State argued that Whisman was unavailable pursuant to Rule 804(a)(5), the trial court made no such finding in its order, merely stating: "That the matter came up on motion of the State to use – I believe it's 804. Is that the rule – to use 804, testimony in the form of a video of a – of an indispensable witness who's in the military."

In order for a trial court to find a witness "unavailable" for the purposes of the Confrontation Clause:

> "the possibility of a refusal [by the witness] is not the equivalent of asking and receiving a rebuff." In short, a witness is not "unavailable" for purposes of the foregoing exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain [her] presence at trial.

Barber v. Page, 390 U.S. 719, 724–25, 20 L. Ed. 2d 255, 260 (1968) (citation omitted).

The State contends that "it is unclear what standard of review applies to a trial court's ruling that a witness is unavailable." The State cites two cases from our Supreme Court to highlight this uncertainty: *State v. Fowler*, 353 N.C. 599, 548 S.E.2d 684 (2001), and *State v. Bowie*, 340 N.C. 199, 456 S.E.2d 771 (1995). To the extent, if any, that these two opinions are in conflict, *Fowler*, as the most recent pronouncement from our Supreme Court, controls. In *Fowler*, the defendant was contesting the admission of a witness' out-of-court statements based upon N.C. Gen. Stat. § Rule 804, Article I, Section 23 of the North Carolina Constitution, and the Confrontation Clause. *Fowler*, 353 N.C. at 607, 548 S.E.2d at 692.

The Court in *Fowler* consistently analyzed whether the trial court's findings of fact related to the witness' unavailability were supported by the evidence and, in turn, supported its conclusions of law. *Fowler*, 353 N.C. at 610, 548 S.E.2d at 693 ("The trial court's detailed findings of fact are sufficient to support its conclusion that [the witness] was unavailable."); *Id.* at 614, 548 S.E.2d at 695–96 ("Contrary to defendant's contention, the trial court's findings support a conclusion that the state acted diligently in trying to produce [the witness] to testify. . . . . The trial court made the following findings of fact to support its conclusion: (1) state officials contacted [the witness] in India, and [the witness] informed them there was no way he would return to the United States to testify; (2) [the witness] was not willing to return to this country because his painful injuries made travel difficult and he feared for his safety; (3) the state spoke numerous times with [the witness]'s brother in California in attempts to locate [the witness]; (4) the state offered to provide [the witness] with police protection during his stay; and (5) the state offered to pay for [the witness]'s airfare, lodging, meals, and care for his injuries during his stay. These facts are sufficient to support the trial court's conclusion that the state's efforts to produce [the witness] were diligent.").

The requirement that the trial court enter sufficient findings of fact to support its conclusion of unavailability is further established by *State v. Triplett:*

> The degree of detail required in the finding of unavailability will depend on the circumstances of the particular case. For example, in the present case, the declarant is dead. The trial judge's determination of unavailability in such cases *must* be supported by a finding that the declarant is dead, which finding in turn *must* be supported by evidence of death. Situations involving out-of-state or ill declarants or declarants invoking their fifth amendment right against self-incrimination may require a *greater degree of detail* in the findings of fact.

State v. Triplett, 316 N.C. 1, 8, 340 S.E.2d 736, 740–41 (1986) (citation omitted) (emphasis added). "Before a trial court may admit hearsay testimony under Rule 804(b), it must find that at least one of the conditions listed in Rule 804(a) has been satisfied. The proponent of the statement bears the burden of satisfying the requirements of unavailability under Rule 804(a)." *Nobles*, 357 N.C. at 440, 584 S.E.2d at 771 (citations omitted). The trial court was required to make sufficient findings of fact, based upon competent evidence, in support of any ruling that the State had satisfied its burden of demonstrating that it had "been unable to procure [Whisman's] attendance . . . by process or other reasonable means" for the purposes of N.C. Gen. Stat. § 8C–1, Rule 804(a)(5), and that it had "made a good-faith effort to obtain [her] presence at trial" for Confrontation Clause purposes. *Barber*, 390 U.S. at 725, 20 L. Ed. 2d at 260.

2. Inadequate Findings of Fact

In the present case, the entirety of the trial court's findings of fact related to the State's burden to prove Whisman's unavailability at trial were as follows:[7] "The [trial court] finds [Whisman] is in the military and is stationed outside of the State of North Carolina currently. May be in Australia or whereabouts may be unknown as far as where she's stationed." The trial court's findings were sufficient to demonstrate that Whisman was "absent from the hearing[.]" N.C. Gen. Stat. § 8C–1, Rule 804(a)(5). However, the trial court made *no* findings that would support more than mere inference that the State "ha[d] been unable to procure

7. Although the prior orders of the other judges were presumably before the trial court on 15 June 2015, none of the findings of the prior orders were adopted by the trial court in its 15 June 2015 ruling.

[her] attendance . . . by process or other reasonable means." *Id.* The trial court made *no findings* concerning any efforts made by the State to procure Whisman's presence at trial, nor any findings demonstrating the necessity of proceeding to trial without Whisman's live testimony. *See Fowler*, 353 N.C. at 614, 548 S.E.2d at 695–96. The trial court did not address the option of continuing trial until Whisman returned from her deployment, nor did it make any finding that the State "made a good-faith effort to obtain [Whisman's] presence at trial[,]" much less any findings demonstrating what actions taken by the State could constitute good-faith efforts. *Barber*, 390 U.S. at 724-25, 20 L. Ed. 2d at 260.

Although the State places much focus on findings made by different judges at earlier hearings, it was the duty of the judge who heard the State's 15 June 2015 motion *in limine* to make all relevant and necessary findings and conclusions in support of its ruling that Whisman was "unavailable" for the purposes of Rule 804 and the Confrontation Clause, and that admission of her deposition testimony without her being present was therefore proper. The trial court's 15 June 2015 ruling failed to include the necessary findings of fact, and we therefore hold that it was error to grant the State's motion to admit Whisman's deposition testimony in lieu of her live testimony at trial. For this same reason, it was error for the trial court to deny Claim 1 of Defendant's amended MAR – that the trial court erred "by permitting the State to introduce a video deposition of a witness rather than calling that witness[.]"

3. Inadequate Evidence of "Unavailability"

Even assuming, *arguendo*, the trial court's findings of fact and conclusions had been sufficient to support its ruling, we further hold that the evidence presented to the trial court was insufficient to support an ultimate finding of "unavailability."

a. Subpoena

The State filed a motion *in limine* on 15 June 2015, requesting the trial court allow the video of Whisman's deposition be entered into evidence and presented at trial in lieu of in-person testimony by Whisman, and the motion was heard on that date. In this motion, the State argued the following evidence relevant to Whisman's alleged "unavailability:"

> 8) [ ] Whisman is currently enlisted in the United States Navy as a Corpsman.
>
> 9) Pursuant to [ ] Whisman's obligations in service to our nation, she is currently assigned to provide naval support

> to a United States Marine Corps mission. See Exhibit A for a copy of [ ] Whisman's military orders.
>
> 10) Since April 2015, [ ] Whisman has been deployed out of the country, and she is not scheduled to return until December 2015.
>
> 11) Due to the potential threat to national security associated with revealing such information, the United States Navy, in communications with the undersigned Assistant District Attorney (see Exhibit B) has indicated that it will not disclose [ ] Whisman's whereabouts.
>
> 12) The undersigned Assistant District Attorney was provided with a mailing address to send a subpoena to [ ] Whisman, which was sent via registered mail (see Exhibit C).

Exhibit C includes a copy of an undelivered subpoena signed on 28 May 2015 by an Assistant District Attorney. The addresses included on the subpoena are what appear to be Whisman's California street address, and an address for a Marine base in Australia: "Marine Rotational Forces [sic] Darwin, 1st BN, 4th Marines, Unit 10126, FPO AE[8] 96610-0126." The presence of this address on the subpoena suggests that, contrary to the State's assertions in its motions and at trial, the Navy had *not* "indicated that it would not disclose [ ] Whisman's whereabouts," at least relative to the location of her overseas command.

Further, in both the 18 February 2015 and the 20 May 2015 letters from the Marine Corps indicating that Whisman would be deployed overseas and that the Marines might not be forthcoming with Whisman's particular location at any specific time, the State was provided with a singular phone number for two personnel who were each identified as "[t]he point of contact for this matter[.]"[9] There is no record evidence that the State contacted either of these people.

The sole attempt to obtain Whisman's attendance at trial appearing in the record was the "Exhibit C" subpoena apparently sent to Darwin, Australia shortly before trial. Further included in Exhibit C is a receipt for "certified mail" postmarked 1 June 2015, and an undated webpage printout from USPS.com indicating that the certified mail postmarked 1 June 2015 arrived at a Postal Service facility in Chicago in the

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8. AE stands for "Armed Forces Europe" which is the incorrect designation for Marine Rotational Force Darwin, which should have been AP – "Armed Forces Pacific."

9. A different person was given as the "point of contact" in each of the two letters.

afternoon of 5 June 2015, and that "[t]he item is currently in transit to the destination."[10]

The included certified mail receipt indicates that $2.80 was paid for "Return Receipt (hardcopy)," though the appropriate box was not checked. Further, the space on the receipt for the "Sent To" address was left blank. In a box marked "Official Use" was included "FPO AP 96610[.]" This "Official Use" entry is the only indication that the certified mail receipt is connected with the subpoena. From the record it appears that only one subpoena was sent. The "Official Use" entry of "FPO AP 96610" would seem to indicate that the single piece of certified mail was sent to Marine Rotational Force Darwin. Though "Return Receipt (hardcopy)" was apparently paid for, no return receipt is included in the record, suggesting the certified mail was never delivered. There is no indication of when the USPS.com tracking webpage printout was obtained. If the State obtained this tracking information right before the 15 June 2015 hearing, then the subpoena had not even reached Australia by that time. What is certain is that the subpoena – assuming that was what was included in the certified mail – was still in the United States on 5 June 2015 for a trial that was scheduled to begin the week of 14 June 2015, and which in fact commenced 15 June 2015. The State produced no evidence that its subpoena reached its destination, much less that it reached its destination in time to have been meaningful.[11]

b. Code of Federal Regulations

[2] We take judicial notice that rules concerning requests for the return of naval service members to the United States, and the service of process on members of the Navy are set forth in the Code of Federal Regulations ("the Code"), specifically 32 CFR "Part 720—Delivery of Personnel; Service of Process and Subpoenas; Production of Official Records." Subpart D of Part 720 states in relevant part: "This instruction: Establishes policy and procedures for requesting the return to the United States of, or other action affecting, Department of the Navy (DON) personnel . . . serving outside the United States . . . in compliance with court orders." 32 C.F.R. § 720.40(b). Request for return is defined as: "Any request or order received from a court, or from federal, state or local authorities concerning a court order, for the return to the United States of members . . . for any reason listed in § 720.42." 32 C.F.R.

10. We assume these items are included as part of Exhibit C, though they are not clearly marked as such.

11. The State acknowledges that "[t]here is no indication in the record that the subpoena was served on [ ] Whisman."

§ 720.41. There is nothing in Subpart D indicating that a subpoena is required for initiating a request for return.

32 C.F.R. § 720.42 states that "[i]t is Department of the Navy policy to cooperate, as prescribed in this instruction, with courts and federal, state and local officials in enforcing court orders. 32 C.F.R. § 720.42(a).[12] The Code further identifies the "responsible officials" authorized to respond to requests for the return of members. 32 C.F.R. § 720.42(g), 32 C.F.R. § 720.44. Contact information is given for these responsible officials in 32 C.F.R. § 720.43(a), and this section also provides a place to send requests when the appropriate responsible official is uncertain. 32 C.F.R. § 720.43(b). There is no record evidence that the State attempted to obtain the presence of Whisman at trial through the procedures laid out in Subpart D of 32 C.F.R. § 720, though Subpart D would appear to offer "other reasonable means" of attempting to procure Whisman for trial as authorized in Rule 804(a)(5).

The Code also specifically addresses the method for subpoenaing members to appear as witnesses in State courts:

> Where members . . . are subpoenaed to appear as witnesses in State courts, and are served as described in §[ ] 720.20, 720.20(d) applies. . . . . If State authorities are attempting to obtain the presence of a member . . . as a witness in a civil or criminal case, and such person is unavailable because of an overseas assignment, *the command should immediately contact the Judge Advocate General*[.]

32 C.F.R. § 720.21 (emphasis added). The Code does contemplate service on out-of-state members by mail:

> Out-of-State process. In those cases where the process is to be served by authority of a jurisdiction other than that where the command is located, the person named is not required to accept process. . . . . *If service of process*

12. 32 C.F.R. § 720.42 is the section establishing appropriate "reasons" for requests for return. 32 C.F.R. § 720.41 ("Request for return. *Any request* or order received from a court, or from federal, *state or local authorities concerning a court order*, for the return to the United States of members . . . for any reason listed in § 720.42."). Though Subpart D seems to be primarily related to the return of "members" to face criminal charges, there is nothing in Subpart D making this specific limitation. *See* 32 C.F.R. § 720.41 ("Respondent. A member, employee, or family member whose return to the United States has been requested, or with respect to whom other assistance has been requested under this instruction.").

> *is attempted from out-of-State by mail and refused, the refusal should be noted and the documents returned to the sender.* Questions should be referred to the staff judge advocate, command counsel, or the local naval legal service office.

32 C.F.R. § 720.20(a)(2) (emphasis added). In general, the following rules apply for serving subpoenas: "Commanding officers afloat and ashore may permit service of process of . . . State courts upon members . . . residing at or located on a naval installation, if located within their commands." 32 C.F.R. § 720.20(a). There is no record evidence that the subpoena mailed to Australia on 1 June 2015 was addressed to the attention of the appropriate commanding officer, the Judge Advocate General, or any other individual that was authorized by the Code to facilitate service of the subpoena or grant any request that Whisman be returned to North Carolina to testify.

When service of process is effectuated, the commanding officer will normally try and facilitate compliance:

> When members . . . are either served with process, or voluntarily accept service of process . . . *the commanding officer normally will grant leave or liberty to the person served to permit compliance with the process, unless to do so would have an adverse impact on naval operations.* . . . . When it would be in the best interests of the United States Government (for example, in State criminal trials), travel funds may be used to provide members . . . as witnesses[.]

32 C.F.R. § 720.20(d) (emphasis added). If service is not permitted, or if the served member is not allowed leave in response to the subpoena, "a report of such refusal and the reasons therefor shall be made . . . to the Judge Advocate General[.]" 32 C.F.R. § 720.20(e).

It is unclear what method was used by the State to subpoena Whisman while she was still in California, but it is clear that the appropriate authorities cooperated in order that Whisman could attend the 23 March 2015 deposition. However, there is no record evidence that the State attempted any *timely* subpoena of Whisman for the 15 June 2015 trial date, nor that it complied with the Code in its attempted method of service. Had the State's subpoena by certified mail reached the proper authorities, they would have been required under the Code to respond; either by facilitating Whisman's return to North Carolina to testify at trial, or by refusing service and returning the subpoena to the State with

notification that service was rejected. 32 C.F.R. § 720.20(a)(2). Relying on the record evidence, neither of these outcomes occurred, which suggests that the State's improper method of service either prevented the subpoena from reaching a proper authority, or delayed service until there was no possibility for Whisman to make the trip from Australia to North Carolina by 15 June 2015.

In its 15 June 2015 motion, the State provided the following additional rationale for why the trial court should find that Whisman was "unavailable" for the purposes of Rule 804(b)(1) and the Confrontation Clause:

> In the present case, the State received information from the United States Navy that [ ] Whisman would be deployed out of the country at the time of trial. Further, [ ] Whisman's prior history of foreign deployment (e.g., Guantanamo Bay, Cuba) suggested that even if the State were to wait for her to return to the country before calling the matter for trial, she could be deployed again. With these things in mind, the State flew [ ] Whisman to Charlotte from California to be deposed, all at the State's expense, the week before she was scheduled to be shipped out of the country. Since the deposition, the State has been in contact with officials from the United States Navy, who have confirmed that [ ] Whisman is deployed and that her whereabouts constitute a matter of national security.[13]
>
> . . . .
>
> Given that the Defendant was present at the deposition and represented by counsel with the opportunity to cross-examine [ ] Whisman, the Defendant's Constitutional rights were protected. Cf., e.g., State v. Ross, 216 N.C. App. 337 (2011) (no violation of Confrontation Clause at trial when court admitted testimony from probable cause hearing, because such hearing provided adequate prior opportunity to cross-examine).

At the 15 June 2015 motion hearing, the State made the following oral argument:

> Since [Whisman's deposition] the State has received further confirmation as indicated in that motion that she is

13. There is no record evidence supporting this contact between the State and the Navy beyond the generic 20 May 2015 letter from the Commanding Officer of the 1st Medical Battalion of the Marine Corps.

> not available. The military has indicated as a matter of national security they will not disclose where she is. I don't know how to get her here. We have made very good effort, Your Honor, flying her out here to testify in the first place. I couldn't tell you where she is now. I've provided documentation from the United States Navy indicating as such. So would ask that you declare her unavailable and admit her prior testimony under the former testimony exception to the hearsay rule.

Based upon the above, the State's *relevant* evidence in support of Whisman's alleged unavailability was as follows: that she would be serving overseas as a Navy corpsman until December 2015; that her whereabouts were currently unknown, but that the State had been provided "with a mailing address to send a subpoena to [her;]" that the State had sent a subpoena, presumably to the mailing address provided, approximately two weeks before the time Whisman was required for trial; and that there had been no response from Whisman. Record evidence strongly suggests that the subpoena never reached Whisman. Although the State mainly focused its argument on evidence related to the effort it took to subpoena and procure Whisman *for the 23 March 2015 deposition*, none of that evidence is relevant to our "unavailability" analysis, which is entirely limited to whether she could be produced *at trial*.

Defendant responded to the State's argument as follows:

> Your Honor, at this time we would renew our objections, first to even the taking of the deposition. We contend that it was an abuse of Judge Bell's power in violation of the defendant's rights under the United States and North Carolina Constitution, Fifth, Sixth and Fourteenth Amendments, to even take. *All we had to do was continue the trial until October*[14] *and she would be here.*
>
> As far as her unavailability, *my understanding is that, if the request was made to her command to have her come, they would make arrangements*. She is in Australia according to her Facebook page, you know, so, again, we understand that she's not here. At the end of the videotaped deposition *the State asked for her to be released, we objected to that, she was released and we're here today.*

14. We presume Defendant meant until after December 2015.

The Code supports Defendant's assertion that the policy of the Navy and Marine Corps is to help facilitate the availability of its members to testify in criminal proceedings when possible. 32 C.F.R. § 720.20.

Further, the trial court's *refusal to continue* the trial to a date subsequent to Whisman's return from Australia, and the State's request that the trial court deny Defendant's motion to continue, is an important factor to be considered in our "unavailability" analysis. Our analysis is *not* confined to whether Whisman was unavailable for trial on the specific date of 15 June 2015, but whether Whisman was unavailable to testify at Defendant's trial, whenever that trial might have taken place, considering all relevant factors, rights, and policy considerations.

However, the trial court ruled that Whisman was "unavailable" for Rule 804 and Confrontation Clause purposes, and allowed Whisman's deposition testimony in lieu of her live testimony at trial, based entirely upon the following findings of fact: "The Court finds the witness is in the military and is stationed outside of the State of North Carolina currently. May be in Australia or whereabouts may be unknown as far as where she's stationed."

c. Rule 804

[3] We hold that even had the trial court made findings and conclusions supporting that the State "has been unable to procure [her] attendance . . . by process or other reasonable means[,]" as required by N.C. Gen. Stat. § 8C-1, Rule 804(a)(5), the record evidence would not support this conclusion. The State could have requested that its *original subpoena* of Whisman remain in place until trial, or it could have served her with a new subpoena when she was in North Carolina for the 23 March 2015 deposition, but it did not do so. *See* N.C. Gen. Stat. § 8-63 (2015) ("Every witness, being summoned to appear in any of the said courts . . . shall appear accordingly, and . . . continue to attend from session to session until discharged, . . . when summoned in a criminal prosecution, until discharged by the court, the prosecuting officer, or the party at whose instance he was summoned[.]"); N.C. Gen. Stat. § 8-59 (2015) ("In obtaining the testimony of witnesses in causes pending in the trial divisions of the General Court of Justice, subpoenas shall be issued and served in the manner provided in Rule 45 of the Rules of Civil Procedure for civil actions. Provided that in criminal cases any employee of a local law-enforcement agency may effect service of a subpoena for the attendance of witnesses by telephone communication with the person named.").

Instead, the State *made a direct request* that the trial court release Whisman from its subpoena, and instead apparently mailed a subpoena,

addressed to no one,[15] to Marine Rotational Force Darwin, in Australia, two weeks before the start of trial. This subpoena was still in the United States ten days before trial, and there is no record evidence that it ever reached its destination. Further, the State could have either suggested a continuation of the trial until after Whisman's deployment ended, or at least not objected to Defendant's repeated requests to continue the trial so Whisman could testify in person. The State articulated no compelling reason in support of its objection to a continuance, nor did the trial court justify the necessity for denying a continuance. We are unable to find any compelling reason why the trial could not have been continued until after Whisman's return from deployment.

We do not find the efforts of the State to effectuate Whisman's appearance at trial to have been reasonable or made in good faith, as there is almost no possibility that the subpoena could have reached Whisman in time for her command to have granted her leave to respond; the State had ample opportunity to maintain or effectuate service in March 2015; and there were other methods available to the State to try and obtain Whisman's presence at trial that it did not pursue. *See Nobles*, 357 N.C. at 437–38, 584 S.E.2d at 770. The evidence presented by the State was insufficient to sustain an ultimate finding that it had "been unable to procure [Whisman's] attendance . . . by process or other reasonable means[,]" N.C. Gen. Stat. § 8C-1, Rule 804(a)(5) and, in fact, *no such finding was made*. For this alternate reason, we also hold that the trial court erred in admitting Whisman's deposition testimony in lieu of her live testimony at trial.

d. Confrontation Clause

[4] Defendant also argues that allowing Whisman's deposition testimony in lieu of her live testimony at trial violated the Confrontation Clause of the Sixth Amendment of the United States Constitution. We agree.

The United States Supreme Court has stated: "We observed in *Coy v. Iowa* that 'the Confrontation Clause guarantees the defendant a face-to-face meeting *with witnesses appearing before the trier of fact*.' " *Maryland v. Craig*, 497 U.S. 836, 844, 111 L. Ed. 2d 666, 677 (1990) (citations omitted) (emphasis added). The United States Supreme Court long ago clarified the primary objective of the Confrontation Clause:

15. The "New Navy Standardized FPO Mail Address Format" requires the intended recipient's name, listed first. *See* http://www.navy.mil/submit/display.asp?story_id=84519.

> [T]he particular vice that gave impetus to the confrontation claim was the practice of trying defendants on 'evidence' which consisted solely of ex parte affidavits or *depositions* secured by the examining magistrates, thus *denying the defendant the opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact*. . . . .
>
> [O]bjections occasioned by this practice appear primarily to have been aimed at the failure to call the witness to confront personally the defendant at his trial. So far as appears, in claiming confrontation rights no objection was made against receiving a witness' out-of-court depositions or statements, so long as the witness was present at trial to repeat his story *and to explain or repudiate any conflicting prior stories before the trier of fact*.
>
> Our own decisions seem to have recognized at an early date that it is this literal right to 'confront' the witness *at the time of trial* that forms the core of the values furthered by the Confrontation Clause[.]

California v. Green, 399 U.S. 149, 156–57, 26 L. Ed. 2d 489, 496 (1970) (citations and footnotes omitted) (emphasis added). "Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.' " *Crawford v. Washington*, 541 U.S. 36, 61, 158 L. Ed. 2d 177, 199 (2004); *see also Fowler*, 353 N.C. at 615, 548 S.E.2d at 696 ("This prong of the *Roberts* inquiry is called the 'Rule of Necessity.' In analyzing this prong, a witness is not 'unavailable' for purposes of the . . . confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial.") (citation omitted).

The United States Supreme Court has stated concerning the admission of testimonial evidence by some means other than the testimony of the declarant at trial:

> First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a *rule of necessity*. In the usual case (*including cases where prior cross-examination has occurred*), the prosecution *must* either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant.

> The second aspect operates *once a witness is shown to be unavailable.*

Ohio v. Roberts, 448 U.S. 56, 65, 65 L. Ed. 2d 597, 607 (1980), *abrogated on other grounds by Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004) (emphasis added) (citations omitted). This Court has defined three separate steps required to admit testimonial evidence in the absence of the declarant witness:

> Our Court has held that evaluating whether a defendant's right to confrontation has been violated is a three-step process. We must determine: "(1) whether the evidence admitted was testimonial in nature; (2) whether the trial court properly ruled the declarant was unavailable; and (3) whether defendant had an opportunity to cross-examine the declarant."

State v. Allen, 171 N.C. App. 71, 74–75, 614 S.E.2d 361, 364–65 (2005) (citations omitted).

These three steps are separate and sequential, they are not three factors in a balancing test. Therefore, the trial court must *first* make a determination of whether the relevant evidence is testimonial in nature; *if* the trial court determines that the evidence is testimonial, *then* it must determine whether the declarant witness is unavailable for trial; *only* upon finding in the affirmative for the first two inquiries must the trial court make a determination concerning the defendant's prior opportunity to cross-examine the declarant witness. *Id.*; *see also State v. McLaughlin*, __ N.C. App. __, __, 786 S.E.2d 269, 277, *appeal dismissed*, *disc. review denied*, __ N.C. __, 787 S.E.2d 29 (2016). Therefore, in this matter, our unavailability analysis does *not* consider the fact that Defendant's attorney had the opportunity to fully cross-examine Whisman in Defendant's presence, before a trial judge applying the rules of evidence, or that the examination was recorded on video and by a court reporter. *See Barber*, 390 U.S. at 725–26, 20 L. Ed. 2d at 260.

In the present case, Whisman's deposition testimony clearly qualifies as "testimonial" for Confrontation Clause purposes. Our analysis therefore next focuses solely on whether the State carried its burden of demonstrating the unavailability of Whisman for trial to a degree that survives constitutional scrutiny, and whether the trial court's ruling comports with the constitutions of North Carolina and the United States, and other relevant law.

The entirety of the trial court's findings of fact related to the State's burden to prove Whisman's unavailability at trial is as follows: "The

Court finds [Whisman] is in the military and is stationed outside of the State of North Carolina currently. May be in Australia or whereabouts may be unknown as far as where she's stationed." The trial court made *no findings* demonstrating the necessity of proceeding to trial without Whisman's live testimony. The trial court did not address the option of continuing trial until Whisman returned from her deployment, nor did it determine that the State "made a good-faith effort to obtain [Whisman's] presence at trial" through its last minute attempt to subpoena her. *Barber*, 390 U.S. at 725, 20 L. Ed. 2d at 260. Further, " 'the possibility of a refusal is not the equivalent of asking and receiving a rebuff.' " *Id.* at 724, 20 L. Ed. 2d at 260. Therefore the State's argument that, even after [Whisman] returned from her Darwin deployment, "she could be deployed again[,]" does not carry weight. It is always possible that a service member *could* be deployed out of the country. This ambiguous but persistent possibility cannot serve to render every service member "unavailable" for an upcoming trial and thereby justify infringement of a defendant's constitutional right to confront that service member, should the State wish to present testimonial evidence from that service member at trial.

We note that, when considering *a defendant's claim* that his Sixth Amendment right to a *speedy trial* has been violated, the United States Supreme Court, as well as the appellate courts of North Carolina, have repeatedly held that *granting a continuance* based upon the temporary unavailability of a witness, especially an essential witness, is often appropriate, and is a factor that may *justify delay of a trial even when the defendant is requesting a "speedy trial"* as guaranteed under the Sixth Amendment. *See Barker v. Wingo*, 407 U.S. 514, 531, 33 L. Ed. 2d 101, 117 (1972) ("a valid reason, such as a missing witness, should serve to justify appropriate delay [in bringing a defendant to trial]"); *State v. Jones*, 310 N.C. 716, 719–20, 314 S.E.2d 529, 532 (1984). We see no legitimate reason why a trial court should not continue a trial to *protect a defendant's confrontation rights* with the same flexibility that it offers the State when it agrees to continue a trial *in order for the State to present testimony of an important witness* at that trial. We find no compelling interest justifying the denial of Defendant's request to continue the trial to allow for Whisman's live testimony. The mere convenience of the State offers no such compelling interest:

> [R]espondent asks us to relax the requirements of the Confrontation Clause to accommodate the " 'necessities of trial and the adversary process.' " It is not clear whence we would derive the authority to do so. The Confrontation

> Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause—like those other constitutional provisions—is binding, and we may not disregard it at our convenience.

Melendez-Diaz v. Massachusetts, 557 U.S. 305, 325, 174 L. Ed. 2d 314, 330 (2009).

Upon review of Confrontation Clause jurisprudence, we note that a finding of unavailability is generally proper when there is *no possibility* the witness can be produced at trial, such as in cases when the witness has died or is terminally ill.[16] A finding of unavailability *may* be proper when the State demonstrates that the witness is *highly unlikely* to be available for trial at any known date, such as when the witness has fled the country in an intentional effort to avoid testifying, or the State demonstrates that, after making sufficient reasonable efforts, it has been unable to locate the witness.[17] The common thread justifying entry of prior recorded testimony is that the witness is *either demonstrably unavailable for trial, or there is no evidence to support a finding that, with a good-faith effort by the State, the witness may be made available at some reasonable time in the future.*

By contrast, when a witness is unavailable for a *limited* period of time, courts have been reluctant to find that witness unavailable for Confrontation Clause purposes. *See Peterson v. United States*, 344 F.2d 419, 425 (5th Cir. 1965) (Witness *not* found "unavailable" for Confrontation Clause purposes because she "was not dead, beyond the reach of process nor permanently incapacitated. She was simply unavailable at the time of trial because of her pregnancy. *Considering the seriousness of the charges* and if the Government desired to use [her] testimony, *it should have requested a continuance to a time when she could probably be present.*") (emphasis added); *Smith v. United States*, 106 F.2d 726, 728 (4th Cir. 1939) (Prior testimony of an unavailable witness "is admitted only because the witness cannot be produced; and *it should not be admitted where the presence of the witness at the trial of the cause might be had by the exercise of due diligence*. . . . . That while

16. *See* N.C. Gen. Stat. 8C-1, 804(4) (2015); *State v. Hurst*, 127 N.C. App. 54, 59, 487 S.E.2d 846, 851 (1997).

17. *See State v. Fowler*, 353 N.C. 599, 610, 548 S.E.2d 684, 693 (2001); *State v. Bowie*, 340 N.C. 199, 456 S.E.2d 771 (1995).

it appeared from the testimony of Dr. Handy that [the witness] was, at the time of this trial, in such condition as not to be available as a witness, it likewise appeared that Dr. Handy considered this condition as temporary." Therefore, the witness should have "been subpoenaed as a witness" or motion "made for a continuance of the case because of her illness and until she could testify.") (Emphasis added).

We note that these medical "unavailability" cases are specifically contemplated in Rule 804: "Evidence Rule 804(a)(4) states that a witness is unavailable if she is unable to testify due to 'an existing physical or mental illness or infirmity.' "[18] *State v. Carter*, 338 N.C. 569, 591, 451 S.E.2d 157, 169 (1994) (citation omitted). There is no such statutory exception for an inability to testify due to military deployment.

Further, the expected *duration* of the witness' unavailability must be considered, and according to some authority, the expected duration must be such that there is no guarantee the witness will ever be available for trial:

> In criminal prosecutions, according to the weight of authority, the mere temporary illness or disability of a witness is not sufficient to justify the reception of his former testimony. . . .
>
> . . . .
>
> . . . it must appear that the witness is in such a state, either mentally or physically, that in reasonable probability he will never be able to attend the trial.

United States v. Amaya, 533 F.2d 188, 191 (5th Cir. 1976) (citations omitted). The *Amaya* Court recognized that some jurisdictions' requirements are not as rigid:

> Although the duration of an illness is a proper element of unavailability, the establishment of permanence as to the particular illness is not an absolute requirement. The duration of the illness need only be in probability long enough so that, with proper regard to the importance of the testimony, the trial cannot be postponed.

Id. (citation omitted).

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18. Statutory provisions cannot, of course, alter constitutional requirements, but we find the distinctions informative in our Sixth Amendment analysis.

Although we have been unable to find binding precedent directly related to the issue of military deployment and unavailability for Confrontation Clause purposes, the United States Court of Military Appeals has rejected a finding of unavailability of a witness due to deployment based upon the following reasoning:

> When offering the deposition on November 29, trial counsel represented to the military judge that the witness was on board ship and that the ship was still in training. . . . . Because the information provided to the military judge was not current, the actual unavailability of the witness at the time the deposition was offered into evidence was not established. *Cf. Burns v. Clusen*, 798 F.2d 931, 943 (7th Cir.1986) (Government's burden to establish "unavailability is a continuing one").
>
> Moreover, it is clear that the refresher training had been scheduled for months and *was known well in advance by trial counsel*. In spite of this, there appears to have been no accommodation made in setting the date of trial so the witness could testify before the factfinder. *Certainly, the record provides no explanation why trial could not have commenced earlier or concluded later so the temporary unavailability of the witness would not have necessitated resort to "a weaker substitute for live testimony." United States v. Inadi*, 106 S. Ct. at 1126.

United States v. Vanderwier, 25 M.J. 263, 266–67 (C.M.A. 1987) (citation omitted) (emphasis added).[19]

We hold that, just as in cases of unavailability due to mental or physical illness, in order for the State to show that a witness is unavailable for trial due to deployment, the deployment must, *at a minimum*, be "in probability long enough so that, with proper regard to the importance of the testimony, the trial cannot be postponed." *Amaya*, 533 F.2d 188, 191.[20] In the present case, the State described Whisman as "an essential

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19. We recognize the stark differences between Article III courts and military tribunals, but agree with the proposition that the record must demonstrate some legitimate justification for the refusal to grant a continuance when a defendant's constitutional rights of confrontation are at issue. *See O'Callahan v. Parker*, 395 U.S. 258, 23 L. Ed. 2d 291 (1969), *overruled on other grounds by Solorio v. United States*, 483 U.S. 435, 97 L. Ed. 2d 364 (1987).

20. "We need not prescribe in this case the exact dimensions of the rule, for under either statement, the Government should have been required to elect either to proceed without [its witness]'s testimony or to request a continuance." *Peterson*, 344 F.2d at 425.

witness," and we concur. Though Defendant had been afforded the ability to cross-examine Whisman *before* trial, that fact has no bearing on Whisman's "unavailability" *at trial* for Confrontation Clause purposes. *See Barber*, 390 U.S. at 725–26, 20 L. Ed. 2d at 260 ("while there may be some justification for holding that the opportunity for cross-examination of a witness at a preliminary hearing satisfies the demand of the confrontation clause *where the witness is shown to be actually unavailable*, this is not, as we have pointed out, such a case") (emphasis added).

There were many steps the State could have taken to demonstrate a good-faith attempt to procure Whisman for trial, including, primarily, requesting continuance of the trial until she was available. We hold, on the facts before us, that the failure to continue the trial until after Whisman's deployment ended in December 2015, alone, constituted a violation of Defendant's confrontation rights.

Additional steps that the State could have taken to demonstrate a "good faith effort" to procure Whisman's presence at trial include either requesting that she remain under subpoena until trial instead of requesting that she be released from her subpoena, or serving her with a new subpoena while she was in North Carolina for her 23 March 2015 deposition. Finally, if the State wanted to make a serious attempt to serve Whisman with a subpoena by mail while she was deployed in Australia, it should have attempted service at a much earlier date, and complied with the Code rules concerning service. "In this case the state authorities made no effort to avail themselves of . . . alternative means of seeking to secure [Whisman's] presence at . . . trial." *Barber*, 390 U.S. at 724, 20 L. Ed. 2d at 259-60.

We hold that the State did not present the trial court with evidence sufficient to demonstrate it had made a good-faith effort to obtain Whisman's presence at trial:

> [A] witness is not 'unavailable' for purposes of . . . the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial. The State made no such effort here, and, so far as this record reveals, the sole reason why [the State's witness] was not present to testify in person was because the State did not attempt to seek [her] presence. The right of confrontation may not be dispensed with so lightly.

Id. at 724–25, 20 L. Ed. 2d at 260.

We further hold, for the same reasons enumerated above, that allowing Whisman's deposition testimony in lieu of her live testimony at trial violated the relevant protections of Article I of the North Carolina Constitution:

> " 'The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding *before the trier of fact*.' " We have generally construed the right to confrontation under our state constitution consistent with its federal counterpart.

Nobles, 357 N.C. at 435, 584 S.E.2d at 768 (emphasis added) (citations omitted). For these additional reasons, we hold that the trial court erred in allowing Whisman's deposition testimony to be entered into evidence in lieu of her live testimony at trial, and that the trial court further erred in denying Claim 1 in Defendant's amended MAR.

4. Prejudice

Because we have found that denying Defendant the opportunity to confront Whisman at trial and in front of the jury violated the Confrontation Clause, "[D]efendant is presumed to have been prejudiced[, and] the burden is upon the State to show beyond a reasonable doubt that the error was harmless. N.C. Gen. Stat. § 15A–1443(b) (2005)." *State v. Bowman*, 188 N.C. App. 635, 650, 656 S.E.2d 638, 650 (2008) (citation omitted). The United States Supreme Court has held regarding the deprivation of a defendant's right to cross-examine a State's witness in front of the jury:

> The correct inquiry is whether, assuming *that the damaging potential of the cross-examination were fully realized*, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Delaware v. Van Arsdall, 475 U.S. 673, 684, 89 L. Ed. 2d 674, 686 (1986) (citations omitted) (emphasis added).

a. Defense of Others

[5] Defendant did not deny shooting Allen on the night of 28 July 2014; his defense at trial was that he was justified in shooting Allen because he believed it was necessary to protect Whisman from death or great bodily harm.[21]

> In general one may kill in defense of another if one believes it to be necessary to prevent death or great bodily harm to the other and has a reasonable ground for such belief, the reasonableness of this belief or apprehension to be judged by the jury in light of the facts and circumstances as they appeared to the defender at the time of the killing.

State v. Perry, 338 N.C. 457, 466, 450 S.E.2d 471, 476 (1994) (citations and quotation marks omitted).

The State argues that "there was overwhelming evidence of [D]efendant's guilt even without [ ] Whisman's testimony." However, it is the State's burden to prove beyond a reasonable doubt that the error of denying Defendant the right to confront Whisman live, in front of the jury, was harmless. *Bowman*, 188 N.C. App. at 650, 656 S.E.2d at 650. The error was not in admitting Whisman's testimony, it was in the manner in which it was admitted. Therefore, in order to prove beyond a reasonable doubt that the error was harmless, the State must show that there was no "reasonable possibility that the [error] complained of might have contributed to the conviction." *State v. Heard*, 285 N.C. 167, 172, 203 S.E.2d 826, 829 (1974).

Defendant's argument is not that Whisman's testimony should have been excluded, it is that because he was deprived of his right to cross-examine Whisman at trial, in front of the jury, his case was prejudicially weakened. Resolution of this case almost entirely relied upon the testimonies and statements of *all three* witnesses that were present at the shooting, and Whisman was the witness most likely to have had sway with the jury; the State referred to Whisman as the "one objective witness who was there[.]"

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21. We limit our review to Defendant's argument that the jury could have found that he was justified in shooting Allen in defense of Whisman, and do not directly address his self-defense claim.

The jury *could* have believed Allen, Defendant, or Whisman exclusively, or it could have believed any combination of their statements. A thorough and complete examination of Whisman's and Allen's testimony at trial was therefore of paramount importance in swaying the jury to either Defendant's or the State's evidence of events. If the jury believed Allen completely, then it would have likely believed he posed no immediate threat to Whisman or Defendant at the time Defendant shot him.

However, if there was a reasonable possibility the jury could have been swayed to accept Defendant's statements to police in their entirety, and believed Allen's testimony in a light favorable to Defendant, it would have found the following: Allen was a man prone to bouts of violent rage, and Defendant had witnessed Allen severely beat people in the past. Even though Allen himself did not believe Defendant was drunk, Allen went into a rage when he saw that Defendant was attempting to drive Whisman back to her hotel, so he grabbed his handgun, ran to Whisman's door screaming obscenities, and managed to get the keys to Whisman's Jeep from Defendant and throw them into the woods. After Whisman retrieved her spare keys and got into the driver's seat of her Jeep, Allen shoved Defendant out of the way, "grabbed [Whisman] by the hair, [and] pulled her out onto the ground." While on the ground, Whisman laughed, which "infuriated" Allen, causing him to grab Whisman off the grown, thrust her against a tree, and put his hands around her throat, get directly in her face, and ask her "if she thought it was a f*ucking joke."

Whisman was terrified and hysterical, and Defendant stepped between her and Allen because Defendant "knew that [Allen] would go off. And with [Whisman] in close proximity, that could not be a very good thing." Whisman was "screaming she was afraid for her life," screamed "help" many times, and screamed " Sam [Defendant], don't let him do this to me again." "Obviously . . . [Whisman] was afraid of [Allen.]"

Allen later confronted Whisman and Defendant and told them they could not leave, and that Defendant needed to "[f]ix your bitch[,]" and "get her under control." As Allen confronted Defendant, Defendant kept his hands firmly in his pants pockets because his handgun was in his waistband and he did not want appear to be a threat, or have Allen take Defendant's gun, or have Allen retrieve his own gun. Defendant was not provoking Allen, but Allen "chest pushed" Defendant a few times. Allen then used his right fist to hit Defendant twice in the face, and Allen was "infuriated at [that] point[.]" Defendant knew Allen could easily best him in a fistfight.

After punching Defendant twice, Allen "changed targets" and "went after [Whisman] and had his hand around her throat again and leg-swept

her onto the ground." Allen held Whisman's hair with one hand, and drew his other fist back like he was going to punch Whisman in the face. Defendant screamed Allen's name to get him to stop his assault on Whisman, but Allen did not stop. At this point, Defendant "decided that [Allen] was going to kill either of us, or at least seriously injure, so I made a split instant decision to defend myself and her." Believing Whisman was in imminent danger of being brutally assaulted by a man who was too strong and proficient in fighting for Defendant to physically control, Defendant shot Allen to prevent him from seriously injuring, or even killing, Whisman. Based upon Allen's actions that evening, Whisman, too, believed that Allen was going to kill her.

The State itself, during its closing argument, admitted that important aspects of Defendant's story were correct, and thus Allen had credibility issues:

> [B]oth [Whisman] and [D]efendant tell us that . . . Allen had [Whisman] up against the tree briefly. [D]efendant said that he had her by the throat. She said it was sort of the shoulder/neck area. [ ] Allen did not say this happened, but, again, the two of them pretty quickly after this happened said that that's what happened, so I think you could reasonably assume that there was something like that going on.

Because Whisman's testimony was presented by video deposition, Defendant had no opportunity to cross-examine her in response to testimony and evidence that came to light at trial. The State must show beyond a reasonable doubt that Defendant's lost opportunities to fully cross-examine Whisman in front of the jury would not have affected either the jury's credibility determinations or its decisions on issues of fact in a manner that "might have contributed to the conviction." *Heard*, 285 N.C. at 172, 203 S.E.2d at 829.

> The opportunity for cross-examination, protected by the Confrontation Clause, is critical for ensuring the integrity of the fact-finding process. Cross-examination is "the principal means by which the believability of a witness and the truth of his testimony are tested." Indeed, the Court has recognized that cross-examination is the " 'greatest legal engine ever invented for the discovery of truth.' " The usefulness of cross-examination was emphasized by this Court in an early case explicating the Confrontation Clause:

> "The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity . . . of *testing the recollection and sifting the conscience of the witness*[.]

Kentucky v. Stincer, 482 U.S. 730, 736, 96 L. Ed. 2d 631, 641-42 (1987) (citations omitted). The United States Supreme Court, discussing *Davis v. Alaska*, 415 U.S. 308, 39 L. Ed. 2d 347 (1974), has considered the prejudice implications of a defendant being denied the right to fully cross-examine a state's witness in violation of the Confrontation Clause:

> Defense counsel was barred from eliciting on cross-examination that [the witness] was on juvenile probation for burglary both at the time of his pretrial identification of [the defendant] and at the time of trial. The defense sought to suggest that [the witness] may have slanted his account in the State's favor either to shift suspicion away from himself or to avoid revocation of probation for failing to "cooperate." This Court reversed [the defendant]'s conviction, emphasizing that [the witness]'s testimony was "crucial" and that there was a "real possibility" that pursuit of the excluded line of impeachment evidence would have done "[s]erious damage to the strength of the State's case."

Van Arsdall, 475 U.S. at 683, 89 L. Ed. 2d at 686 (citations omitted). As the United States Supreme Court has reasoned when a defendant was not permitted to fully cross-examine an essential witness concerning issues of credibility:

> We cannot speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted this line of reasoning had counsel been permitted to fully present it. But we do conclude that the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on [the State's witness'] testimony which provided 'a crucial link in the proof . . . of petitioner's act.' The accuracy and truthfulness of [the State's witness'] testimony were key elements in the State's case against petitioner.

Davis v. Alaska, 415 U.S. 308, 317, 39 L. Ed. 2d 347, 354 (1974).

Had Whisman been present to testify at trial, she could have stated directly to the jury that Allen was lying when he testified that he never assaulted Whisman by holding her up against a tree by her neck, and when Allen testified that he did not throw her to the ground right before the shooting. Being confronted with Allen's actual testimony, Whisman could have provided additional relevant testimony that was not brought forth in her deposition, which was conducted without Defendant having the benefit of the State's actual evidence at trial, including Allen's actual testimony. Had Whisman been given the opportunity to respond directly to Allen's testimony, she could have both created more doubt in the minds of the jurors concerning Allen's credibility, and could have provided additional testimony surrounding the contested issues.

For example, Whisman could have: responded to Allen's comment that early on in the confrontation "[o]bviously, for some reason she was afraid of me[,]" and that later Whisman was "screaming she was afraid for her life[,]" by explaining why Allen made her feel that way; responded to Allen's testimony that he did not clap his hands and call Whisman like he was calling a "dog;" clarified why she was yelling "help," if in fact she was doing so; or contested Allen's testimony that Whisman pushed Allen and hit him on the top of his head, and then came after Allen again after he pushed her away. In light of Defendant's and Allen's conflicting statements concerning Allen's actions right before Defendant shot him, Whisman, had she been able to testify at trial, could have more fully addressed those critical last moments, potentially providing more credibility and support for Defendant's version of those most relevant events.

Finally, Whisman was unable to respond to Allen's testimony that she screamed: "Sam [Defendant], don't let him do this to me again." The State, because Whisman did not testify at trial, was able to argue to the jury that Whisman was not asking Defendant to protect her from Allen, but was having a "flash-back" to some earlier unrelated assault. Not only did the State's depiction of Whisman's statement serve to potentially diminish the jury's understanding of Whisman's fear of Allen, it also served to potentially plant in the minds of the jurors that Whisman was *over-reacting* to Allen's actions in response to some prior trauma. The jury could have believed Whisman was, perhaps even sub-consciously, irrationally inflating her fear of Allen's intent in the crucial moments just before Allen was shot. The jury could have diminished or discounted Whisman's testimony that Allen threw her to the ground so hard her glasses came off, then he came after her, was "over the top of [her]" as she lay on the ground, and that she did not believe Allen "was going to stop" his assault. It was potentially critically important whether the

jury believed Whisman's stated beliefs that "[Allen] was going to kick my face in[,]" and that she "was really afraid [Allen] was going to – he was going to kill me[,]" were reasonable. We therefore hold that the State failed to prove beyond a reasonable doubt that denial of Defendant's constitutional right to confront Whisman at trial and in front of the jury had no prejudicial effect on the jury's rejection of his "defense of another" defense.

b. Intent to Kill

[6] Assuming *arguendo* the jury rejected both of Defendant's defenses – self-defense and defense of another – the jury still could have found that Defendant, though acting unlawfully, did not *intend* to kill Allen, his "brother," but merely sought to prevent Allen from further assaulting Whisman. *State v. Daniel*, 333 N.C. 756, 763, 429 S.E.2d 724, 729 (1993) ("A specific intent to kill is an essential element of assault with a deadly weapon with intent to kill inflicting serious injury. N.C.G.S. § 14-32(a) (1986).") (citation omitted). Determination of the lack, or presence, of a defendant's specific intent to kill is an "ultimate issue[ ] to be determined by the jury." *Daniel*, 333 N.C. at 763, 429 S.E.2d at 729 (citations omitted). Absent the jury finding that Defendant intended to kill Allen, it could have at most convicted him of the lesser included offense of assault with a deadly weapon inflicting serious injury.

The State's theory that Defendant formed the intent to kill Allen because he was humiliated by having been punched by Allen required a fair amount of speculation based upon circumstantial evidence. The State further argued that the fact that Defendant shot Allen three times instead of firing once, or firing a warning shot, was proof of Defendant's intent to kill. Though we agree the jury *could* reasonably view the facts in that manner, we hold that the State has failed to demonstrate there was no "reasonable possibility that [denial of Whisman's live testimony in front of the jury] might have contributed to the conviction." *Heard*, 285 N.C. at 172, 203 S.E.2d at 829.

There was testimonial evidence that Defendant was never the aggressor during the altercations leading up to the shooting; that Defendant attempted on multiple occasions to calm both Allen and Whisman, and thereby de-escalate the volatile situation; that Defendant did not react violently when Allen pushed him, or immediately after Allen punched him twice in the face; and that Defendant called out to Allen several times before pulling the trigger, which the jury could have interpreted as an attempt to get Allen to stop assaulting Whisman before resorting to potentially deadly force. Further, Defendant called 911 and administered

first aid to Allen until the police arrived. The jury could have determined that, though Defendant was not legally justified in shooting Allen three times, he never formed a specific intent to kill his best friend.

The jurors' decisions on these issues were undoubtedly influenced by the weight they gave to both Defendant's statement and Whisman's testimony. We hold that there was a reasonable possibility that had Defendant been allowed to further explore Whisman's testimony concerning Allen's assaultive actions, her fear that Allen was going to "kick her face in" or "kill her," and her plea: "Sam [Defendant], don't let him do this to me again[,]" the jury could have decided this additional "testimony was 'crucial' and that there was a 'real possibility' that pursuit of the excluded line of impeachment evidence [against Allen] would have done '[s]erious damage to the strength of the State's case' " that Defendant intended to kill Allen. *Van Arsdall*, 475 U.S. at 683, 89 L. Ed. 2d at 686 (citations omitted); *see also Id.* at 683–84, 89 L. Ed. 2d at 686 (Remand was required because though "it is impossible to know how [the] wrongfully excluded evidence would have affected the jury . . . [the defendant] was denied an opportunity to cast doubt on the testimony of an adverse witness. [T]he prosecution was thus able to introduce evidence that was not subject to constitutionally adequate cross-examination. [T]he reviewing court should be able to decide whether the not-fully-impeached evidence might have affected the reliability of the fact-finding process at trial.").

c. Prejudice Conclusion

[7] Whisman's testimony was of overwhelming importance to Defendant's defense; her testimony was not cumulative, because it served as the most objective of three sometimes competing recitations of the relevant events. Her testimony was generally corroborated by both Allen and Defendant, but contradicted Allen's testimony in ways that, if further explored, could have had an impact on the jury's credibility assessments, and thus its verdict. The State's case relied primarily on the testimony of the witnesses concerning Allen's actions and the threat he posed that night, as the fact that Defendant shot Allen three times was not in dispute. We hold that "the not-fully-impeached evidence might have affected the reliability of the fact-finding process at trial[,]" *Van Arsdall*, 475 U.S. at 684, 89 L. Ed. 2d at 686 and, therefore, the State has failed in its burden of proving the deprivation of Defendant's constitutional rights was "harmless beyond a reasonable doubt." *Id.* at 684, 89 L. Ed. 2d at 687. We make this holding both with respect to the possibility that the jury might have accepted Defendant's "defense of another" claim, and with respect to the possibility that the jury might have

determined that Defendant did not act with the intent to kill Allen and, therefore, could, at most, have been convicted of the lesser included offense of assault with a deadly weapon inflicting serious injury.

B. Jury Instruction

[8] In Defendant's second argument, he contends that "the trial court erred by failing to instruct the jury on imperfect self-defense and imperfect defense of others[.]" We disagree.

Defendant did not request the trial court give any instruction on imperfect self-defense or imperfect defense of others. In fact, when the State indicated that it believed imperfect self-defense or imperfect defense of others was not legally available to Defendant in this situation, Defendant's counsel agreed with the State. Defendant cannot show prejudice from invited error. *See State v. Hope*, 223 N.C. App. 468, 472, 737 S.E.2d 108, 111 (2012).

By informing the trial court that he agreed instructions on imperfect self-defense or imperfect defense of others were not legally available to him, Defendant invited any alleged error, and waived right to appellate review. *Id.* Defendant is, of course, free to request those instructions should this matter again proceed to trial. We therefore further hold that the trial court did not err in denying the related claim, Claim II, in Defendant's amended 15 December 2015 MAR.

III. Conclusion

We point out in response to the dissenting opinion that a new trial is granted for multiple and independent reasons, including: (1) The trial court failed to make *required* findings of fact concerning Whisman's unavailability. *See Nobles*, 357 N.C. at 440, 584 S.E.2d at 771; *Triplett*, 316 N.C. at 8, 340 S.E.2d at 740–41. (2) The evidence presented at the hearing on the State's motion *in limine* was insufficient to meet the State's burden of demonstrating Whisman's unavailability for purposes of both Rule 804(a)(5) and the Confrontation Clause. We specifically hold that the State's attempt to subpoena Whisman for trial did not constitute "a good-faith effort to obtain [her] presence at trial" as required by *Barber*. *Barber*, 390 U.S. at 725, 20 L. Ed. 2d at 260. We further hold that there were reasonable alternative methods for procuring Whisman's testimony that the State could have pursued, but did not; instead relying solely on its inadequate and belated attempt to subpoena Whisman in Australia. *Id.* at 724, 20 L. Ed. 2d at 259-60. These alternatives included, *inter alia*, simply keeping Whisman under subpoena until trial, in light of the fact that she had been successfully served prior to 23 March 2015. (3) Neither

the State nor the trial court presented adequate justification for denying Defendant's request to continue the trial to a date subsequent to the end of Whisman's deployment; further, the trial court failed to even address this issue in its order granting the State's motion *in limine*.

Concerning the first reason for granting a new trial, the dissenting opinion agrees that the trial court failed to make the necessary findings of fact. *See Triplett*, 316 N.C. at 8, 340 S.E.2d at 740–41. However, the dissenting opinion differs with the majority opinion concerning what, if any, remedy is thereby required.

Concerning the second reason, the dissenting opinion disagrees with our holding that the State did not make a good-faith effort to obtain Whisman's presence at trial, focusing on steps the State took to procure Whisman for her deposition testimony, and the fact that the State gave Defendant proper notice of its intention to admit her deposition testimony. However, these actions are not relevant to Confrontation Clause unavailability analysis. *See Barber*, 390 U.S. at 725–26, 20 L. Ed. 2d at 260. The only action taken by the State to procure Whisman for trial was the subpoena – non-compliant with the Code service procedures – that was mailed to Australia shortly before the beginning of the trial, and which in all likelihood was never served on Whisman. Although the dissenting opinion also appears to give weight to the State's argument that there was a possibility that Whisman could be subject to future deployments, "the prosecution must either produce, *or demonstrate the unavailability of*, the declarant whose statement it wishes to use against the defendant." *Roberts*, 448 U.S. at 65, 65 L. Ed. 2d at 607 (emphasis added) (citations omitted). The State was required to demonstrate that proceeding to trial without the presence of Whisman was *necessary*. *Id.* The hypothetical possibility that Whisman might have been unavailable at some future date is insufficient to demonstrate her actual unavailability. *See Barber*, 390 U.S. at 724, 20 L. Ed. 2d at 260 (" 'the possibility of a refusal is not the equivalent of asking and receiving a rebuff' "); *Nobles*, 357 N.C. at 438, 584 S.E.2d at 770 (" '[i]f there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith may demand their effectuation' ") (emphasis omitted).

Concerning the third reason, the dissenting opinion does not address the State's failure to request a continuance, the State's express resistance to Defendant's motion to continue, nor the trial court's denial of Defendant's motion to continue. The dissenting opinion does state that "[a]ll parties knew Whisman was serving on active duty and subject to repeated deployments[.]" While true, we do not believe the fact that all service members may be subject to deployment at some unknown future

date renders them all "unavailable" for Confrontation Clause purposes, nor does this fact absolve the trial court from the need to consider a continuance instead of depriving a defendant of his constitutional right of confrontation. The Confrontation Clause requires more than the temporary inability of a material witness to attend trial at a certain date if the trial can reasonably be continued to a date when the witness would likely be available. *See Peterson*, 344 F.2d at 425; *Smith*, 106 F.2d at 728; *Vanderwier*, 25 M.J. at 266–67. We hold above that, in order for the State to show a witness is unavailable for trial due to deployment, the deployment must, *at a minimum*, be "in probability long enough so that, with proper regard to the importance of the testimony, the trial cannot be postponed." *Amaya*, 533 F.2d at 191.

In conclusion, we hold that the trial court erred in allowing Whisman's deposition testimony to be entered into evidence in lieu of her live testimony in violation of both N.C. Gen. Stat. § 8C-1, Rule 804, and the provisions of the constitutions of both the United States and North Carolina. We so hold because: (1) the trial court failed to make the required findings of fact to demonstrate unavailability for the purposes of Rule 804 or the Confrontation Clause; (2) the State failed in its burden of showing Whisman could not be made present at trial "by process or other reasonable means." N.C. Gen. Stat. § 8C-1, Rule 804(a)(5); and (3) the State failed in its burden of proving it had carried its constitutionally required burden of demonstrating that it had "made a good-faith effort to obtain [Whisman's] presence at trial." *Barber*, 390 U.S. at 724–25, 20 L. Ed. 2d at 260. We further hold that the State has failed in its burden of proving the deprivation of Defendant's constitutional rights was "harmless beyond a reasonable doubt." *Van Arsdall*, 475 U.S. at 684, 89 L. Ed. 2d at 687. Finally, Defendant failed to preserve appellate review of his jury instruction argument.

NEW TRIAL.

Judge STROUD concurs.

Judge Tyson dissents by separate opinion.

TYSON, Judge, dissenting.

I agree with the majority's opinion, which holds the trial court could have made additional findings of fact to show the State made a reasonable, good faith effort to procure Whisman's physical presence at trial. However, the record and evidence the State presented clearly supports

the trial court's ultimate conclusion that Whisman was unavailable for trial.

The majority's opinion adds an unnecessary and burdensome weight upon the State. Defendant failed to show any prejudicial error. At a minimum, we should remand for further findings of fact. I respectfully dissent from the majority opinion's award of a new trial.

I. Standard of Review

While the admissibility of hearsay evidence is generally reviewed *de novo*, *State v. McLaughlin*, __ N.C. App. __, __, 786 S.E.2d 269, 283 (2016), as the majority notes, our Supreme Court has established a different standard when this Court is reviewing the trial court's determination of the availability of a witness for trial. *State v. Fowler*, 353 N.C. 599, 610, 548 S.E.2d 684, 693 (2001).

We review whether the trial court's findings of fact are supported by the evidence, and whether those findings support the court's conclusions of law. *See id.*; *State v. Triplett*, 316 N.C. 1, 8, 340 S.E.2d 736, 740-41 (1986). A trial court's conclusions of law are reviewed *de novo*. *State v. Simon*, 185 N.C. App. 247, 250, 648 S.E.2d 853, 855 (2007).

II. Unavailability of Witness

Defendant argues the admission of Whisman's video-taped deposition violated his rights under the Confrontation Clause contained in the Sixth Amendment of the Constitution of the United States. Defendant asserts the trial court erred by finding Whisman was unavailable to testify at trial.

A. Unavailability under the Confrontation Clause

Our courts employ a three-step inquiry to determine whether a defendant's right to confront a witness has been violated: (1) whether the evidence admitted was testimonial in nature; (2) whether the trial court properly ruled the declarant was unavailable; and, (3) whether defendant had an opportunity to cross-examine the declarant. *State v. Clark*, 165 N.C. App. 279, 283, 598 S.E.2d 213, 217 (2004); *see Crawford v. Washington*, 541 U.S. 36, 68, 158 L. Ed. 2d. 177, 203 (2004).

Defendant contends Whisman should have been produced as a witness at trial and that the trial court improperly held Whisman was unavailable. We all agree that Whisman's deposition was testimonial in nature. There is also no dispute that Defendant was present at the deposition, had the opportunity to and did, in fact, cross-examine Whisman. Steps (1) and (3) of the inquiry are satisfied. Thus, if Whisman was

constitutionally unavailable, her prior, preserved testimony was properly admitted. *See Crawford*, 541 U.S. at 68, 158 L. Ed. 2d. at 203.

The Supreme Court of the United States and our Supreme Court have "rejected the assumption that the mere absence of a witness from the jurisdiction was sufficient ground for dispensing with confrontation." *State v. Nobles*, 357 N.C. 433, 437-38, 584 S.E.2d 765, 770 (2003) (internal quotation marks and citation omitted); *see Barber v. Page*, 390 U.S. 719, 723, 20 L. Ed. 2d 255, 259 (1968).

The Supreme Court of the United States in *Barber v. Page*, noted:

> It must be acknowledged that various courts and commentators have heretofore assumed that the mere absence of a witness from the jurisdiction was sufficient ground for dispensing with confrontation on the theory that it is impossible to compel his attendance, because the process of the trial [c]ourt is of no force without the jurisdiction, and the party desiring his testimony is therefore helpless.

Id. (footnotes, internal quotation marks, and citation omitted). The Court in *Barber* stated "increased cooperation between the States themselves and between the States and the Federal Government has largely deprived [that assumption] of any continuing validity in the criminal law." *Id.* (footnote omitted).

The Court also assigned a broader meaning of "unavailable" within the context of the confrontation requirement and declared:

> In short, a witness is not "unavailable" for purposes of the foregoing exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial.

Id. at 724-25, 20 L. Ed. 2d at 260.

The Supreme Court also rejected the argument that just "because the State would have had to request an exercise of discretion on the part of federal authorities, it was under no obligation to make any such request," and stated "the possibility of a refusal is not the equivalent of asking and receiving a rebuff." *Id.* at 724, 20 L. Ed. 2d. at 260.

Following this line of reasoning, our Supreme Court has held:

> If there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith may demand their effectuation. The lengths to which

> the prosecution must go to produce a witness . . . is a question of reasonableness. *The prosecution need not exhaust every possible alternative for producing a witness*. Nonetheless, to demonstrate constitutional unavailability, the state's *good-faith efforts* must include, at a minimum, an *attempt to contact* the witness *and request* his or her presence at the proceeding.

Nobles, 357 N.C. at 438, 584 S.E.2d at 770 (emphasis original and supplied) (internal quotation marks and citations omitted). The State must demonstrate it "attempted in good faith to contact the potential witness, that it attempted in good faith to inquire into her willingness and availability to testify, and that it presented the results of this inquiry to the trial court." *Nobles*, 357 N.C. at 441, 584 S.E.2d at 772. As the trial court properly concluded, the State met that burden here.

A. Unavailability under Rule 804

This Court recently held:

> While it is well-established that there is "wisdom" to the hearsay exceptions, it is similarly settled that, while the Confrontation Clause and rules of hearsay may protect similar values, it would be an erroneous simplification to conclude that the Confrontation Clause is merely a codification of hearsay rules. Evidence admitted under an exception to the hearsay rule may still violate the Confrontation Clause.
>
> At the same time, the U.S. Supreme Court in *Crawford* did acknowledge that the Confrontation Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. In doing so, *Crawford* recognized that most of the exceptions to the hearsay rule cover statements that by their nature are not testimonial and, therefore, do not present a Confrontation Clause problem.

McLaughlin, __ N.C. App. at __, 786 S.E.2d at 276-77 (brackets, internal quotation marks and citations omitted).

Under Rule 804, "unavailability as a witness" includes situations where the declarant "[i]s absent from the hearing and the proponent of his statement has been unable to procure his attendance . . . by process or other reasonable means." N.C. Gen. Stat. § 8C-1, Rule 804(a)(5) (2015).

Prior to allowing testimonial evidence to be presented under Rule 804(b), the trial court, as it properly did here, must find the declarant is unavailable. *Triplett*, 316 N.C. at 8, 340 S.E.2d at 740; *see Clark*, 165 N.C. App. at 286, 598 S.E.2d at 218 ("The trial court must receive substantial supporting evidence before making a finding of unavailability."). "The proponent of the statement bears the burden of satisfying the requirements of unavailability under Rule 804(a)." *Nobles*, 357 N.C. at 440, 584 S.E.2d at 771.

Our Supreme Court has held:

> The degree of detail required in the finding of unavailability will depend on the circumstances of the particular case. For example, in the present case, the declarant is dead. The trial judge's determination of unavailability in such cases must be supported by a finding that the declarant is dead, which finding in turn must be supported by evidence of death. *See, e.g.*, *United States v. Sindona*, 636 F. 2d 792, 804 (2d Cir. 1980). Situations involving out-of-state or ill declarants or declarants invoking their fifth amendment right against self-incrimination may require a greater degree of detail in the findings of fact. *See, e.g.*, *Parrott v. Wilson*, 707 F. 2d 1262 (11th Cir.), *cert. denied*, 464 U.S. 936 (1983) (duration of illness was found to be long enough that trial could not be postponed).

See Triplett, 316 N.C. at 8, 340 S.E.2d at 741-42.

For example, under Rule 804(a)(5) and under the Confrontation Clause, our Supreme Court has held a witness may be deemed unavailable if: (1) the witness moves abroad and refuses to return to the United States; (2) the State cannot find the witness despite making a reasonable or good-faith effort to do so; or, (3) if the witness refuses to respond to the State's efforts to contact her. *See e.g.*, *Fowler*, 353 N.C. 599, 610, 548 S.E.2d 684, 693; *State v. Bowie*, 340 N.C. 199, 207, 456 S.E.2d 771, 775 (1995); *Clark*, 165 N.C. App. at 285, 598 S.E.2d at 218-19; *State v. Grier*, 314 N.C. 59, 68, 331 S.E.2d 669, 675 (1985).

C. Whisman's Unavailability

The trial court made the following ruling regarding Whisman's unavailability:

> That the matter came up on motion of the State to use [Rule 804] testimony in the form of a video . . . of an indispensable witness who's in the military. The Court

> heard argument of both sides regarding the availability or unavailability of said witness. The Court finds the witness is in the military and is stationed outside of the State of North Carolina currently. May be in Australia or whereabouts may be unknown as far as where she's stationed. That the State duly and properly followed the procedure to preserve that witness's testimony. That prior to trial her testimony was taken pursuant to an order of the Court and preserved in a form that allowed cross-examination as the defendant and the defendant's counsel were present as was the prosecution. . . .
>
> Again, the Court heard arguments and determines that . . . Whisman is unavailable within the definition of the rule, and, therefore, the Court intends to allow introduction of the video if the formalities and the proper foundation are laid of this witness's testimony, she being unavailable for this trial.

Post hoc review, the trial court could have included further findings of fact regarding whether the State made "good faith efforts" or used "other reasonable means" to procure Whisman's physical attendance at trial. See N.C. Gen. Stat. § 8C-1, Rule 804(a)(5); *Nobles*, 357 N.C. at 440, 584 S.E.2d at 771.

However, after reviewing the State's motions, the transcript, and the evidence presented, the record clearly demonstrates the State made reasonable, good faith efforts to procure Whisman's physical presence at trial to affirm the trial court's conclusion that Whisman was unavailable.

All parties knew Whisman was serving on active duty and subject to repeated deployments, including to being sent outside of the country, between February 2015 and December 2015. In March 2015, prior to Whisman's deployment outside the United States, the State subpoenaed Whisman, brought her to North Carolina from California, and deposed and recorded her testimony on video. Defendant's counsel was noticed and present for the deposition, and was given the unlimited opportunity to cross-examine Whisman.

The evidence presented to the trial court demonstrates the State filed "notice of intention to admit prior testimony" on 22 May 2015 because "the State anticipate[d] Ms. Whisman being 'unavailable' for trial." The State also filed a motion *in limine* at the start of the trial on 15 June 2015, which requested the trial court to allow Whisman's deposition to be entered into evidence and presented at trial in lieu of her in-person testimony.

The State's motion *in limine* asserted:

> 9) Pursuant to Ms. Whisman's obligations in service to our nation, she is currently assigned to provide naval support to a United States Marine Corps mission. See Exhibit A for a copy of Ms. Whisman's military orders.
>
> 10) Since April 2015, Ms. Whisman has been deployed out of the country, and she is not scheduled to return until December 2015.
>
> 11) Due to the potential threat to national security associated with revealing such information, the United States Navy, in communications with the undersigned Assistant District Attorney (see Exhibit B) has indicated that it will not disclose Ms. Whisman's whereabouts.
>
> 12) The undersigned Assistant District Attorney was provided with a mailing address to send a subpoena to Ms. Whisman, which was sent via registered mail (see Exhibit C).

The attached exhibits included two letters received from the United States Marine Corps dated 18 February 2015 and 20 May 2015. The 18 February 2015 letter confirmed Whisman's deployment between February 2015 to approximately December 2015. The 20 May 2015 letter confirmed Whisman was deployed overseas and noted "[d]ue to the potential threat of national security, I am unable to provide you with detailed information such as location, dates, and purpose."

The State received this letter prior to filing its notice of intention to admit prior testimony. A copy of the subpoena signed on 28 May 2015 by the Assistant District Attorney, along with a certified mail receipt and the USPS tracking information, were also attached as Exhibit C. The subpoena has a delivery address for a U.S. Marine Corps Base in Australia. The subpoena was mailed on 1 June 2015, more than two weeks prior to the scheduled trial.

Generally, a witness, as opposed to a party, who is located outside of the state and particularly outside of the United States, is beyond the jurisdiction of the state and cannot be compelled to return to North Carolina by subpoena, whether served or not. As an active duty member of the armed services, Whisman could not return to North Carolina on her own choice or volition on any given date, whether she had been physically served with a subpoena, without the express permission by and her release from duty by her commanding officer.

Whisman's undisputed overseas deployment and the U.S. Marine Corps' refusal to disclose her exact whereabouts on national security grounds are strong indications of her unavailability as a witness in North Carolina to support the trial court's conclusion of unavailability under Rule 804. Moreover, the record demonstrates the State, in good faith, contacted the U.S. Marine Corps to confirm Whisman's deployment well prior to trial to seek her presence and received the 20 May 2015 letter in response. The State was provided an alternative address and sent the subpoena to Whisman on 1 June 2015. Only after the State received the 20 May 2015 letter regarding Whisman's overseas deployment and unknown whereabouts did the State file the notice of intention with the court to use the video-taped deposition. Based upon the record before us, the trial court properly concluded Whisman was physically unavailable as a witness at trial and correctly admitted her prior, preserved testimony to the jury at trial. *See* N.C. Gen. Stat. § 8C-1, Rule 804(a)(5); *Nobles*, 357 N.C. at 440, 584 S.E.2d at 771.

III. Conclusion

The State made good faith efforts to procure Whisman at trial and the possibility of refusal of the military to comply did not relieve the State's duty to make such an effort. *See Barber*, 390 U.S. at 724-25, 20 L.Ed.2d at 260. *Post hoc*, while the trial court could have made additional findings, the undisputed evidence in the record supports the trial court's ultimate conclusion that Whisman was unavailable.

The State made reasonable and good faith efforts to procure Whisman's physical presence at trial. The State contacted the U.S. Marine Corps well in advance of trial to inquire about Whisman's whereabouts and received the 20 May 2015 letter in response. The letter confirmed Whisman was deployed overseas until approximately December 2015 and, due to national security, the U.S. Marine Corps was unable to provide the State with her exact location. The State also produced evidence demonstrating it sent Whisman a subpoena to the overseas address provided to the State.

The trial court properly found Whisman was unavailable as a witness at trial. After unlimited opportunity to cross-examine Whisman when she was present in North Carolina by the efforts of the State, Defendant has failed to show any prejudicial error.

In the alternative, the trial court's failure make further findings of fact on the extent of the State's efforts to procure Whisman's physical presence at trial does not *per se* mandate a new trial. As an appellate court, we are "to determine whether the prosecution met its burden of

establishing that the witness was constitutionally unavailable to testify." *Clark*, 165 N.C. App. at 285, 598 S.E.2d at 218.

If, after our appellate review of the evidence and findings by the trial court on the record, this Court is unable to review the merits of Defendant's claim, the proper action is to remand this case to the trial court to make the further findings of fact, and not set aside the jury's verdict and award a new trial. I respectfully dissent.

STATE OF NORTH CAROLINA, PLAINTIFF
v.
OMAR COOK, DEFENDANT

No. COA16-883

Filed 20 June 2017

Criminal Law—self-defense—no intent to shoot attacker

Defendant was not entitled to a self-defense instruction where he testified that he was awakened by loud banging on his bedroom door and a foot coming through the door, that he feared for his life, and that he fired his weapon through the door and the drywall without the intent to shoot anyone. A defendant who testifies that he did not intend to shoot the attacker is not entitled to an instruction under N.C.G.S. § 14-51.2 because his own words disprove the rebuttable presumption that he was in reasonable fear of imminent harm.

Judge MURPHY concurs by separate opinion.

Judge STROUD dissents by separate opinion.

Appeal by Defendant from judgments entered 9 February 2016 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 March 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Lars F. Nance, for the State.

Ann B. Petersen for the Defendant.

DILLON, Judge.

Omar Cook ("Defendant") appeals from two convictions for felonious assault with a firearm on a law enforcement officer. For the following reasons, we find no error in Defendant's trial.

I. Background

In February 2015, uniformed officers executed a search warrant at Defendant's residence while Defendant was upstairs in his bedroom. Defendant's family members resisted as the officers gained entry and secured the downstairs.

Two officers proceeded upstairs, announcing that they were there to serve a warrant. One officer encountered Defendant's closed bedroom door. The officer announced that he was a police officer and that he was going to kick in the door. The officer's foot went through the door on the first kick. Defendant fired two gunshots from inside the bedroom through the still-unopened door and the drywall adjacent to the door, narrowly missing the officer.

The officers eventually entered Defendant's room where they found a shell casing and noticed an open window. Officers followed footprints in the snow below the open window and found Defendant barefoot and wearing undershorts. Defendant was taken into custody. A handgun was recovered near the residence with DNA that matched Defendant's DNA profile.

The jury found Defendant guilty of two counts of assaulting a law enforcement officer with a firearm. Defendant timely appealed.

II. Summary

In his sole argument on appeal, Defendant contends that the trial court erred by denying his request for a self-defense instruction. He argues that he was entitled to the instruction based on his testimony which tended to show that:

- Defendant was asleep when the officer arrived at his bedroom door.
- His girlfriend woke him up, he heard loud banging on his bedroom door and saw a foot come through the door "a split second" after waking up.
- He did not hear the police announce their presence but did hear his mother and brother "wailing" downstairs.

- He was "scared for [his] life . . . thought someone was breaking in the house . . . hurting his family downstairs and coming to hurt [him] next."
- He stated that when he fired his weapon he had "no specific intention" and was "just scared."

Because Defendant essentially testified that he did not intend to shoot anyone when he fired his gun, we are compelled by Supreme Court precedent to conclude that he was not entitled to a self-defense instruction, notwithstanding the fact that there may have been other evidence from which the jury could infer that Defendant did intend to shoot the officer, *e.g.*, that he fired the shots towards the bedroom door. Accordingly, we find no error.

III. Analysis

Generally, the trial judge must instruct the jury regarding all substantial features of a case. *State v. Higginbottom*, 312 N.C. 760, 764, 324 S.E.2d 834, 835 (1985). "All defenses[,] [including self-defense,] rising from the evidence presented at trial constitute substantive features of a case and therefore warrant the trial court's instruction thereon." *State v. Loftin*, 322 N.C. 375, 381, 368 S.E.2d 613, 617 (1988). Further, in determining whether a defendant is entitled to a self-defense instruction, the evidence must be viewed "*in the light most favorable to the defendant*," *State v. Bush*, 307 N.C. 152, 159, 297 S.E.2d 563, 568 (1982) (emphasis added), and the determination shall be based on evidence offered by the defendant and the State. *See State v. Deck*, 285 N.C. 209, 215, 203 S.E.2d 830, 834 (1974) (self-defense instruction required based on evidence offered by the State).

Here, Defendant essentially argues that he was entitled to an instruction on self-defense based on his testimony that he was "scared for [his] life" when he fired the shots. We note, however, that Defendant also testified that he did not take aim at or otherwise have any specific intent to shoot the "intruder" when he fired the shots:

> [Defense Counsel]. Now, when you reached for the firearm, what was your intention?
>
> [Defendant]. I really didn't have no specific intention. I was just scared. I didn't know what was going on. I was scared.
>
> . . .

Q. And what did you do with [the firearm] after you pulled it out from under the mattress?

A. I turned my head and discharged it.

. . .

Q. Were you looking where you were shooting?

A. No, sir.

. . .

Q. When you discharged your weapon, were you trying to kill someone?

A. No, sir.

Our Supreme Court has stated that "[t]he right to act in self-defense is based upon necessity, real or apparent, and a person may use such force as is necessary or apparently necessary to save himself from death or great bodily harm in the lawful exercise of his right of self-defense." *State v. Pearson*, 288 N.C. 34, 38-39, 215 S.E.2d 598, 602 (1975). It may be argued that, based on *Pearson*, Defendant was entitled to a self-defense instruction if he reasonably believed that the firing of warning shots would be sufficient to repel a potentially deadly attack.

However, our Supreme Court has repeatedly held that a defendant who fires a gun in the face of a perceived attack is not entitled to a self-defense instruction *if he testifies* that he did not intend to shoot the attacker when he fired the gun. For instance, in *State v. Williams*, 342 N.C. 869, 872, 467 S.E.2d 392, 393 (1996), the Court found no error in the trial court's denial of the defendant's request for a self-defense instruction where he testified that he did not intend to shoot the attacker but rather was simply firing "warning shots" into the air. *Id.* The *Williams* Court stated that "perfect self-defense" is available only if "it appeared to defendant that he believed it to be necessary *to kill the [attacker] in order to save himself* from death or great bodily harm," and that, therefore, "[t]he defendant [was] not entitled to an instruction on self-defense while still insisting that he did not intend to fire the pistol at anyone, that he did not intend to shoot anyone and that he did not know anyone had been shot. . . . The defendant's own testimony, therefore, disproves [that he believed it was necessary to kill when he fired the shot]." *Id.* at 873, 467 S.E.2d at 394.

Based on *Williams*, a person under an attack of deadly force is not entitled to defend himself by firing a warning shot, even if he believes

that firing a warning shot would be sufficient to stop the attack; he must shoot to kill or injure the attacker to be entitled to the instruction. This is true *even if* there is, in fact, *other* evidence from which a jury could have determined that the defendant *did* intend to kill the attacker. Specifically, in *Williams*, while sustaining the trial court's ruling not to give a self-defense instruction, the Supreme Court sustained the defendant's conviction of first-degree murder based on premeditation and deliberation – a conviction which can only stand if there is evidence from which the jury could conclude that the defendant had the intent to kill. *Id.* at 874, 467 S.E.2d at 395.

Further, in *State v. Lyons*, the Supreme Court addressed a factual scenario very similar to the facts in the present case. *State v. Lyons*, 340 N.C. 646, 459 S.E.2d 770 (1995). In *Lyons*, an officer knocked on the defendant's front door to serve a search warrant. The defendant fired shots through the front door, killing the officer. The defendant testified that he did not hear the officer announce his identity but only heard loud banging on his front door, that he became scared that he was being robbed, and that he fired shots in the direction of the front door. Our Supreme Court held that the trial court did not err in refusing to instruct on self-defense based on the defendant's testimony that he did not intend to hit anyone with his gunshots, *id.* at 662, 459 S.E.2d at 778, but otherwise held that there was sufficient evidence to convict the defendant of first-degree murder based on a finding that he "acted with the specific intent to kill after premeditation and deliberation." *Id.* at 658, 459 S.E.2d at 777. *See also State v. Reid*, 335 N.C. 647, 671, 440 S.E.2d 776, 789 (1994) (upholding first-degree murder conviction, holding that self-defense instruction was not warranted where the defendant testified that he did not aim at anyone but only shot at the floor); *State v. Hinnant*, 238 N.C. App. 493, 497, 768 S.E.2d 317, 320 (2014) (self-defense instruction is not available where the defendant testifies that he did not intend to shoot the attacker when he fired the gun).

In sum, based on Supreme Court precedent, where a defendant fires a gun as a means to repel a deadly attack, the defendant is not entitled to a self-defense instruction where he testifies that he did not intend to shoot the attacker.

The dissent states that N.C. Gen. Stat. § 14-51.2, codifying the "castle doctrine," warrants reversal; contending that, under the statute, there is a rebuttable presumption that Defendant held a reasonable fear of imminent death or serious bodily harm. N.C. Gen. Stat. § 14-51.2 is an affirmative defense provided by statute which supplements other affirmative

defenses that are available under our common law. N.C. Gen. Stat. § 14-51.2(g) ("This section is not intended to repeal or limit any other defense that may exist under the common law."). Defendant, however, never cited N.C. Gen. Stat. § 14-51.2 nor does he make any argument concerning that defense in his brief. Therefore, our Court should not base our resolution of this appeal on that statute. N.C. R. App. P. 28. We can only base our resolution of Defendant's appeal on the defense he argues: self-defense.

In any event, assuming Defendant had properly preserved an argument based on N.C. Gen. Stat. § 14-51.2, we do not believe that the defense was available in this case, based on the reasoning of our Supreme Court in the cases cited above. Neither the common law self-defense theory nor the N.C. Gen. Stat. § 14-51.2 defense theory applies where the defendant did not hold a reasonable fear of imminent death or serious bodily injury. In the common law self-defense context, the defendant bears the burden of showing that he held this reasonable fear. However, in a common law self-defense context, even where there is sufficient evidence to meet the defendant's burden that he intended to shoot the attacker, Supreme Court precedent instructs that the defendant is not entitled to the instruction if he testifies that he did not intend to shoot the attacker because in that scenario, the defendant's own words show that he did not believe he was in reasonable fear of *imminent* harm. Applying this same reasoning to the N.C. Gen. Stat. § 14-51.2 context, a defendant who testifies that he did not intend to shoot the attacker is not entitled to an instruction under N.C. Gen. Stat. § 14-51.2 because his own words disprove the rebuttable presumption that he was in reasonable fear of *imminent* harm.

Accordingly, we conclude that Defendant received a fair trial, free from error.

NO ERROR.

Judge MURPHY concurs by separate opinion.

Judge STROUD dissents by separate opinion.

MURPHY, Judge, concurring

Judge Stroud's dissent reflects a stronger policy that more accurately represents what most citizens would believe our law to be and what I believe self-defense law *should be* in our state. However, I must

concur in the opinion authored by Judge Dillon as it accurately reflects what our current law *is* in this matter.

Under the holdings of our Supreme Court, it is unlawful for a person to use a warning shot as a means of self-defense no matter how reasonable a warning shot may be instead of shooting to kill one's attacker. While I encourage the Supreme Court to reverse our ruling today and accept the reasoning of the dissent, we are bound by precedent to rule that Defendant was not entitled to an instruction on self-defense.

STROUD, Judge, dissenting.

Because I believe that the majority failed to rely on the dispositive law in this case, North Carolina General Statute § 14-51.2, I dissent.

While the State may characterize defendant's testimony in a slightly different way, when considering whether to provide the self-defense instruction to the jury the trial court was required to view defendant's evidence as true. *See State v. Whetstone*, 212 N.C. App. 551, 554–55, 711 S.E.2d 778, 781–82 (2011) ("Our Supreme Court has held when there is evidence from which it may be inferred that a defendant acted in self-defense, he is entitled to have this evidence considered by the jury under proper instruction from the court. 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. Thus, if the defendant's evidence, taken as true, is sufficient to support an instruction for self-defense, it must be given even though the State's evidence is contradictory. The evidence is to be viewed in the light most favorable to the defendant." (citations, quotation marks, and brackets omitted)). Defendant testified that in the evening prior to the incident from which this case arose, he and his girlfriend were watching movies in his upstairs locked back bedroom and smoked marijuana; he felt tired because it had been "a long day[,]" and he had shoveled snow out of his driveway. In the morning, he was awakened by his girlfriend to hear his mother and brother "wailing" and to see a foot coming through his door. Defendant did not hear anyone "announce 'police' " or request for him to open the door. Defendant picked up his gun, shot it, jumped out the window, and ran to his neighbor's house "screaming for help" and telling his neighbor to "call the police" because "someone [was] trying to kill [him] and [his] family."

Defendant's only issue on appeal is whether the trial court erred in failing to instruct the jury on self-defense upon his request. The

applicable statute to this case is North Carolina General Statute § 14-51.2, which codified the "castle doctrine[,]" a name which stems from the colloquialism "that one's home is one's castle." *State v. Stevenson*, 81 N.C. App. 409, 412, 344 S.E.2d 334, 335 (1986) ("The 'castle doctrine' is derived from the principle that one's home is one's castle and is based on the theory that if a person is bound to become a fugitive from her own home, there would be no refuge for her anywhere in the world.") While the castle doctrine is a legal theory in the nature of self-defense, it is a separate and distinct analysis from simple self-defense against a threat of serious or deadly force because under the castle doctrine the person is not just defending himself but also defending himself in the place he has the right to be and feel safe; the castle doctrine is thus the synthesis of self-defense and the defense of habitation. *See generally* Catherine L. Carpenter, Of the Enemy Within, the Castle Doctrine, and Self-Defense, 86 Marq. L. Rev. 653, 665–69 (2003) ("[T]he Castle Doctrine sits at the intersection of two distinct but interrelated defenses: defense of habitation and self-defense. Defense of habitation is primarily based on the protection of one's dwelling or abode, and stems from the common law belief that a man's home is his castle. Essentially, the defense provides that the use of deadly force may be justified to prevent the commission of a felony in one's dwelling . . . . Whereas in defense of habitation, deadly force may be used to prevent the commission of an atrocious felony, in self-defense, deadly force may be used when necessary in resisting or preventing an offense which reasonably exposes the person to death or serious bodily harm. The contemplated need for self-defense in the home, therefore, is in some sense broader–it can be an external or internal attack–but it is narrower in its requirement that the attacker intends death or serious bodily harm." (footnotes omitted)).

Turning to our own statutory version of the castle doctrine, North Carolina General Statute § 14-51.2(b) provides that

> [t]he 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.

N.C. Gen. Stat. § 14-51.2 (2013) (emphasis added). Thus, North Carolina General Statute § 14-51.2 gives the defendant the benefit of a presumption that he "held a reasonable fear of imminent death or serious bodily harm to himself or herself or another" in this situation. *Id.* The State then has the burden of *rebutting* this presumption by showing that the entry was not unlawful since police officers were "forcefully entering" to execute a search warrant after properly identifying themselves:

> The presumption set forth in subsection (b) of this section shall be *rebuttable* and does not apply in any of the following circumstances:
>
> . . . .
>
> (4) The person against whom the defensive force is used is a law enforcement officer or bail bondsman who enters or attempts to enter a home, motor vehicle, or workplace in the lawful performance of his or her official duties, and the officer or bail bondsman identified himself or herself in accordance with any applicable law or the person using force knew or reasonably should have known that the person entering or attempting to enter was a law enforcement officer or bail bondsman in the lawful performance of his or her official duties.

Id. (emphasis added).

Here, the State presented evidence upon which the jury, if properly instructed, could have determined that the presumption of defendant's reasonable fear had been rebutted. Officer Mark Hanson testified that he identified himself as a police officer before he kicked in defendant's bedroom door; defendant testified he did not hear him do so. Thus, there was a factual question as to whether Officer Hanson did in fact identify himself "in accordance with any applicable law" or defendant otherwise "knew or reasonably should have known that the person entering" was a law enforcement officer. In actuality, all of the aforementioned testimony could be true: Officer Hanson properly identified himself and defendant did not hear him; defendant was asleep, and had to be

awakened by his girlfriend and when he awoke his family was "wailing" which may have drowned out the announcement. Defendant testified he was in only a tank top and underwear when he jumped out of the window into the snow and fearfully ran from his home for help to have his neighbor call the police. Testimony from law enforcement officers confirms they found defendant barefoot and in his underwear next to an individual who was on his phone. Defendant was not fleeing or trying to escape the police officers but was merely "standing next" to the person on the phone. Thus, it is entirely possible the jury, if properly instructed, would have believed the testimony of these officers *and* defendant. Had the jury been properly instructed according to North Carolina General Statute § 14-51.2, they could have decided whether the State had overcome the rebuttable presumption established by the statute. *See id.*; *see also Whetstone*, 212 N.C. App. at 554–55, 711 S.E.2d at 781–82 ("Our Supreme Court has held when there is evidence from which it may be inferred that a defendant acted in self-defense, he is entitled to have this evidence considered by the jury under proper instruction from the court. 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. Thus, if the defendant's evidence, taken as true, is sufficient to support an instruction for self-defense, it must be given even though the State's evidence is contradictory. The evidence is to be viewed in the light most favorable to the defendant." (citations, quotation marks, and brackets omitted)).

North Carolina General Statute § 14-51.2 as written indicates only that officers need to identify themselves in accordance with the law and if they do so, the State need not prove that the defendant actually heard them, but I doubt the General Assembly intended such a strict application, since even a quiet announcement at the door of a home could perhaps qualify as an announcement.[1] *See generally* N.C. Gen. Stat. § 14-51.2. Nonetheless, I need not resolve the broader statutory question not before this Court or the factual issues in this case because that should have been the jury's job. *See Whetstone*, 212 N.C. App. at 554–55, 711 S.E.2d at 781–82. The question before us is simply whether defendant's requested instruction should have been provided; as there

1. Although not an issue in this case, where a law enforcement officer simply calls out "police" or a similar announcement, North Carolina General Statute § 14-51.2 raises some obvious concerns in situations where the residents of a home are deaf or hard of hearing. For law enforcement officers, there is the danger of being shot by a deaf resident even though they properly announced their identification. For the residents, there is the danger of being convicted of a serious felony for reasonably defending themselves and their homes.

was evidence from which a jury could determine that the officers had not announced their presence properly, the officer exception to North Carolina General Statute § 14-51.2 would *not* apply and the castle doctrine would. *See* N.C. Gen. Stat. § 14-51.2.

The majority's analysis relies upon law which developed in substantially different factual situations than this case, particularly law focusing on self-defense in public places or at a party. *Contrast State v. Williams*; 342 N.C. 869, 467 S.E.2d 392 (1996); *State v. Reid*, 335 N.C. 647, 440 S.E.2d 776 (1994); *State v. Pearson*, 288 N.C. 34, 215 S.E.2d 598 (1975); *State v. Hinnant*, 238 N.C. App. 493, 768 S.E.2d 317 (2014). *State v. Lyons* is the only case the majority analysis notes that involves the defendant being in his own home, *see State v. Lyons*, 340 N.C. 646, 459 S.E.2d 770 (1995), but it is an opinion written more than 15 years before the codification of the castle doctrine. *See* N.C. Gen. Stat. § 14-51.2. If the castle doctrine and the law of self-defense are not both reconciled and clearly distinguished we end up with this nonsensical result – a person asleep in his own home is awakened by an intruder attempting to enter his bedroom; the resident fires a "warning shot" to frighten the intruder away, and escapes from his home through the window, as he does not wish to encounter the intruder -- that person may be convicted of a crime for firing the gun simply because he did not say that he *intended to kill* the intruder when he fired the gun. The law should not encourage people to shoot to kill any other person -- even someone invading a home at night -- if a warning shot will suffice.

Because there was evidence upon which to instruct the jury as to self-defense in the home based upon the castle doctrine codified in North Carolina General Statute § 14-51.2, the trial court erred in not providing such an instruction upon defendant's request. I therefore respectfully dissent and would grant defendant a new trial.

STATE v. DYE

[254 N.C. App. 161 (2017)]

STATE OF NORTH CAROLINA
v.
JEFFERY L. DYE, JR.

No. COA16-778

Filed 20 June 2017

1. Evidence—credibility of witness—expert on child sexual assault

The trial court did not abuse its discretion in a prosecution for statutory rape by admitting the testimony of a doctor who was an expert on child sexual assault and child medical examinations where the doctor explained why her examination suggested that sexual abuse had occurred, but did not make a definitive diagnosis or testify that sexual abuse had occurred.

2. Appeal and Error—satellite-based monitoring—civil hearing—written notice of appeal required—certiorari

The Court of Appeals granted certiorari in a case involving satellite-based monitoring (SBM) where defendant did not file a written notice of appeal. SBM hearings are civil for purposes of appeal, and failure to file a written notice pursuant to Appellate Rule 3 is a jurisdictional fault. However, defendant petitioned for certiorari, which the Court of Appeals granted in its discretion.

3. Appeal and Error—preservation of issues—sentencing—no objection below

The defendant's contention concerning his satellite-based sentencing order was preserved for appeal though he did not object when the matter was heard. Appellate review of an allegedly unauthorized sentence may be obtained regardless of whether an objection was made at trial. Invocation of Appellate Rule 2 is not necessary.

4. Sentencing—satellite-based monitoring—remand—further findings

A satellite-based monitoring determination made at the time defendant was sentenced was controlled by N.C.G.S. § 14-208.40A, which required certain findings by the trial court. The undisputed findings in this case required a risk assessment from the Division of Adult Correction, which resulted in a Moderate-High risk assessment. That assessment, however, did not support a finding that

defendant required the highest possible level of supervision and monitoring. The prosecutor attempted to present further evidence to support the finding of the level of supervision required, but was not permitted to do so by the trial court. The matter was remanded for further findings.

Appeal by Defendant from judgment entered 25 February 2016 by Judge William H. Coward in Superior Court, Mitchell County. Heard in the Court of Appeals 20 February 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Margaret A. Force, for the State.

Anne Bleyman for Defendant.

McGEE, Chief Judge.

Jeffery L. Dye, Jr. ("Defendant") appeals from judgment entered after a jury found him guilty of statutory rape. We find no error in Defendant's trial, but vacate the order imposing satellite-based monitoring for a period of thirty years due to a violation of N.C. Gen. Stat. § 14-208.40A.

I. Background

The State's evidence at trial tended to show the following: Defendant lived with his fiancée, Heather Townsend ("Townsend"), in a mobile home park in Mitchell County, North Carolina, in June 2013. Around that time, Defendant's cousin, B.G., began living with Misty Briggs ("Briggs"), B.G.'s aunt and Defendant's mother. At the times relevant to the present case, Defendant was twenty-three years old and B.G. was fourteen years old.

Shortly after B.G. began living with Briggs, Defendant called to ask if B.G. would come to his mobile home to wash the dishes and babysit two of his children. When B.G. arrived, she assisted Defendant in washing the dishes and putting the children to bed. After the children were asleep, Defendant began telling B.G. about an argument he had with Townsend earlier in the day, and B.G. listened "because no one else was there for [Defendant]." While telling B.G. about the argument, Defendant asked B.G. "if [she] wanted to have sex with him, and [B.G.] told him no at first." As B.G. explained at trial:

> You know, [I told Defendant]. . . I don't want to have sex with you, this is wrong, and I was like if your girlfriend finds out this is not going to look good at all, you know.

> And so [Defendant] was undressing me, you know, like, he told -- well, he told me to go put a bathing suit on and I was like sure, you know, okay. I put a bathing suit on and we were standing in the room, in his back bedroom, and yeah that's pretty much it. . . . [Defendant] undressed me from there, and then that's when [Defendant] raped me.

Upon further questioning, B.G. stated Defendant had engaged in vaginal intercourse with her. The encounter continued for approximately an hour and a half, until Townsend returned to the mobile home. At that point, Defendant stopped having sex with B.G., gave her clothing to wear, and told her to not tell anyone because "[Defendant] didn't want to go into jail or . . . get in any trouble with the law[.]" Despite Defendant's warning, B.G. testified she told Briggs that Defendant had raped her, but Briggs did not believe the accusation. B.G. eventually repeated the allegation to her school counselor in August 2013, when school was back in session.

B.G. was examined by Dr. Kelly Rothe ("Dr. Rothe") on 27 March 2014. At trial, Dr. Rothe was accepted, without objection, as an expert in child sexual assault and in child medical examinations. Dr. Rothe began B.G.'s medical examination by asking B.G. a series of questions, and then performed a "head to toe" physical examination, including an internal vaginal examination. Dr. Rothe testified, without objection, that the examination revealed that the "posterior rim" of B.G.'s hymen was "thinned, which would have been consistent with a vaginal penetration." Elaborating on the examination, again without objection, Dr. Rothe testified that when she examined the posterior rim of B.G.'s hymen, it was "thinned," and "was, in fact, absent in what we call that 5 to 7 o'clock area, and that is the area that is most suspicious for vaginal penetration in child abuse." After discussing her findings, the following colloquy between Dr. Rothe and the prosecutor occurred:

> [Prosecutor:] . . . [A]fter conducting the investigation, Dr. Roth[e], did you form any opinion regarding the possibility of sexual abuse?
>
> [Dr. Rothe:] Right, so, like I said that having an absent hymen in that section of posterior rim is very suspicious for sexual abuse. Just for your background, the only time that as a clinical provider we can say sexual abuse happened is if we see that hymen within three days of the sexual abuse, and then we also track it [sic] healing. That's why the nomenclature becomes difficult because the

> hymen, like the inside of the mouth, heals very quickly. But [B.G.'s] exam with an absent posterior rim was very suspicious for sexual abuse and with the disclosure of sexual abuse –

Defendant's counsel then objected and argued that Dr. Rothe was able to "say . . . that [her] findings support or are suspicious of, I think is what [Dr. Rothe] said, sexual abuse" but was not able to "give an opinion about what [B.G.] said to [Dr. Rothe]." After a protracted discussion with the prosecutor and Defendant's counsel, the trial court stated that Dr. Rothe "should not vouch for [B.G.'s] credibility."

Upon further questioning, Dr. Rothe twice reiterated that the results of the examination were "suspicious for vaginal penetration" due to the absence of the posterior rim of B.G.'s hymen. On cross-examination, Dr. Rothe admitted the results of her examination of B.G. were "suspicious but not conclusive" for vaginal penetration and that, without a "baseline" examination of B.G. conducted before the alleged abuse, it was "hard to tell" whether the trauma observed in the examination was "normal to [B.G.] or not."

Defendant was convicted of statutory rape and sentenced to a term of 254 to 365 months in prison. After sentencing Defendant, the trial court considered whether satellite-based monitoring ("SBM") was appropriate in an SBM hearing. The prosecutor presented the results of Defendant's Static-99 examination that indicated a risk assessment of four points, placing Defendant in a "Moderate-High" risk category. The trial court found that: (1) the offense was a sexually violent offense pursuant to N.C. Gen. Stat. § 14-208.6(5); (2) Defendant "has not been classified as a sexually violent predator;" (3) Defendant is not a recidivist; (4) the offense is not an aggravated offense; and (5) the offense did involve the physical, mental, or sexual abuse of a minor.

Based upon these findings, the trial court ordered Defendant to register as a sex offender for a period of thirty years. The trial court then asked the prosecutor if the decision to order Defendant to enroll in satellite-based monitoring was "in [the trial court's] discretion . . . [b]ecause of the score on the Static-99," and the prosecutor indicated that it was. After brief arguments from both the State and Defendant, the trial court ordered Defendant to enroll in satellite-based monitoring for the duration of the thirty year period that Defendant was to be registered as a sex offender. The trial court memorialized these findings as a written order ("the SBM order"). Defendant appeals.

II. Analysis

Defendant argues the trial court erred by: (1) allowing Dr. Rothe to improperly bolster B.G.'s credibility; (2) failing to make adequate findings of fact in the SBM order to support a determination that the highest possible level of supervision was required; and (3) failing to determine whether enrollment in satellite-based monitoring would violate Defendant's Fourth Amendment right to be free from unreasonable searches and seizures. Defendant also contends he received ineffective assistance of counsel because his trial counsel failed to object to, and enter written notice of appeal from, the SBM order.

A. Dr. Rothe's Testimony

[1] Defendant argues the trial court allowed Dr. Rothe to improperly bolster B.G.'s credibility. Specifically, Defendant argues Dr. Rothe's testimony that B.G.'s hymen was "thin[ning] [or] absent in . . . that 5 to 7 o'clock area," and that such a result was consistent with penetration and was "most suspicious for vaginal penetration in child abuse" improperly bolstered B.G.'s credibility. We disagree.[1]

Pursuant to N.C. Gen. Stat. § 8C-702(a), a qualified expert may testify as to her opinion in her field of expertise if the testimony will assist the jury in understanding the evidence. A trial court's decision on the admissibility of an expert opinion "will not be reversed on appeal absent a showing of abuse of discretion." *State v. McGrady*, 368 N.C. 880, 893, 787 S.E.2d 1, 11 (2016) (citations omitted). Generally, an expert may not testify about the credibility of a witness or state that it is the expert's belief the defendant is innocent or guilty. *State v. Heath*, 316 N.C. 337, 341-42, 341 S.E.2d 565, 568 (1986) (holding that "an expert's expression of an opinion as to the defendant's guilt or innocence" is impermissible). Our Supreme Court has held that "[t]he question of whether a witness is telling the truth is a question of credibility and is a matter for the jury alone." *State v. Solomon*, 340 N.C. 212, 221, 456 S.E.2d 778, 784, *cert. denied*, 516 U.S. 996, 133 L. Ed. 2d 438, 116 S. Ct. 533 (1995).

In *State v. Stancil*, 355 N.C. 266, 559 S.E.2d 788 (2002), our Supreme Court held, consistent with *Solomon*, that a "trial court should not admit expert opinion that sexual abuse has *in fact* occurred because, absent

1. Defendant and the State disagree about whether this argument has been properly preserved for our full review, or whether plain error review is appropriate. Because we determine that Dr. Rothe's testimony did not improperly bolster B.G.'s credibility, we need not determine whether any error amounted to plain error.

physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility." 355 N.C. at 266-67, 559 S.E.2d at 789 (emphasis in original) (citations omitted). However, "an expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith." *Id.* (citations omitted).

In the present case, and after being accepted without objection as an expert in child sexual assault and in child medical examinations, Dr. Rothe explained the interview and physical examination she performed on B.G. Dr. Rothe then testified that the results of her examination – which revealed that B.G.'s hymen was "absent in . . . that 5 to 7 o'clock area" – was "most suspicious for vaginal penetration in child abuse" and "very suspicious for sexual abuse." Dr. Rothe also testified about why the absence of the hymen in the posterior region is suspicious for vaginal penetration, explaining that "the posterior rim [of a hymen] [is] less elastic" than the anterior rim, such that "if there is vaginal penetration, it is the most likely affected" area of the hymen.

Defendant directs this Court's attention to *State v. Trent*, 320 N.C. 610, 359 S.E.2d 463 (1987) and *State v. Parker*, 111 N.C. App. 359, 432 S.E.2d 705 (1993) in support of his position that Dr. Rothe's testimony was improper. The testimony of the experts in those cases, however, are materially different from Dr. Rothe's testimony in the present case. In *Trent*, the examining physician testified the victim's hymen was not intact, but otherwise the victim had no "lesions, tears, abrasions, bleeding or otherwise abnormal conditions." *Id.* at 613, 359 S.E.2d at 465. Based on this evidence, and over the objection of the defendant, the physician testified it was his belief that the victim had in fact been sexually abused. *Id.*

Similarly, in *Parker*, the examining physician testified "[i]t was [his] opinion that [the victim] had been sexually abused over a long period of time[.]" *Parker*, 111 N.C. App. at 366, 432 S.E.2d 359, 709-10 (1993). This Court found that the testimony was based only on an interview the physician completed with the victim, and the fact that her hymenal ring was not intact. *Id.* In both cases, the reviewing court held that the expert was in no better position than the jury to determine whether the victim "was sexually abused," and therefore held it was erroneous for the trial court to admit the expert's diagnosis of sexual abuse. *Trent*, 320 N.C. at 614-15, 359 S.E.2d at 465-66; *Parker*, 111 N.C. App. at 366, 432 S.E.2d at 709-10.

In the present case, and unlike the experts in *Trent* and *Parker*, Dr. Rothe made no definitive diagnosis that B.G. was a victim of sexual

abuse. Instead, Dr. Rothe detailed the examination she performed on B.G., and testified that the absence of B.G.'s hymen in the 5-7 o'clock area was "suspicious" for vaginal penetration and that "having an absent hymen in that section of posterior rim is very suspicious for sexual abuse." Dr. Rothe also appropriately cautioned that her findings, while suspicious for vaginal penetration and sexual abuse, were not conclusive; Dr. Rothe explained that "the only time . . . a clinical provider . . . can say sexual abuse happened is if we see that hymen within three days of the sexual abuse[.]" Since Dr. Rothe had not examined B.G. within three days of the alleged sexual abuse in this case, she explained that the "nomenclature becomes difficult." Dr. Rothe also readily conceded on cross-examination that the gap of eight months between the alleged abuse and the examination would "affect [Dr. Rothe's] ability to determine some results" of her examination; that there is "a lot of variation in what one would consider normal in what a hymen of a prepubescent or pubescent girl looks like" and the appearance of B.G.'s hymen could fall within that normal variation; and that conclusive results were not possible without a "baseline" examination conducted before the alleged abuse. Dr. Rothe further testified on cross-examination that the results of B.G.'s examination were "suspicious but not conclusive" for vaginal penetration.

Given this testimony, it is clear that Dr. Rothe did not opine sexual abuse had in fact occurred, but rather explained that the results of her examination merely suggested that it had. Dr. Rothe's testimony that the results of B.G.'s examination were "suspicious" of vaginal penetration and sexual abuse is consistent with testimony this Court has found to be permissible, including an expert's opinion that the results of an examination are "consistent with" sexual abuse. *See*, *e.g.*, *State v. Goforth*, 170 N.C. App. 584, 589-90, 614 S.E.2d 313, 316-17 (2005); *see also State v. Dick*, 126 N.C. App. 312, 314-16, 485 S.E.2d 88, 90 (1997) (finding no error in expert testimony that sexual abuse was "very likely" where there was physical evidence of the abuse, and distinguishing *Trent* and *Parker*, where there was no physical evidence of sexual abuse). Accordingly, we hold the trial court did not abuse its discretion in admitting the challenged testimony, as that testimony did not improperly bolster the credibility of B.G.

B. SBM Hearing Procedure; Violation of N.C. Gen. Stat. § 14-208.40A

[2] Defendant contends the trial court erred by ordering him to enroll in the SBM program for a period of thirty years without sufficient findings of fact that Defendant required the highest possible level of supervision and monitoring, and that such a failure violated the statutory mandate of N.C. Gen. Stat. § 14-208.40B. As Defendant concedes, he only gave

oral notice of appeal at the conclusion of his sentencing hearing, and did not file a written notice of appeal from the trial court's SBM order. This Court has "interpreted SBM hearings and proceedings as civil, as opposed to criminal, actions, for purposes of appeal. Therefore, 'a defendant must give [written] notice of appeal pursuant to N.C. R. App. P. 3(a),' from an SBM proceeding." *State v. Springle*, ___ N.C. App. ___, ___, 781 S.E.2d 518, 520 (2016) (quoting *State v. Brooks*, 204 N.C. App. 193, 194-95, 693 S.E.2d 204, 206 (2010)). Failure to comply with N.C.R. App. P. 3 is a jurisdictional default "that prevents this Court from acting in any manner other than to dismiss the appeal." *Id.* (citation omitted).

Recognizing the defect in his notice of appeal, Defendant has petitioned this Court for a writ of *certiorari* to consider his argument regarding, *inter alia*, the sufficiency of the findings of fact in the SBM order. A 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[.]" N.C.R. App. P. 21(a)(1). In our discretion, we grant *certiorari* and consider Defendant's argument.

[3] In addition to the jurisdictional defect created by Defendant's failure to properly file a written notice of appeal, the State contends Defendant's argument regarding the sufficiency of the findings of fact in the SBM order is also unpreserved due to Defendant's failure to object when the SBM matter was heard, and contends this Court may only consider this argument by invoking N.C.R. App. P. 2. We disagree that invocation of N.C.R. App. P. 2 is necessary. N.C. Gen. Stat. § 15A-1446(d) provides that when a defendant asserts that a "sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law[,]" appellate review of such errors may be obtained regardless of whether an objection was made at trial. N.C. Gen. Stat. § 15A-1446(d)(18) (2015); *see also State v. Hunt*, 221 N.C. App. 48, 53, 727 S.E.2d 584, 588-89 (2012).[2] Therefore, Defendant's argument was preserved, notwithstanding his failure to object in the trial court, and we proceed to the merits of Defendant's argument.

[4] While Defendant contends that this case is controlled by the sentencing procedures set forth in N.C. Gen. Stat. § 14-208.40B, we find that

2. While not controlling, we note that this Court has held, in a recent unpublished opinion, that N.C.G.S. § 15A-1446(d)(18) preserved a defendant's right to appeal an SBM order when the defendant failed to object at the SBM hearing. *See State v. Egan*, ___ N.C. App. ___, ___ S.E.2d ___, 2016 N.C. App. LEXIS 148, at *5-6 (2016) (unpublished).

the procedures set forth in N.C. Gen. Stat. § 14-208.40A are applicable. This Court has held that N.C.G.S. § 14-208.40B applies "in cases in which the offender has been convicted of an applicable conviction and the trial court has not previously determined whether the offender must be required to enroll in SBM." *State v. Kilby*, 198 N.C. App. 363, 367, 679 S.E.2d 430, 432-33 (2009); *see also* N.C. Gen. Stat. § 14-208.40B(a) (2015). N.C.G.S. § 14-208.40A, on the other hand, applies in cases in which the SBM determination was made "during the sentencing phase." N.C. Gen. Stat. § 14-208.40A(a); *see also Kilby*, 198 N.C. App. at 367, 679 S.E.2d at 432 (noting that the procedure set forth in N.C. Gen. Stat. § 14-208.40A "applies in cases in which the district attorney has requested that the trial court consider SBM during the sentencing phase of an applicable conviction"). The SBM determination in the present case was made at the time Defendant was sentenced; therefore, N.C.G.S. § 14-208.40A controls.

When an offender is convicted of a "reportable conviction" as that term is defined by N.C. Gen. Stat. § 14-208.6(4), N.C.G.S. § 14-208.40A(a) instructs that the district attorney

> shall present to the court any evidence that (i) the offender has been classified as a sexually violent predator pursuant to G.S. 14-208.20, (ii) the offender is a recidivist, (iii) the conviction offense was an aggravated offense, (iv) the conviction offense was a violation of G.S. 14-27.23 or G.S. 14-27.28, or (v) the offense involved the physical, mental, or sexual abuse of a minor.

N.C. Gen. Stat. § 14-208.40A(a) (2015). Once this evidence has been presented, the trial court must determine "whether the offender's conviction places the offender in one of the categories described in G.S. 14-208.40(a), and if so, shall make a finding of fact of that determination, specifying" in which of the five categories listed in N.C.G.S. § 14-208.40A(a) the offense fits. N.C. Gen. Stat. § 14-208.40A(b). Then, and as relevant to the present case,

> [i]f the court finds that the offender committed an offense that involved the physical, mental, or sexual abuse of a minor, that the offense is not an aggravated offense or a violation of G.S. 14-27.23 or G.S. 14-27.28 and the offender is not a recidivist, the court shall order that the Division of Adult Correction do a risk assessment of the offender.

N.C. Gen. Stat. § 14-208.40A(d) (2015). After receiving the risk assessment from the Division of Adult Correction, the trial court must "determine whether, based on the Division of Adult Correction's risk assessment,

the offender requires the highest possible level of supervision and monitoring." N.C. Gen. Stat. § 14-208.40A(e) (2015). A "Moderate-High" risk assessment "still constitutes 'Moderate' for the purposes of our precedent," *State v. Smith*, ___ N.C. App. ___, ___ n.1, 769 S.E.2d 838, 840 n.1 (2015), and a "risk assessment of 'moderate,' *without more*, is insufficient to support the finding that a defendant requires the highest possible level of supervision and monitoring." *State v. Green*, 211 N.C. App. 599, 601, 710 S.E.2d 292, 294 (2011) (emphasis in original). "If the court determines that the offender does require the highest possible level of supervision and monitoring, the court shall order the offender to enroll in a satellite-based monitoring program for a period of time to be specified by the court." N.C.G.S. § 14-208.40A(e).

In the present case, Defendant was convicted of statutory rape in violation of N.C. Gen. Stat. § 14-27.7A(a), and the trial court found as fact that such conviction was one of the categories described in N.C. Gen. Stat. § 14-208.40(a).[3] The trial court further found as fact that: (1) Defendant had not been classified as a sexually violent predator under the procedure set out in N.C. Gen. Stat. § 14-208.20; (2) Defendant was not a recidivist; (3) the offense was not an aggravated offense; and (4) the offense did involve the physical, mental, or sexual abuse of a minor. Given these findings, all undisputed, Defendant's offense falls within N.C.G.S. § 14-208.40A(d) and (e), that required the Division of Adult Correction to complete a risk assessment.

The Static-99 in the present case revealed a risk assessment of four points, which translated into a "Moderate-High" risk category. Pursuant to *Smith* and *Green*, a "Moderate-High" risk category was insufficient to support a finding that the highest possible level of supervision and monitoring was required. *Smith*, ___ N.C. App. at ___ n.1, 769 S.E.2d at 840 n.1; *Green*, 211 N.C. App. at 601, 710 S.E.2d at 294. Nevertheless, the trial court found that Defendant required the highest possible level of supervision and monitoring "based on the risk assessment of the Division of Adult Correction," and did not make any further findings

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3. One of the "categories described" in N.C.G.S. § 14-208.40(a) is "an offender [who] is convicted of a reportable conviction as defined by G.S. 14-208.6(4)[.]" N.C. Gen. Stat. § 14-208.40(a). N.C. Gen. Stat. § 14-208.6(4), in turn, defines "reportable conviction" as, *inter alia*, "a sexually violent offense." N.C. Gen. Stat. § 14-208.6(4). Sexually violent offense is, in turn, defined as including, *inter alia*, "a violation of . . . G.S. 14-27.25(a)." N.C. Gen. Stat. § 14-208.6(5). N.C.G.S. § 14-27.7A, of which Defendant was convicted, was later recodified at N.C. Gen. Stat. § 14-27.25(a) in 2015. *See* 2015 N.C. Sess. Laws ch. 181 § 7(a). Therefore, Defendant's conviction qualified as a reportable conviction.

of fact as to why SBM was appropriate. This finding was in error, and requires us to vacate the SBM order.[4]

Relying on *State v. Causby*, 200 N.C. App. 113, 117, 683 S.E.2d 262, 265 (2009), Defendant argues this Court should simply vacate the order without remand to the trial court for further findings of fact regarding the appropriate level of supervision. In *Causby*, the Court noted that the defendant's risk assessment was "moderate," and that the trial court's finding "that the defendant requires the highest possible level of supervision and monitoring" was inappropriate considering no additional findings of fact were made. *Id.* at 115-16, 683 S.E.2d at 264. Relying on this Court's previous decision in *State v. Kilby*, 198 N.C. App. 363, 679 S.E.2d 430 (2009), this Court considered whether remand for further findings of fact was appropriate:

> The State did not present evidence which could support a finding that "defendant requires the highest possible level of supervision and monitoring." The DOC assessment of defendant rated him as a moderate risk. The State's other evidence indicated that defendant was fully cooperating with his post release supervision, which might support a finding of a lower risk level, but not a higher one. As no evidence was presented which tends to indicate that defendant poses a greater than "moderate" risk or which would demonstrate that "defendant requires the highest possible level of supervision and monitoring[,]" we need not remand this matter to the trial court for additional findings of fact as requested by the State. Consequently, we reverse the trial court's order.

Causby, 200 N.C. App. at 116, 683 S.E.2d at 264 (quoting *Kilby*, 198 N.C. App. at 370, 679 S.E.2d at 434).

We find the present case distinguishable from *Causby* and *Kilby*. In the present case, the trial court assumed – and the prosecution agreed, incorrectly – that Defendant's risk assessment score on the Static-99 left the decision whether to impose satellite-based monitoring within the trial court's discretion. The prosecution nevertheless attempted to present additional evidence at the SBM hearing that the highest level of

4. Defendant asks this Court to "reverse" the SBM order rather than "vacate" it. While there is some support for reversal rather than vacatur in our precedent, *see, e.g.*, *Kilby*, 198 N.C. App. 363, 370-71, 679 S.E.2d 430, 434-35 (2009), in cases where this Court has chosen to remand the matter for further proceedings – which as explained below, we do here – this Court has chosen to "vacate" the SBM order. *E.g.*, *State v. Thomas*, 225 N.C. App. 631, 634-35, 741 S.E.2d 384, 387 (2013). Following that precedent, we do the same.

supervision and monitoring was required, but was not permitted by the trial court to do so:

> [Prosecutor]: Your Honor, the state would ask that [Defendant], we find that he does require the highest level of supervision. Your Honor, [Defendant] was a, I think it was four points which is moderate to high. In addition to that, [Defendant] is a person who has committed a very serious –
>
> THE COURT: I know that. Just argue to me about the time period.

Because the State was not permitted to complete its argument regarding additional factors that made, in the State's view, the highest level of supervision and monitoring appropriate, we are unable to determine if that evidence "could support a finding that 'defendant requires the highest possible level of supervision and monitoring.' " *Causby*, 200 N.C. App. at 116, 683 S.E.2d at 264. Given that the State attempted to introduce additional evidence regarding whether the highest level of supervision and monitoring was required, but was unable to do so, we find the present case distinguishable from *Causby* and *Kilby*. We therefore remand to the trial court for further findings of fact as to whether the highest possible level of supervision and monitoring is appropriate.

C. Defendant's Remaining Arguments

In light of our determination that the SBM order must be vacated and remanded for a new hearing, we do not address Defendant's argument that the SBM order must also be vacated because enrollment in SBM violated Defendant's right to be free from unreasonable searches under the Fourth Amendment and the United States Supreme Court's decision in *Grady v. North Carolina*, ___ U.S. ___, 191 L. Ed. 2d 459 (2015). We also dismiss Defendant's argument that he received ineffective assistance of counsel ("IAC"), as our allowance of *certiorari* and vacatur of the SBM order renders that argument moot. *See In re K.C.*, 226 N.C. App. 452, 463, 742 S.E.2d 239, 246-47 (2013) (declaring an appellant's IAC claim premised on trial counsel's failure to properly preserve an argument for appellate review to be moot when the unpreserved argument was addressed and found to be meritorious, notwithstanding improper preservation).

NO ERROR IN PART; DISMISSED IN PART; VACATED AND REMANDED IN PART.

Judges HUNTER, JR. and DAVIS concur.

STATE OF NORTH CAROLINA
v.
SAMMY LEE HENSLEY, SR.

No. COA16-689

Filed 20 June 2017

1. Evidence—detective's notes—rule of completeness

The trial court did not abuse its discretion in a prosecution for possession of a firearm by a felon by admitting into evidence portions of a detective's handwritten notes. Although defendant contended that the State's proffer of the notes failed to satisfy the contemporaneity requirement of the rule of completeness in N.C.G.S. § 8C-1, Rule 106, the purpose of that rule is merely to ensure that a misleading impression created by taking matters out of context is corrected on the spot. Defendant cross-examined the detective about a phrase on the first page of her notes but objected when the prosecutor tried to admit the full text of the notes. Defendant's reliance on the contemporaneity requirement was misplaced, since defendant opened the door on cross-examination. Additionally, defendant's trial lasted only two days.

2. Evidence—relevance—detective's notes

A detective's notes were relevant in a prosecution for possession of a firearm by a felon where they provided context to the statement that "defendant denies all involvement with any guns." Defendant's statement was not related to the sale of the firearm in this case.

3. Evidence—detective's notes—probative value not outweighed by prejudicial value

The prejudice from a detective's notes did not outweigh their probative value in a prosecution for possession of a firearm by a felon. There was significant evidence that it was not likely that a different result would have been obtained at trial without the evidence. Furthermore, defendant had opened the door.

Judge STROUD concurring by separate opinion.

Judge DAVIS concurring in the result only.

Appeal from judgment entered 28 October 2015 by Judge Nathaniel J. Poovey in Burke County Superior Court. Heard in the Court of Appeals 18 April 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Kimberly Randolph, for the State.

Cooley Law Office, by Craig M. Cooley, for defendant-appellant.

BRYANT, Judge.

Where the trial court did not violate Rule 106 or otherwise abuse its discretion by admitting into evidence a detective's handwritten notes after defendant opened the door to this evidence during cross-examination, we find no error.

The State's evidence tended to show that Danny Stanley purchased a .40-caliber Glock handgun from defendant Sammy Lee Hensley Sr. in "roughly October of [20]13." The transaction occurred in a trailer belonging to defendant's mother. Defendant personally handed the gun to Stanley, and Stanley paid defendant $300.00. During the exchange, defendant assured Stanley that "the gun was clean, wasn't stolen." Later, however, defendant told Stanley that he " 'stole [the gun] out of a car in Louisiana.' " Stanley contacted a friend in the Burke County Sheriff's Office and "asked him if he would run that gun to see if it was stolen." The friend advised him that the gun was stolen and referred the matter to Detective Melanie Robinson in the Criminal Investigations Division.

On 3 October 2014, Stanley met with Detective Robinson and surrendered the handgun purchased from defendant. Detective Robinson traced the gun's serial number through the National Criminal Information Center database and confirmed the gun had been reported stolen in Louisiana. Though "very reluctant" to reveal how he had obtained the weapon, Stanley eventually told Detective Robinson that he bought it from "Sammy Hensley, Sr."

Detective Robinson interviewed defendant at the Sheriff's Office on 17 October 2014 after he was arrested on unrelated charges. During the course of the interview, defendant acknowledged having " 'sold a gun to Sam [Stanley] or his father, Dan.' He didn't remember which one." Defendant reviewed and signed a written statement prepared by Detective Robinson on the afternoon of 17 October 2014, stating as follows:

> Back towards the middle of 2013, . . . Danny [Hall] came to me & he had a couple of guns – a Glock & a .38 [c]aliber pistol. Danny asked me to help him out & sell the gun cause he needed money for morphine for his pain. I called up Sam Stanley & he asked his Daddy. Then I sold the gun

> to them for Danny & I didn't keep any of the money. I don't remember what they paid for it. The reason I don't remember is it was so long ago. I also didn't take a cut because Danny was my friend & would give me morphine for my leg when I was out of my meds. . . .

After obtaining defendant's statement, Detective Robinson contacted Stanley and asked if he would be willing to give a written statement now that defendant had admitted selling him the gun. Stanley met Detective Robinson at the Sheriff's Office on 23 October 2014 and signed a written statement describing the transaction.

At trial, the State presented two witnesses—Detective Robinson and Danny Stanley. Detective Robinson's direct examination was limited mainly to her investigation of the case, including discussions with Stanley, and the fact that she talked to defendant, but not the substance of her conversation with defendant. At that point, the State noted that it had completed its questioning of Detective Robinson "subject to being . . . allowed to recall her after Mr. Stanley's testimony to corroborate his statement, if in fact it [did corroborate his statement], and also to introduce what the defendant told her . . . ." Defense counsel noted no objection to the State proceeding in that manner.

Defense counsel then proceeded to conduct an extensive cross-examination of Detective Robinson, including questions about three pages of handwritten notes she had taken during her interview with defendant on 17 October 2014:

> Q. The bottom of page 1, the last sentence, what's written in your notes?
>
> A. (As read) "Denies all involvement with any guns."
>
> Q. And this is [defendant's] statement to you, correct?
>
> A. This is his statement prior to me questioning him about this case. I interviewed him on multiple cases that day.
>
> Q. So but if he denies any involvement with guns, you didn't put that in his statement, though, that you wrote, right?
>
> . . . .
>
> A. It -- No, I did not. It did not have any bearing on this statement as I was writing it. He, he made -- Whenever I made this note, everything's chronological. When I take

> my notes, I take them in chronological order. And as you review them, you will be able to follow and see what case we were discussing as I was writing it. And I had not yet began [sic] to question him in reference to this firearm when he made that comment.
>
> Q. Well, let's talk about when you started questioning about this firearm. . . .

Later, on redirect, the State asked Detective Robinson about her reference to defendant denying "all involvement with any guns" including the gun sold to Stanley:

> Q. [Defense counsel] pointed you out to certain segments of both . . . Stanley's statement and [defendant's] statement.
>
> A. Yes, sir.
>
> Q. At one point he asked you to look at handwritten notes that you took from . . . defendant. And he wanted you to specifically read a segment where at the bottom of the page he said he denied all involvement with any guns. What was that specific question in ref -- or answer in reference to?
>
> A. When he made that statement to me, that was right after he informed me that he was a convicted felon.
>
> Q. Was it in reference, though, to this gun, this Glock .40 caliber 20 -- Model 22 or another gun?
>
> A. No, sir. It was not in reference to that. It was -- It wasn't in reference to any gun. It was just something that came up in the conversation when he was basically telling me some of his criminal past.
>
> . . . When I asked him if he had any guns, he says, "No, I don't mess with" -- something along the lines of, "No, I don't mess with guns. I don't have any guns." He did make that statement.
>
> And that's when I wrote, (as read) "Denies all involvement with any guns." But this was prior -- *We discussed two other cases before I questioned him about this firearm. And this was a statement made early on in the interview.*

(Emphasis added).

After Stanley testified, Detective Robinson was recalled to testify and the trial court admitted, *inter alia*, three documents into evidence: defendant's written statement signed on 17 October 2014, Detective Robinson's handwritten notes taken during her interview with defendant that same day, and Stanley's written statement signed on 23 October 2014. The documents were then published to the jury by being read aloud by Detective Robinson.[1] Defendant presented no direct evidence at trial. During its deliberations, the jury requested and received paper copies of defendant's and Stanley's written statements, but not Detective Robinson's notes.

The jury found defendant guilty of possession of a firearm by a convicted felon. Upon his guilty plea to attaining habitual felon status, the trial court sentenced him to an active term of 100 to 132 months. Defendant filed timely notice of appeal from the judgment.

On appeal, defendant claims the trial court abused its discretion by admitting into evidence certain portions of Detective Robinson's handwritten notes from his interview on 17 October 2014. Specifically, defendant contends (I) the prosecutor's Rule 106 request was not made contemporaneously with defense counsel's alleged misleading or incomplete use of the handwritten notes and further, that those notes were not relevant to the portion already admitted. Defendant also contends (II) the probative value of the handwritten notes was substantially outweighed by their undue prejudice, pursuant to Rule 403. We disagree.

I. Rule 106

[1] In challenging the trial court's decision to admit Detective Robinson's notes into evidence, defendant first contends the State's proffer of the notes failed to satisfy the contemporaneity requirement of the "rule of completeness" codified in N.C. Gen. Stat. § 8C-1, Rule 106 (2015):

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Id. "The purpose of the 'completeness' rule codified in Rule 106 is merely to ensure that a misleading impression created by taking matters out of

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1. Stanley's statement was proffered to corroborate his trial testimony.

context is corrected on the spot, because of 'the inadequacy of repair work when delayed to a point later in the trial.' " *State v. Thompson*, 332 N.C. 204, 220, 420 S.E.2d 395, 403–04 (1992) (quoting *United States v. LeFevour*, 798 F.2d 977, 981 (7th Cir. 1986)).

"A trial court's decision in determining whether an excluded portion ought to be admitted under Rule 106 will not be reversed on appeal in the absence of a showing of an abuse of discretion." *State v. Hall*, 194 N.C. App. 42, 50, 669 S.E.2d 30, 36 (2008) (citing *Thompson*, 332 N.C. at 220, 420 S.E.2d at 403). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (citation omitted).

Citing *State v. Lloyd*, 354 N.C. 76, 552 S.E.2d 596 (2001), defendant observes that the prosecutor did not seek to introduce the full text of the notes at the time Detective Robinson was cross-examined about her notation, "Denies all involvement with any guns." *See id.* at 96, 552 S.E.2d at 612–13 (addressing the defendant's Rule 106 argument).

In *Lloyd*, the trial court refused to allow the defendant to introduce previously-excluded portions of his statement to police after "other parts of [his] police statement had been introduced by the State." *Id.* at 96, 552 S.E.2d at 613. Our Supreme Court rejected the defendant's claim that the exclusion of the additional portions of his statement violated Rule 106, explaining that the "defendant's argument fails, because he did not seek to introduce the excluded parts of his police statement contemporaneously as required by statute, but instead sought to introduce them on rebuttal." *Id.* (citation omitted).

The *Lloyd* Court upheld the trial court's decision to exclude evidence based on the contemporaneity requirement of Rule 106. It does not follow that a trial court would lack the discretion to admit similar evidence under the same circumstances. See N.C. Gen. Stat. § 15A-1226(b) (2015) ("The judge in his discretion may permit any party to introduce additional evidence at any time prior to verdict."); *Thompson*, 332 N.C. at 220, 420 S.E.2d at 403 ("The standard of review [under Rule 106] is whether the trial court abused its discretion." (citation omitted)).

In the instant case, the transcript shows defense counsel objected when the prosecutor sought to admit the full text of the notes. On *voir dire*, defense counsel acknowledged having cross-examined Detective Robinson about the phrase on the first page of her notes, "Denies all involvement with any guns." But when the court asked for "the grounds of [his] objection," defense counsel replied, "I would object to the whole

statement being admitted. I would argue that the probative value of those -- that other information is outweighed by the extreme prejudice that would be caused to the defendant." Defense counsel made no specific Rule 106 objection at trial.

"Our Supreme Court 'has long held that where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount' in the appellate courts." *State v. Holliman*, 155 N.C. App. 120, 123, 573 S.E.2d 682, 685 (2002) (citations omitted) (quoting *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5–6 (1996)). Accordingly, this argument is waived by defendant. *See id.* at 124, 573 S.E.2d at 686. However, even if defendant's Rule 106 argument were properly before us, it would still fail.

Here, the prosecutor observed that it was defense counsel who first asked Detective Robinson about her notes, "specifically with that one sentence from the bottom of page 1." In order to "put it all into context," the prosecutor argued that "the whole thing should be introduced." The trial court addressed defendant's objection as follows:

> THE COURT: . . . I agree with [the prosecutor], that you, you opened the door to this, specifically by asking [Detective Robinson] about something that was not related to this incident on the bottom of page 1.
>
> Knowing that this was taken in chronological order, or should have known that this was taken in chronological order, asking her about the specific statement of your client "Denies all involvement with any guns," which was unrelated completely to this investigation, I think opens the door to things unrelated to this investigation. You can't ask a question like that, raise the suspicion and the, the confusion in the minds of the jury, and then step back and hide behind it.

Defense counsel then argued that there were specific parts of the detective's notes which were more prejudicial than probative. But the trial court overruled each of defense counsel's objections to certain portions of the detective's notes being read into evidence.

After the jury returned to the courtroom, Detective Robinson read aloud the full first page of her notes:

> (As read) "I didn't go to court, because I didn't have money. Ryan Willis bought flatscreen TV from me with [*two*] *fake hundred dollar bills. Got TV, traded 10 roxies*

> *for it.* Went to Kmart and used bill to try to buy Prilosec. Cashier told me it was fake. I left. M.D.P.S. C. Daniels came and interviewed me. I told him I got it from Ryan.
>
> "Jacob told Sam Stanley he and Natalie had stolen some guy Rafe's gun. Me, Jacob, and Sam hung out together. Sam's daddy likes guns. I never saw the gun, don't know what kind it was. Heard Rafe's daddy was pissed and was going to whip his ass.
>
> "I'm a convicted felon since 1985. I really can't tell you nothing. I wished I could, you know. *Thirteen days in Albany, New York, for grand theft auto.*[*"*] *Stolen from here. Caught at restaurant by New York. Boy stole from his momma back in '85.* Denies all involvement with any guns. . . ."

(Emphasis added).

In essence, defendant argues it was error for the trial court to permit the State to publish to the jury the entirety of Detective Robinson's handwritten notes *non-contemporaneously* with the portion testified to on cross-examination. Defendant's reliance on the contemporaneity requirement of Rule 106 is misplaced, particularly where, as here, defense counsel opened the door to the detective's notes during cross-examination and then objected to the admission of the full statement being read to the jury, arguing that specific portions of the notes were "more prejudicial than probative." It was only after defense counsel "opened the door" by taking a portion of defendant's statement out of context so as to be misleading that Detective Robinson's notes regarding criminal activity that might otherwise be inadmissible were allowed by the trial court to correct the misleading impression created by defendant. The trial court's actions were entirely consistent with the purposes of Rule 106.

Unlike in *Lloyd*, a capital murder trial which appeared to span almost a month, *see* 354 N.C. at 79–80, 552 S.E.2d at 603, where the Supreme Court rejected defendant's Rule 106 argument when he sought to introduce evidence in rebuttal, *see* 354 N.C. at 96, 552 S.E.2d at 612–13, here, defendant's trial lasted only two days and Detective Robinson's notes were introduced during the State's direct case. On these facts, we reject defendant's claim that the contemporaneity requirement of Rule 106 was violated. *See State v. Melvin*, No. COA-09-62-2, 2011 WL 2462570, at *3 (N.C. Ct. App. June 21, 2011) (unpublished) (noting that where the defendant initially introduced letters at trial to impeach a witness,

the State was entitled to submit the letters in their entirety pursuant to Rule 106, which the State did on redirect).[2] The trial court did not abuse its discretion. Defendant's argument is overruled.

II. Rule 403

[2] Defendant next claims the trial court erred in admitting the challenged portions of Detective Robinson's notes because they were not relevant to the charge at issue. *See* N.C. Gen. Stat. § 8C-1, Rules 401–02 (2015). We hold that defendant "opened the door" to the first page of Detective Robinson's interview notes by eliciting testimony about the notation "Denies all involvement with any guns" during her cross-examination.

As our Supreme Court has explained,

> "[t]he law wisely permits evidence not otherwise admissible to be offered to explain or rebut evidence elicited by the defendant himself. Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such latter evidence would be incompetent or irrelevant had it been offered initially."

State v. Anthony, 354 N.C. 372, 415, 555 S.E.2d 557, 585–86 (2001) (alteration in original) (internal citations omitted) (quoting *State v. McNeil*, 350 N.C. 657, 682, 518 S.E.2d 486, 501 (1999)). The first page of Detective Robinson's notes, which recounted defendant's self-reported criminal history, was admissible to dispel the favorable inference created by defendant's selective introduction of a single phrase found at the bottom of the page. *See State v. Ratliff*, 341 N.C. 610, 614–16, 461 S.E.2d 325, 327–28 (1995). By contextualizing the phrase, "Denies all involvement with any guns," the remaining text tended to show that defendant's seeming denial was unrelated to his sale of the firearm to Stanley in 2013.

[3] Defendant further claims the trial court's admission of the challenged evidence amounted to an abuse of discretion under N.C.G.S. § 8C-1, Rule 403, because "the probative value of challenged notes was substantially outweighed by their undue prejudice." By referring to defendant trading "roxies," using counterfeit money, and serving

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2. We note with approval the concurring opinion setting forth the possible peril in courts citing to unpublished opinions. We retain the cite to the above unpublished opinion as an example of the importance of the role such opinions play as in the instant case, but also the *possibility* of unintended consequences that may arise if non-precedential case law "bleeds over" into precedential case law.

"13 days in Albany N.Y. for grand theft auto" in 1985, he contends the notes created an "*intolerable*" risk that the jury based its verdict on impermissible factors other than the substantive evidence of his guilt. Defendant also suggests the court failed to undertake "a proper Rule 403 balancing analysis" by weighing the probative value of the challenged notes against the risk they posed of unfair prejudice. We disagree.

Rule 403 provides that otherwise relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." N.C.G.S. § 8C-1, Rules 403. "Whether to exclude evidence under Rule 403 is a matter within the sound discretion of the trial court." *State v. Penley*, 318 N.C. 30, 41, 347 S.E.2d 783, 789 (1986) (citation omitted). "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.* (quoting *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986)).

While the evidence defendant argues should have been excluded is certainly prejudicial, we cannot say that the trial court abused its discretion in admitting the evidence. And, while we are not conducting a plain error review, we note for the record that significant evidence exists—from the direct witness testimony of Mr. Stanley to defendant's unchallenged admission to selling the gun—such that it is not likely a different result would have been obtained at trial had the evidence been excluded.

Further, this Court has held that, "[w]here . . . a party is responsible for 'opening the door' with respect to certain evidence, that party may not complain of unfair prejudice resulting from its admission." *Everhart v. O'Charley's Inc.*, 200 N.C. App. 142, 148, 683 S.E.2d 728, 735 (2009) (citing *State v. Wilson*, 151 N.C. App. 219, 226, 565 S.E.2d 223, 228 (2002)). *But cf. State v. Cotton*, 329 N.C. 764, 765–69, 407 S.E.2d 514, 516–18 (1991) (addressing but rejecting defendant's argument under Rule 403). Having created the impression that he "[d]enie[d] all involvement with any guns" when questioned about the firearm sold to Stanley, defendant cannot complain of unfair prejudice when the trial court allowed the State's evidence that defendant's denial pertained to his criminal history prior to this incident. *See Cotton*, 329 N.C. at 769, 407 S.E.2d at 518. We find no abuse of discretion by the trial court.

NO ERROR.

Judge STROUD concurs by separate opinion.

Judge DAVIS concurs in the result only.

STROUD, Judge, concurring.

I concur in the majority opinion except as to any citation of unpublished cases of this Court. In briefs filed in this Court, the Rule 30(e) of the Rules of Appellate Procedure allows citation of unpublished cases only in very limited circumstances.

> (e) *Unpublished Opinions.*
>
> (1) In order to minimize the cost of publication and of providing storage space for the published reports, the Court of Appeals is not required to publish an opinion in every decided case. If the panel that hears the case determines that the appeal involves no new legal principles and that an opinion, if published, would have no value as a precedent, it may direct that no opinion be published.
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> . . . .
>
> (3) An unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority. Accordingly, citation of unpublished opinions in briefs, memoranda, and oral arguments in the trial and appellate divisions is disfavored, except for the purpose of establishing claim preclusion, issue preclusion, or the law of the case. If a party believes, nevertheless, that an unpublished opinion has precedential value to a material issue in the case and that there is no published opinion that would serve as well, the party may cite the unpublished opinion if that party serves a copy thereof on all other parties in the case and on the court to which the citation is offered. This service may be accomplished by including the copy of the unpublished opinion in an addendum to a brief or memorandum. A party who cites an unpublished opinion for the first time at a hearing or oral argument must attach a copy of the unpublished opinion relied upon pursuant to the requirements of Rule 28(g). When citing an unpublished opinion, a party must indicate the opinion's unpublished status.

N.C. R. App. P. 30(e).

Our Court has discussed the limited circumstances in which citation to unpublished opinions is appropriate many times. For example, in

Long v. Harris, this Court stressed the importance of compliance with Rule 30(e):

> An unpublished opinion establishes no precedent and is not binding authority[.]
>
> Compliance with the Rules is mandatory and violation thereof subjects a party to sanctions. *See* N.C. R. App. P. 25(b) (Court may "impose a sanction against a party or attorney or both when the court determines that such party or attorney or both substantially failed to comply with" the Rules). Notwithstanding, we have elected in our discretion pursuant to N.C. R. App. P. 2 to review defendant's contentions herein, but without consideration of the unpublished decision cited in his appellate brief. Nonetheless, we remind counsel of the explicit provisions of N.C. R. App. P. 30(e), prohibiting citation of unpublished opinions and use thereof as precedent.

Long v. Harris, 137 N.C. App. 461, 470-71, 528 S.E.2d 633, 639 (2000) (citations, quotation marks, and brackets omitted).

More recently, this Court noted:

> Citation to unpublished authority is expressly disfavored by our appellate rules but permitted if a party, in pertinent part, believes there is no published opinion that would serve as well as the unpublished opinion. Neither of the principles propounded by the surety justify citation to the [unpublished opinion cited by a party in its brief] in this matter, and we reiterate that citation to unpublished opinions is intended solely in those instances where the persuasive value of a case is manifestly superior to any published opinion.

State ex rel. Moore Cnty. Bd. of Educ. v. Pelletier, 168 N.C. App. 218, 222, 606 S.E.2d 907, 909 (2005) (citation, quotation marks, and ellipses omitted).

Although the Rules of Appellate Procedure do not address this Court's own citation to unpublished opinions, I believe that there are very good reasons for the Court to follow the same rule which we require parties filing briefs in our Court to follow. In this particular case, neither party's brief citied to the unpublished case cited in the majority opinion, so we need not address it for that reason. I also believe that citation to an unpublished opinion is not necessary for the majority's opinion.

Although I admit I have not done any formal analysis of the frequency of citation of unpublished opinions in opinions of this Court or in appellate briefs, it appears to me that these citations are increasing in frequency. This is not surprising, given the large numbers of unpublished opinions. But there are still many excellent reasons courts generally discourage reliance upon unpublished opinions, which have been specifically designated as being non-precedential. The panel which issues each opinion decides when it is written whether the opinion will have precedential value, and there are many different reasons judges decide not to publish opinions. *See* Donna S. Stroud, *The Bottom of the Iceberg: Unpublished Opinions*, 37 Campbell L. Rev. 333 (2015). We cannot know the reasons the judges on a particular case decided to issue an opinion as unpublished, but if we did, those reasons may demonstrate exactly why we should not rely upon it.

One of my more practical concerns regarding citation to unpublished opinions in this Court's opinions is that it will encourage litigants to do more of the same. Another more serious concern is that the law which is developed in the unpublished, non-precedential opinions has a tendency to bleed over into other cases and eventually to end up in precedential opinions, even though it may not be cited as such. This tendency has been studied in some limited areas of law, but I see no reason to believe that it cannot happen in any area of law. *See e.g.*, Brian Soucek, *Copy-Paste Precedent*, 13 J. App. Prac. & Process 153, 154 (2012). In his article, Soucek describes how portions of text from unpublished opinions regarding different interpretations of "social visibility" in asylum cases in the Second Circuit have been copied and pasted without acknowledgement in later published opinions, leading to error in the court's analysis of this issue. *Id.* at 158-71 (discussing *Romero v. Mukasey*, 262 F. App'x 328 (2d Cir. 2008) and noting subsequent decisions that cited *Romero*). We should err on the side of caution in the development of our jurisprudence by not relying upon or citing unpublished opinions if it can possibly be avoided.

STATE v. LANGLEY

[254 N.C. App. 186 (2017)]

STATE OF NORTH CAROLINA
v.
WILLIE JAMES LANGLEY, DEFENDANT

No. COA16-1107

Filed 20 June 2017

1. Jury—misconduct—mistrial denied—invited error

The trial court did not abuse its discretion by denying defendant a mistrial in a prosecution for assault and attempted murder where a juror looked up the meaning of "intent" on the internet. Defendant invited any error by not accepting the trial court's offer to continue its inquiry of the jury.

2. Indictment and Information—habitual felon—essential elements—date of offense and date of conviction

A habitual felon indictment was defective on its face where its listing of prior felonies included dates when defendant committed armed robberies but the conviction dates were for common law robberies.

Appeal by defendant from judgment entered 28 January 2015 by Judge W. Russell Duke, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 5 April 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Kimberly N. Callahan, for the State.

Cheshire Parker Schneider & Bryan, PLLC, by John Keating Wiles, for defendant-appellant.

MURPHY, Judge.

Willie James Langley ("Defendant") appeals from his judgment for assault with a deadly weapon with intent to kill, assault with a deadly weapon with intent to kill inflicting serious injury, two counts of attempted first degree murder, possession of a firearm by a felon, discharge of a weapon into an occupied motor vehicle, and attaining habitual felon status. On appeal, he contends that the trial court erred by (1) denying Defendant's Motion for a Mistrial; (2) giving jury instructions that constructively amended the habitual felon indictment; and (3) proceeding on a facially defective habitual felon indictment. After

careful review, we hold that the trial court did not abuse its discretion in denying Defendant's Motion for a Mistrial as any error was invited by Defendant. However, we agree with Defendant that the trial court proceeded on a facially deficient habitual felon indictment. Therefore, we order that the judgment regarding the habitual felon conviction be vacated and the case be remanded for resentencing on the underlying felonies without the habitual felon enhancement, and we need not reach the issue of whether the trial court's jury instructions materially varied from the allegations in the habitual felon indictment.

Factual Background

On 24 September 2014,[1] Jesse Atkinson, Sr., Jesse Atkinson, Jr., and a friend of Atkinson Jr.'s, Kion, drove to Vance Street in Greenville in a car belonging to Kion. When they arrived, the men parked the car; Kion exited and the Atkinsons remained in the car. A few minutes later, a blue car, containing Defendant and Mr. Davron Lovick, passed by, then U-turned and pulled up beside Kion's car. Defendant began to fire a gun at the Atkinsons through the rolled-down driver's side window. Atkinson, Sr. was shot in his right calf and left thigh.

Although the above acts resulted in the charges now in dispute, Defendant bases his appeal primarily on conduct that took place at trial, after jury deliberation began. Approximately an hour into deliberation, the foreman sent a question to the trial judge: "With the charge of assault with a deadly weapon of Atkinson, Jr. with intent to kill does the law state intent to kill only or does it include inflicting serious bodily injury as well?" In response, the trial court returned the jury to the courtroom and reread the pertinent instructions. Just over an hour later, the jury sent another question: "With the two attempted first degree murder charges do they have to have the same verdict?" The trial court told the jury they did not, and provided them with a written copy of the instructions for each offense. Before recessing for the evening, the trial court instructed the jurors not to deliberate on the case, except when they were all together in the jury room, and not to look at the television, read the newspaper, or listen to the radio.

The next morning, the foreperson immediately sent the following note to the court: "[O]ne juror Google'd intent to kill on the internet to try to understand the law, and, second, can we get clarification on the

1. The offense conduct took place from the late hours of 24 September 2014 into the early morning hours of 25 September 2014.

underlined item on page four of Court's Exhibit Number 1?" The judge again returned the jury to the room and inquired:

> All right, now, first, I'm going to address the first one. Which juror Google'd intent?
>
> All right, now, Ladies and Gentlemen, at the beginning of the case, I think y'all remember, that you are to follow the law as given to you by the Court; do y'all remember that? Remember me asking you that? And this is the reason. And it's because everyone tried for the same crime in North Carolina should be treated in the same way and have the same law applied to him. That's only fair. Now, I'm going to ask each one of you to pledge to me that, that's what you're going to do. Now, if all of you can accept and follow the law as given to you by the Court, a North Carolina Judge, North Carolina Court, if you can do that, please, raise your hand.
>
> (All twelve jurors raise their hands.)
>
> Thank you. And can you disregard any other definition of intent to kill or anything else other than what I give you because it is, I can assure, the accepted law in North Carolina. It is applied in every case. Can you disregard any other law other than the law that's given to you by the Court? And if you can just raise your hand, please.
>
> (All twelve jurors raise their hands.)
>
> Thank you. Now, the underlined word is the legal effect. If the Defendant intended to harm one person but instead harmed a different person the legal effect would be the same as if the Defendant had harmed the intended victim. And, Ladies and Gentlemen, I have given you the instructions that - and I've given you that the Defendant intended to commit first degree murder. That's an element of the charge of attempted first degree murder. And I've defined for you intent. And then I've defined for you what happens when someone else is hurt or harmed other than the person who was intended - the Defendant intended to kill or harm. And I'm going to just ask you to apply the law as I've given it to you here. Do y'all understand?
>
> (All jurors nod their heads affirmatively.)

Judge Duke then turned to the second question, explaining the underlined item on page four of Court's Exhibit Number 1.

Once the jury exited the courtroom, Defendant moved for a mistrial and the following exchange took place:

> [DEFENSE COUNSEL]: Your Honor, as to the way you presented, I felt like you just restated what you had already said. However, given the question - given the nature of what happened, I feel like I need to move for the Court to declare that this is a mistrial, that the jurors have gone outside of the Court's instructions to follow the law as given to them. They have gone on the Internet to look up the law. It is unclear whether they went to the Internet last night and did research and deliberated outside of the jury room. It's unclear whether other jurors asked this juror to Google or look on the Internet to find the law and declare what the law is. I think at this point the jury has been tainted and I would ask for a mistrial.
>
> THE COURT: Well, her question - the foreman's question - let me read it back to you - her question says, one juror -
>
> [DEFENSE COUNSEL]: Yes, your Honor, but the -
>
> THE COURT: *Now, I'll bring them back here and quiz them all. What do you say?*
>
> [PROSECUTOR]: Your Honor, I think your instructions to them were sufficient, your questions to them, if they would agree to follow only the law that you have given them is sufficient.
>
> THE COURT: I do, too. I'm going to deny your motion.
>
> [DEFENSE COUNSEL]: Yes, sir, thank you.

(Emphasis added). After 43 minutes of deliberation, the jury returned a verdict, finding Defendant guilty of all counts charged.

Following the verdict, the habitual felon phase of the trial began. The indictment listed Defendant as being a habitual felon on the basis of the following:

> [1. T]hat on or about September 11, 2006, the defendant did commit the felony of Felony Larceny, in violation of North Carolina General Statute 14-72(a), and that on or about February 15, 2007, the defendant was convicted of

> Felony Larceny in the Superior Court of Pitt County, North Carolina; and
>
> [2. T]hat on or about October 08, 2009, the defendant did commit the felony of *Robbery with a Dangerous Weapon*, in violation of North Carolina General Statute 14-87, and that on or about September 21, 2010, the defendant was convicted of the felony of Common Law Robbery in the Superior Court of Pitt County, North Carolina; and
>
> [3. T]hat on or about August 24, 2011, the defendant did commit the felony of *Robbery with a Dangerous Weapon*, in violation of North Carolina General Statute 14-87.1, and that on or about May 5, 2014, the defendant was convicted of the felony of Common Law Robbery in the Superior Court of Pitt County, North Carolina . . . [.]

(Emphasis added). As evidence, the State called an Assistant Clerk of Superior Court of Pitt County, Cathy Watson, to describe the judgment relevant to each of the convictions listed in the habitual felon indictment. The trial court admitted and published each judgment to the jury. In the trial court's charge to the jury, it instructed that the jury should return a guilty verdict if it found the following true beyond a reasonable doubt:

> [1.] That he committed the offense of felony larceny on 11 September 2006 and was convicted of felony larceny on 15 February 2007;
>
> [2.] That he committed the offense of *common law robbery* on 8 October 2009 and was convicted of common law robbery on 21 September 2010; and
>
> [3.] That he committed the offense of *common law robbery* on 24 August 2011 and was convicted of common law robbery on 5 May 2014.

(Emphasis added). The jury found Defendant guilty of attaining habitual felon status and the trial court consolidated Case Nos. 14CRS57851-52, 3452, and 3454 into a judgment on a Class B2 felony, sentencing Defendant to a term of imprisonment of 238 to 298 months, followed by a consecutive sentence 14CRS57853 to a term of imprisonment of 110 to 144 months, followed by another consecutive sentence in 14CRS57854 to a term of imprisonment of 110 to 144 months. Defendant gave notice of appeal on 29 January 2015.

Analysis

On appeal, Defendant presents three arguments: (1) the trial court erred by denying his Motion for Mistrial; (2) the trial court erred by giving jury instructions that constructively amended the habitual felon indictment; and (3) the trial court proceeded on a facially deficient habitual felon indictment. We only reach (1) and (3) given our determination that the trial court proceeded on a facially deficient habitual felon indictment, and we need not scrutinize the appealed jury instructions.

I. Juror Misconduct

[1] Defendant first argues that the trial court abused its discretion in denying his motion for a mistrial based on juror misconduct. We disagree because we find that any error was invited by Defendant.

A trial judge "must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." N.C.G.S. § 15A-1061 (2015). We review a trial court's decision to grant or deny a motion for mistrial on the basis of juror misconduct for abuse of discretion. *State v. Salentine*, 237 N.C. App. 76, 80-81, 763 S.E.2d 800, 804 (2014). "An abuse of discretion occurs 'only upon a showing that the judge's ruling was so arbitrary that it could not have been the result of a reasoned decision.' " *Id.* at 81, 763 S.E.2d at 804 (quoting *State v. Dial*, 122 N.C. App. 298, 308, 470 S.E.2d 84, 91, *disc. review denied*, 343 N.C. 754, 473 S.E.2d 620 (1996)).

"When juror misconduct is alleged, it is the trial court's responsibility 'to make such investigations as may be appropriate, including examination of jurors when warranted, to determine whether misconduct has occurred and, if so, whether such conduct has resulted in prejudice to the defendant.' " *Salentine*, 237 N.C. App. at 80-81, 763 S.E.2d at 804 (quoting *State v. Aldridge*, 139 N.C. App. 706, 712, 534 S.E.2d 629, 634, *appeal dismissed and disc. review denied*, 353 N.C. 269, 546 S.E.2d 114 (2000)). Generally, an examination is required "where some prejudicial content is reported." *State v. Harrington*, 335 N.C. 105, 115, 436 S.E.2d 235, 240 (1993) (citation omitted). When conducting an examination, the trial court has discretion to determine the scope and procedure thereof. *State v. Burke*, 343 N.C. 129, 149, 469 S.E.2d 901, 910 (1996).

Whether misconduct occurred depends on "the facts and circumstances in each case." *State v. Drake*, 31 N.C. App. 187, 190, 229 S.E.2d 51, 54 (1976). "Not every violation of a trial court's instruction to jurors

is such prejudicial misconduct as to require a mistrial." *State v. Wood*, 168 N.C. App. 581, 584, 608 S.E.2d 368, 370 (citation omitted), *disc. review denied*, 359 N.C. 642, 614 S.E.2d 923 (2005)). The trial court's decision "should only be overturned where the error is so serious that it substantially and irreparably prejudiced the defendant, making a fair and impartial verdict impossible." *State v. Gurkin*, 234 N.C. App. 207, 211, 758 S.E.2d 450, 454 (2014). "Ordinarily one who causes (or we think joins in causing) the court to commit error," invites the error, and "is not in a position to repudiate his action and assign it as ground for a new trial." *State v. Payne*, 280 N.C. 170, 171, 185 S.E.2d 101, 102 (1971).

Here, it is undisputed that juror misconduct took place. The dispute is whether the misconduct resulted in such substantial and irreparable prejudice to Defendant's case that the trial judge was required to declare a mistrial. Defendant argues that the trial court abused its discretion, depriving Defendant of his right to an impartial jury. We disagree, because Defendant invited any error that occurred and prevented further remedial efforts that may have been conducted by the trial court.

When Defendant moved for mistrial, the trial court offered to continue the inquiry, even offering to interview each juror. Defendant did not respond to the trial judge's offer, yet, now, on appeal suggests that such an inquiry may have adequately protected Defendant's interests by contrasting the present case with *State v. Bethea*, 173 N.C. App. 43, 617 S.E.2d 687 (2005), where the judge examined specific jurors involved in misconduct before questioning and instructing the entire jury to address the misconduct.

While we recognize the growing problem of juror misconduct through the use of easily accessible electronics and potential Due Process and Equal Protection concerns, Defendant has prevented us from further review. Even assuming *arguendo* that the trial court abused its discretion in this instance, Defendant is not in a position to repudiate the action and argue that it is grounds for a new trial since he did not accept the trial court's offer to continue the inquiry when the judge offered to do so. Therefore, if any error took place, Defendant invited it. *Payne*, 280 N.C. at 171, 185 S.E.2d at 102.

II. Habitual Felon Indictment

[2] Defendant argues that the habitual felon indictment was defective on its face. We agree.

The facial validity of an indictment may be challenged "at any time, even if it was not contested in the trial court" because an indictment

that is invalid on its face does not confer the trial court with jurisdiction. *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341 (2000). Valid indictments must charge all essential elements of the charged offense. *State v. Mason*, 279 N.C. 435, 440, 183 S.E.2d 661, 664 (1971). A valid habitual felon indictment must include: "[1] the date that prior felony offenses were *committed*, [2] the name of the state or other sovereign against whom *said felony offenses* were committed, [3] the dates that pleas of guilty were entered to or convictions returned in *said felony offenses*, and [4] the identity of the court wherein said pleas or convictions took place." N.C.G.S. § 14-7.3 (2015) (emphasis added). The Supreme Court of North Carolina paraphrased N.C.G.S. § 14-7.3 in *State v. Cheek*, when it held that a habitual felon indictment fully comported with the statute:

> by setting forth the three prior felony convictions relied on by the State, the dates *these offenses* were committed, the name of the state against whom they were committed, the dates defendant's guilty pleas for *these offenses* were entered, and the identity of the court wherein these convictions took place.

339 N.C. 725, 729-30, 453 S.E.2d 862, 865 (1995) (emphasis added). "Nothing in the plain wording of N.C.G.S. § 14-7.3 requires a specific reference to the predicate substantive felony in the habitual felon indictment." *Id.* at 728, 453 S.E.2d at 864. However, for a habitual felon indictment to fully comport with statutory requirements there must be two dates listed for each prior felony conviction put forth in the habitual felon indictment – both the date the defendant committed the felony and the date the defendant was convicted of *that same felony* in the habitual felon indictment. N.C.G.S. § 14-7.3; *Cheek*, 339 N.C. at 729-30, 453 S.E.2d at 865.

Here, the habitual felon indictment, as written, failed to meet the statutory requirements. The indictment listed Defendant as being a habitual felon on the basis of the following:

> [1. T]hat on or about September 11, 2006, the defendant did commit the felony of Felony Larceny, in violation of North Carolina General Statute 14-72(a), and that on or about February 15, 2007, the defendant was convicted of Felony Larceny in the Superior Court of Pitt County, North Carolina [("Conviction 1")]; and
>
> [2. T]hat on or about October 08, 2009, the defendant did commit the felony of Robbery with a Dangerous Weapon,

> in violation of North Carolina General Statute 14-87, and that on or about September 21, 2010, the defendant was convicted of the felony of Common Law Robbery in the Superior Court of Pitt County, North Carolina [("Conviction 2")]; and
>
> [3. T]hat on or about August 24, 2011, the defendant did commit the felony of Robbery with a Dangerous Weapon, in violation of North Carolina General Statute 14-87.1, and that on or about May 5, 2014, the defendant was convicted of the felony of Common Law Robbery in the Superior Court of Pitt County, North Carolina [("Conviction 3")] . . . [.]

On its face, the indictment did not provide the offense date for Conviction 2 or Conviction 3. Instead, for both of these convictions, the indictment alleged offense dates for robberies with a dangerous weapon, and then gave conviction dates for two counts of common law robbery. There is nothing in the indictment alleging Defendant committed the crime of common law robbery on 8 October 2009 and was subsequently convicted on 21 September 2010; or 24 August 2011 and was subsequently convicted on 5 May 2014.

It would be an impermissible inference to read into the indictment that common law robbery took place on 8 October 2009 or 24 August 2011 because that is not what the grand jury found when it returned its bill of indictment. The State cannot rest on an assertion that Defendant committed an offense on a date that it never presented to the grand jury. This would be a gross violation of Defendant's right to grand jury presentment. N.C. Const. art. I § 22.

As the State emphasized, it is true that N.C.G.S. § 14-7.3 does not require that a habitual felon indictment list the predicate felony. However, we are not considering a case in which whether the predicate felony was listed is at issue. The issue is that the grand jury did list an offense that was committed on a date certain, and it was not the same crime of which the grand jury found Defendant had been convicted. The indictment listed no offense dates for the felonies resulting in Conviction 2 or Conviction 3.

The dates of offense and the corresponding dates of conviction are essential elements of the habitual felon indictment because of the temporal requirements of N.C.G.S. § 14-7.1:

> The commission of a second felony shall not fall within the purview of this Article unless it is committed after the conviction of or plea of guilty to the first felony. The commission of a third felony shall not fall within the purview of this Article unless it is committed after the conviction of or plea of guilty to the second felony.

The State did not meet the requirements of the habitual felon indictment set out by statute as it did not provide an offense date for the crime the State *convicted* Defendant for committing. Defendant's habitual felon indictment, defective on its face, must be vacated. *State v. Petersilie*, 334 N.C. 169, 175, 432 S.E.2d 832, 836 (1993). Our decision to vacate the judgment for the habitual felon indictment on this ground makes it unnecessary to address whether the jury instructions materially varied from the fatally defective indictment.

Conclusion

For the reasons stated above, we conclude that the trial court proceeded on a facially deficient habitual felon indictment. Thus, we vacate the habitual felon conviction and remand the case for resenting on the underlying felonies without the habitual felon enhancement.

NO ERROR IN PART; JUDGMENT VACATED AS TO THE HABITUAL FELON INDICTMENT; REMANDED FOR A NEW SENTENCING HEARING ON THE UNDERLYING FELONIES WITHOUT THE HABITUAL FELON ENHANCEMENT.

Judges CALABRIA and DIETZ concur.

STATE v. MILLER

[254 N.C. App. 196 (2017)]

STATE OF NORTH CAROLINA
v.
MARVIN EVERETTE MILLER, JR.

No. COA16-1206

Filed 20 June 2017

1. Constitutional Law—Confrontation Clause—officer's testimony—earlier domestic abuse investigation

The Confrontation Clause rights of a first-degree murder defendant were violated where defendant was accused of killing his estranged wife and a police officer testified in the current trial about statements made by the estranged wife in a prior domestic violence investigation. The statements by the estranged wife (now deceased) plainly addressed what happened, rather than what had happened and were not made during any immediate threat or ongoing emergency. They were testimonial in nature.

2. Constitutional Law—Confrontation Clause—statement from a prior incident—deceased victim—opportunity to cross-examine at prior trial—no transcript

The State's argument in a first-degree murder case that the Confrontation Clause was not violated was rejected where the violation concerned a prior domestic assault investigation with the same victim and a testimonial statement by an officer about what the victim had said. Although the State contended that defendant had the opportunity to cross-examine the victim at the earlier trial arising from that investigation, there was no transcript or evidence from that proceeding in the record on appeal.

3. Constitutional Law—Confrontation Clause—first-degree murder—testimony by victim in prior case—rights not forfeited

The Confrontation Clause rights of a first-degree murder defendant were not forfeited where he killed his estranged wife, her statements to an officer in a prior domestic violence case were introduced, and the State contended that defendant had forfeited those rights by killing his wife. The trial court did not find that defendant killed his wife to prevent her from testifying about the earlier incident.

4. Constitutional Law—Confrontation Clause—violation prejudicial

There was prejudicial error in a first-degree murder prosecution where defendant's right to confront the witness against him

was violated where an officer was allowed to relate the statements that the victim had made in a prior domestic violence incident. The State had the burden of proving the error harmless but abandoned any argument on harmlessness by not raising the issue in its appellate brief.

Appeal by defendant from judgments entered 8 April 2016 by Judge Edwin G. Wilson, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 4 May 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General David J. Adinolfi II, for the State.

Mark Montgomery for defendant.

DIETZ, Judge.

Defendant Marvin Miller appeals his conviction for killing his estranged wife and severely wounding her boyfriend. He argues that the State violated his Confrontation Clause rights at trial when a law enforcement officer described to the jury what Miller's wife told him during an earlier domestic abuse investigation.

As explained below, we agree that the State violated Miller's Confrontation Clause rights. The victim's statements to the officer in that earlier domestic violence incident were made after she fled from Miller in her car and called police from a safe location. Moreover, the purpose of the officer's questions was to determine what happened, not what was happening. As a result, those statements were testimonial in nature.

Although Miller was tried for that earlier domestic violence offense, the record in this case does not indicate that Miller had an opportunity to cross-examine his wife about the challenged statements at the time. To the contrary, Miller's wife asked the State to drop the charges and sat with him at the trial, which suggests Miller may have had no need to cross-examine her in that earlier proceeding; in any event, because the record contains no transcript of the proceeding, this Court has no way to know.

Likewise, the record contains no indication (and no findings from the trial court) that Miller killed his wife to prevent her from testifying about that earlier incident. Thus, under controlling U.S. Supreme Court precedent, the mere fact that the victim is unavailable *because* Miller killed her does not mean Miller forfeited his Confrontation Clause rights.

Finally, because this is a constitutional error, the burden is on the State to show that the error was harmless beyond a reasonable doubt. The State did not argue harmless error on appeal and, as a result, abandoned any harmless error argument. We therefore vacate the trial court's judgments and remand for further proceedings.

Facts and Procedural History

On 1 September 2013, Defendant Marvin Miller entered the home of his estranged wife, Lakeshia Wells, and found her and her boyfriend, Marcus Robinson, naked. Miller attacked Wells and Robinson with a knife, wounding Robinson and killing Wells.

A grand jury indicted Miller for first degree murder, attempted first degree murder, and burglary and the case went to trial. The jury acquitted Miller on the burglary charge but convicted him of first degree murder and attempted first degree murder. The court arrested judgment on the attempted first degree murder conviction and sentenced Miller to life in prison without the possibility of parole. Miller timely appealed.

Analysis

[1] Miller argues that the trial court violated his constitutional rights under the Confrontation Clause by permitting a police officer to testify to statements made by the victim. As explained below, we agree that the State violated Miller's Sixth Amendment rights.

Miller properly preserved his Confrontation Clause argument at trial; we thus review it *de novo* on appeal. *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009). The Confrontation Clause of the Sixth Amendment bars admission of testimonial statements of a witness who did not appear at trial, unless the witness was unavailable to testify and the defendant had a prior opportunity to cross-examine the witness. *State v. Bodden*, 190 N.C. App. 505, 513, 661 S.E.2d 23, 28 (2008). "Statements are testimonial when circumstances objectively indicate there is no ongoing emergency and the primary purpose of the interrogation is to establish or prove past events that will be relevant later in a criminal prosecution." *Id.* at 514, 661 S.E.2d at 28. Among the factors that indicate a statement is testimonial are the fact that there was no immediate threat to the witness and that the law enforcement officer was seeking to determine "what happened" rather than "what is happening." *State v. Lewis*, 361 N.C. 541, 547, 648 S.E.2d 824, 829 (2007).

Applying these factors, we hold that the challenged statements were testimonial in nature. In 2012, roughly a year before the crimes alleged in this case, Miller's estranged wife, Lakeshia Wells, called police. She

explained that she had been held against her will by Miller inside her apartment for more than two hours. Eventually, Wells was able to leave the apartment, where Miller remained. Wells got in her car, drove away, and called police.

Officer E.R. Kato of the Greensboro Police Department responded to the call and met Wells near her apartment building. Wells told the officer that Miller held her against her will and things had "escalated to a physical struggle." The officer accompanied Wells back to her apartment "to just generally clear the apartment and make sure there was nobody in there that shouldn't be there" and then he left and obtained a warrant for Miller's arrest. At the trial in this case, Officer Kato testified to what Wells told him when he met her outside her apartment, including her statement that Miller had confined her in the apartment and that she had a physical struggle with Miller.

Wells's statements about the confinement and altercation with Miller were "testimonial" and thus subject to the Confrontation Clause. First, there was no immediate threat or ongoing emergency when the officer spoke to Wells. *See Lewis*, 361 N.C. at 547, 648 S.E.2d at 828–29. The officer's own testimony demonstrates that Wells had left the scene of the crime in her car and called police from a safe location away from Miller.

Second, according to the officer's own testimony, his questions were focused on "what happened" rather than "what is happening." *See id.* To be sure, as the State argues, the officer might have sought to gather information about Miller's location, because Miller was still inside the apartment without permission. But the statements about which the officer testified were not ones addressing Miller's current whereabouts—for example, responses to questions such as "where did you last see Miller?" or "what room of the apartment was he in?" Instead, the statements to which the officer testified at trial concerned past events—information necessary to obtain a warrant to arrest Miller for his actions:

> Q. And did she indicate anything else happening between the two of them?
>
> A. She advised that during the time he was there, which was approximately two hours, that they argued. The argument became heated at one point, I believe she stated, and that it escalated to a physical struggle as well, and that after it had deescalated to no longer being physical, she was able to exit the apartment and leave the area in her vehicle.

> Q. And did you notice any physical marks or any marks of a physical—
>
> A. I don't recall physical injury, but I did recall a tear in a shirt, a tear and what appeared to be stress marks, pull marks, to—if I recall, it was a cotton shirt, which would have been consistent with a struggle.

These statements to the officer plainly addressed what happened, not what was happening, and they were not made during any immediate threat or ongoing emergency. Thus, we agree with Miller that these statements were testimonial in nature and thus subject to the Confrontation Clause.

[2] The State contends that, even if Wells's statements were testimonial, their admission did not violate the Confrontation Clause because Miller had an opportunity to cross-examine Wells on these issues at an earlier trial for criminal domestic trespass. *See Bodden*, 190 N.C. App. at 513, 661 S.E.2d at 28. But we have no way to know that Wells actually gave this testimony at the earlier trial because the record does not contain any transcripts or evidence from that proceeding. This is fatal for the State's argument because (rather obviously) Miller cannot confront Wells about statements she made if she never actually made them. Indeed, there are some suggestions in the record that Wells did *not* provide this testimony at the earlier trial. For example, the record indicates that Wells asked the State to drop those earlier charges against Miller, and that she sat with Miller during that earlier trial. Simply put, the appellate record does not contain any indication that Wells made the challenged statements at this earlier trial or that Miller had an opportunity to cross-examine her about them. Accordingly, we reject this argument.

[3] The State next contends that Miller forfeited his Confrontation Clause rights when he killed Wells. *See generally State v. Weathers*, 219 N.C. App. 522, 524–25, 724 S.E.2d 114, 116 (2012). But again, the record (or, more precisely, the trial court's ruling on the Confrontation Clause issue) does not support this contention. The mere fact that Miller killed Wells is not enough for forfeiture. The U.S. Supreme Court has held that forfeiture applies "only when the defendant engaged in conduct *designed* to prevent the witness from testifying." *Giles v. California*, 554 U.S. 353, 359 (2008). Thus, forfeiture requires some showing that the defendant killed the witness at least in part to prevent the witness from testifying. *See Weathers*, 219 N.C. App. at 525, 724 S.E.2d at 116; *United States v. Jackson*, 706 F.3d 264, 268 (4th Cir. 2013).

The trial court did not make a finding that Miller killed Wells to prevent her from testifying about this earlier domestic violence incident, and we find no indication in the record that this was Miller's motivation, even in part. Thus, the record does not support the State's argument that Miller forfeited his Confrontation Clause rights by killing Wells to prevent her from testifying.

[4] Having determined that the State violated Miller's rights under the Confrontation Clause, we next turn to whether the error prejudiced the trial. This is a constitutional error and thus is prejudicial and requires a new trial unless it is harmless beyond a reasonable doubt. N.C. Gen. Stat. § 15A–1443(b). Importantly, "[b]ecause this error is one with constitutional implications, *the State* bears the burden of proving that the error was harmless beyond a reasonable doubt." *State v. Bell*, 359 N.C. 1, 36, 603 S.E.2d 93, 116 (2004) (emphasis added).

The State has abandoned any argument on harmlessness because it did not raise the issue in its appellate brief. *See In re L.I.*, 205 N.C. App. 155, 162, 695 S.E.2d 793, 799 (2010); *State v. Pinchback*, 140 N.C. App. 512, 520–21 & n.4, 537 S.E.2d 222, 227 & n.4 (2000). We acknowledge that there is overwhelming evidence of Miller's guilt in this case and that the challenged testimony from the officer, relaying the victim's statements from an earlier, unrelated domestic violence incident, almost certainly played little if any role in the jury's decision to convict.

But this Court routinely finds that criminal defendants abandoned prejudicial error arguments by failing to adequately argue them on appeal. *See*, *e.g.*, *State v. Tatum-Wade*, 229 N.C. App. 83, 94–95, 747 S.E.2d 382, 390 (2013). It is no injustice to hold the State, with its vast and virtually unlimited resources, to the same standard as a criminal defendant, whose life or liberty is at stake. Accordingly, we hold that the State violated Miller's Sixth Amendment right to confront the witnesses against him and that this violation prejudiced his trial. We vacate the trial court's judgments and remand for further proceedings consistent with this opinion. Because we vacate and remand on this issue, we need not reach Miller's other arguments on appeal.

Conclusion

For the reasons explained above, we vacate the trial court's judgments and remand for further proceedings.

VACATED AND REMANDED.

Judges DILLON and TYSON concur.

STATE v. PERRY

[254 N.C. App. 202 (2017)]

STATE OF NORTH CAROLINA
v.
JUSTIN LEE PERRY, DEFENDANT

No. COA16-768

Filed 20 June 2017

1. Appeal and Error—argument on appeal—basis for objection at trial

Defendant's argument concerning the denial of his motion to suppress evidence obtained from a warrantless blood draw was not considered on appeal where the basis for his argument on appeal differed from the basis for the objection at trial.

2. Constitutional Law—ineffective assistance of counsel—insufficient prejudice

A claim for ineffective assistance of counsel in an impaired driving prosecution was dismissed for lack of sufficient prejudice where defense counsel did not argue at trial that a blood draw was unconstitutional. The State introduced overwhelming evidence of appreciable impairment through the testimony of an officer.

3. Constitutional Law—ineffective assistance of counsel—record insufficient—dismissal without prejudice

An assignment of error alleging ineffective assistance of counsel in the admission of guilt during closing arguments was dismissed without prejudice where the record on appeal was insufficient to determine whether the error occurred and the Court of Appeals could not find that defendant consented. Defendant's right to file a motion for appropriate relief in the trial courts was not prejudiced.

Appeal by defendant from judgments entered 14 April 2016 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 26 January 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Robert T. Broughton, for the State.

Parish & Cooke, by James R. Parish, for defendant-appellant.

BERGER, Judge.

On April 14, 2016, Justin Lee Perry ("Defendant") was convicted by a Mecklenburg County jury of felony fleeing to elude arrest, resisting a public officer, and driving while impaired. Defendant was sentenced as an habitual felon for 90 to 120 months in prison. Defendant has only challenged his driving while impaired conviction on appeal. Specifically, he asserts that (1) the trial court erred when denying his motion to suppress the results of a blood alcohol concentration test; (2) he received ineffective assistance of counsel when his counsel failed to argue the constitutionality of the warrantless blood draw performed on Defendant when counsel was arguing for the suppression of that evidence; and (3) he also received ineffective assistance of counsel when his counsel admitted Defendant's guilt of the driving while impaired charge during closing arguments.

Because Defendant has waived appellate review of his first argument on appeal, we decline to address its merits. For Defendant's first ineffective assistance of counsel claim, because he has failed to show that a different outcome would have been obtained had his counsel made a constitutional argument in favor of suppressing the warrantless blood draw, we grant Defendant no relief. However, for his second ineffective assistance claim, because the trial record does not provide this Court with sufficient facts to make a determination as to Defendant's consent for his counsel to argue his guilt, we must dismiss this part of his appeal without prejudice. Defendant may take this matter up again in the trial court by filing a motion for appropriate relief. Therefore, we find no error in part, and dismiss without prejudice in part.

Factual Background

On May 10, 2014, Mecklenburg County Sheriff Deputy Robert Stokes observed a gold Toyota Camry, driven by a man later identified as Defendant, moving at a high rate of speed on Atando Avenue in Mecklenburg County. Deputy Stokes estimated Defendant's vehicle was traveling approximately fifty miles per hour in a thirty mile per hour zone. As Defendant's vehicle approached Deputy Stokes, he passed other vehicles on the road, using the center turning lane. Deputy Stokes activated his marked patrol vehicle's lights and siren, and turned to follow Defendant's vehicle.

Deputy Stokes attempted to stop Defendant's vehicle, but he continued, "squeezing in between the median and [other] vehicles that were traveling in the same lane [and] . . . pushing [other cars] off to the side [of the road]." Deputy Stokes caught up with Defendant's vehicle "because . . . the traffic was slowing him down." However, Defendant was able to

accelerate and Deputy Stokes fell behind. Defendant's vehicle continued at speeds estimated to be between sixty-five and seventy miles per hour, while the speed limit remained thirty miles per hour.

Still traveling at this high rate of speed, Defendant drove through a red light at the intersection of Atando and Statesville Avenues. Defendant then failed to stop at a stop sign at the entrance ramp onto Interstate 77, causing a truck to slam on its brakes to avoid a collision with the subject vehicle. Defendant's vehicle then nearly hit another vehicle that was turning left. Defendant then drove over a concrete island and hit a mound of dirt where it came to a stop.

Defendant exited the vehicle and fled on foot. Deputy Stokes shouted four or five times for Defendant to stop running, a command Defendant failed to follow. Deputy Stokes continued to pursue Defendant into a residential neighborhood where he lost sight of Defendant. Deputy Stokes soon found Defendant lying under a piece of plywood "face down," "breathing heavily," and "sweating profusely."

Deputy Stokes ordered Defendant to get up, but he remained on the ground. Deputy Stokes handcuffed Defendant and "pulled him out to an open area[, out from under the plywood] . . . so he [could] get more oxygen." Defendant was initially unresponsive, but suddenly "jumped up" and said, "I'm ready to go. Let's go." Defendant walked a short distance before passing out again. Defendant was transported to the emergency room of a local hospital.

In the hospital, Defendant remained unresponsive. He periodically drifted in and out of consciousness and would suddenly state that he had been poisoned and "[didn't] remember anything," and that "he drank a whole lot." Because Deputy Stokes suspected Defendant of driving while impaired, he read Defendant his rights, filled out "a rights form," and directed a nurse to draw Defendant's blood so that it could be analyzed for its blood alcohol concentration ("BAC").

Procedural History

The State timely provided Defendant with notice of its intent to introduce the results of its analysis of Defendant's blood, and its BAC findings, as evidence at trial. Defense counsel made no pretrial motion to suppress the BAC results.

At a motions hearing before trial, defense counsel notified the trial court that he may address certain "bad acts" regarding Defendant's driving in his opening statement. Counsel requested that the trial court address "any kind of acknowledgement or reference by us to wrongdoing

[that] may require for us to protect [Defendant's] rights [so that counsel could] present the defense . . . we have strategized." Defense counsel also indicated that these comments would likely reference Defendant's driving and implicate Defendant's fleeing to elude charge. The trial court conducted a colloquy with Defendant addressing these possible admissions regarding his driving. Defendant acknowledged that he had previously discussed with counsel the possible admissions and how those facts related to Defendant's overall trial strategy. Defendant consented to these disclosures for the purposes of opening arguments. Following its colloquy with Defendant, the trial court found that:

> Defendant has heard from his attorney relating to the intent to discuss his driving behavior in the opening and they have discussed the dangers and advantages of possibly providing that information early on. And based on discussion with counsel, the Defendant has, without undue influence from anyone else, made the decision to allow his attorney to make those statements.

During trial, Deputy Stokes testified to the circumstances surrounding Defendant's blood draw while at the hospital. Defense counsel objected to the admission of any evidence gained from the blood draw and moved for its suppression. The trial court overruled the objection and denied the motion to suppress. A State Bureau of Investigation ("SBI") lab analyst testified to the results of the tests of Defendant's blood sample, and to the SBI lab report giving Defendant's BAC. This evidence was admitted without objection.

Defendant was found guilty of felony fleeing to elude, resisting a public officer, and driving while impaired. Defendant admitted to attaining habitual felon status. Defendant gave timely notice of appeal in open court.

Analysis

I. Motion to Suppress

[1] Defendant asserts that the trial court erred in summarily denying his motion to suppress evidence obtained from the warrantless blood draw taken from Defendant during his hospitalization. This motion to suppress was made during trial when the State sought to introduce the blood draw evidence.

However, this Court is procedurally barred from addressing the merits of Defendant's argument because the basis for the objection given during trial is not the basis of Defendant's argument on appeal. At trial,

defense counsel objected to the introduction of evidence resulting from the warrantless blood draw because Deputy Stokes had not complied with the requirements of N.C. Gen. Stat. § 20-16.2 when he failed to arrest Defendant for driving while impaired before he drew Defendant's blood.

On appeal, however, Defendant states a different argument for the suppression of the blood draw evidence. In his appeal, Defendant merely mentions N.C. Gen. Stat. § 20-16.2 once in an argument heading, but substantively argues that "[t]he drawing of the blood violated [his] Fourth Amendment rights against unreasonable searches and seizures as set out by the Constitution of North Carolina and the Constitution of the United States." Specifically, Defendant argues that (1) "taking a blood sample is a search governed by the Fourth Amendment [of the U.S. Constitution]"; (2) the North Carolina Supreme Court has held that a "search warrant must be issued before a blood sample can be obtained, unless probable cause and exigent circumstances" exist; and (3) the U.S. Supreme Court ha[s] previously held that "the natural dissipation of alcohol from the blood stream does not always indicate an exigency to justify warrantless taking of a blood sample."

Exceptions to the admission of evidence must generally be preserved by counsel with an objection made at the time evidence is admitted. N.C. Gen. Stat. § 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)). Defendant has not argued plain error.

"[W]here a theory argued on an appeal was not raised before the trial court, the argument is deemed waived on appeal." *State v. Hernandez*, 227 N.C. App. 601, 608, 742 S.E.2d 825, 829 (2013) (citations, quotation marks, and brackets omitted). "It is well settled that constitutional matters that are not 'raised and passed upon' at trial will not be reviewed for

the first time on appeal." *State v. Garcia*, 358 N.C. 382, 410, 597 S.E.2d 724, 745 (2004) (citing *State v. Watts*, 357 N.C. 366, 372, 584 S.E.2d 740, 745 (2003), *cert. denied*, 541 U.S. 944, 158 L. Ed. 2d 370 (2004)). Therefore, we do not reach the merits of Defendant's argument on this issue, and his assignment of error is overruled.

II. Ineffective Assistance of Counsel

In Defendant's next assignment of error, he argues that his trial counsel violated his Sixth and Fourteenth Amendment rights to the effective assistance of counsel. Specifically, Defendant contends that his counsel rendered ineffective assistance when he (1) failed to argue that the warrantless blood draw and all subsequent evidence obtained from his blood was seized in violation of the United States and North Carolina Constitutions; and (2) admitted Defendant's guilt to the driving while impaired charge during closing arguments without first obtaining Defendant's consent.

"On appeal, this Court reviews whether a defendant was denied effective assistance of counsel de novo." *State v. Wilson*, 236 N.C. App. 472, 475, 762 S.E.2d 894, 896 (2014). Under the Sixth and Fourteenth Amendments of the United States Constitution and Article 1, Sections 19 and 23 of the North Carolina Constitution, "[a] defendant's right to counsel includes the right to the effective assistance of counsel." *State v. Braswell*, 312 N.C. 553, 561, 324 S.E.2d 241, 247 (1985) (citation omitted). In *Braswell*, our Supreme Court "expressly adopt[ed] the test set out in *Strickland v. Washington*[, 466 U.S. 668, 80 L. Ed. 2d 674 (1984),] as a uniform standard to be applied to measure ineffective assistance of counsel under the North Carolina Constitution." *Braswell*, 312 N.C. at 562-63, 324 S.E.2d at 248.

On appeal, a defendant must show that his counsel's conduct "fell below an objective standard of reasonableness" to prevail. *Strickland*, 466 U.S. at 688, 80 L. Ed. 2d at 693. To show that, the defendant must satisfy a two-part test.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687, 80 L. Ed. 2d at 693.

For the error of counsel, even an objectively unreasonable error, to warrant the reversal of a conviction, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 80 L. Ed. 2d at 698. "That requires a substantial, not just conceivable, likelihood of a different result." *Cullen v. Pinholster*, 563 U.S. 170, 189, 179 L. Ed. 2d 557, 575 (2011) (citations and quotation marks omitted). In making this determination, this Court "must consider the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695, 80 L. Ed. 2d at 698.

A. Motion to Suppress Blood Draw Evidence

[2] Defendant argues that his counsel gave ineffective assistance when he failed to assert that the seizure of Defendant's blood was unconstitutional when moving the trial court to suppress this evidence. The results of the BAC test conducted on Defendant's blood were consequently admitted into evidence at trial. Defendant ascribes prejudice to the admission of this evidence because it established a BAC of 0.15 – nearly double the limit prohibited – and because BAC was "necessary to prove driving under the influence" as defined by N.C. Gen. Stat. § 20-138.1. Defendant, therefore, argues that he is entitled to a new trial.

> Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice.

Kimmelman v. Morrison, 477 U.S. 365, 375, 91 L. Ed. 2d 305, 319 (1986). However,

> a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.

Braswell, 312 N.C. at 563, 324 S.E.2d at 248 (citation omitted).

For Defendant to prevail on this assertion of error, he must prove prejudice. *Strickland*, 466 U.S. at 693, 80 L. Ed. 2d at 697. Defendant must show a reasonable probability that, had the trial court suppressed the BAC test results, Defendant would not have been found guilty of driving while impaired. Furthermore, the likelihood of being found not guilty of driving while impaired must be "substantial, not just conceivable." *Cullen*, 563 U.S. at 189, 179 L. Ed. 2d at 575 (citation and quotation marks omitted).

To determine whether Defendant had a substantial likelihood of obtaining a not guilty verdict for his driving while impaired charge, we look to the statute proscribing impaired driving. *State v. Taylor*, 165 N.C. App. 750, 757, 600 S.E.2d 483, 489 (2004) ("N.C. Gen. Stat. § 20-138.1 governs the offense of impaired driving . . . ."). In relevant part, it provides:

> (a) Offense. – 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 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[.]

N.C. Gen. Stat. § 20-138.1(a) (2016). "Thus, the acts of driving while under the influence of an impairing substance and driving with an alcohol concentration of .08 are two separate, independent and distinct ways by which one can commit the single *offense* of driving while impaired." *Taylor*, 165 N.C. App. at 757, 600 S.E.2d at 489 (citation, quotation marks, and brackets omitted) (emphasis in original). "In fact, the State may prove DWI where the [BAC] is entirely unknown or less than .08." *Id.* (citation, quotation marks, and brackets omitted). Provided a determination of impairment is not based solely on the odor of alcohol, "[t]he opinion of a law enforcement officer . . . has consistently been held sufficient evidence of [a defendant's] impairment." *Id.* (citation and quotation marks omitted).

In this case, Deputy Stokes testified that Defendant "lost control of his bodily or mental faculties, or both, to such an extent that [he was] . . . appreciably impair[ed]." He based this opinion on his observations

that Defendant was driving approximately twenty miles over the speed limit, driving in the center turning lane, using his car to push other vehicles off the road, accelerating away from Deputy Stokes' marked patrol vehicle during pursuit, and running a stoplight and a stop sign before crashing his car into a mound of dirt. After he had wrecked his vehicle, Defendant fled the scene on foot, ignored multiple verbal commands to stop, and was eventually located where he had passed out under a piece of plywood. Upon finding Defendant under the plywood, Deputy Stokes testified that Defendant was "unresponsive," had "labored breathing," was "sweating profusely," and "smelled . . . [and] reeked of alcohol" to the extent that Deputy Stokes could smell the "strong odor of alcohol coming from [Defendant's] breath" when "standing over him." Finally, while receiving treatment in the emergency room, Defendant lapsed in and out of consciousness and made several unprompted statements that he did not "remember anything" and that "he drank a whole lot." Deputy Stokes testified he "believe[d] that alcohol was a contributing factor to the events that led up to that day[']s incident]."

In light of this testimony, the State introduced overwhelming evidence of appreciable impairment. Because this was sufficient to find Defendant guilty of the offense of driving while impaired, "the State was not required to establish [BAC] to prove that [D]efendant was driving while impaired." *Taylor*, 165 N.C. App. at 757, 600 S.E.2d at 489. As a result, Defendant has failed to show "that there is a reasonable probability that the verdict would have been different absent the excludable evidence" and has, thus, failed to "demonstrate actual prejudice." *See Kimmelma*n, 477 U.S. at 375, 91 L. Ed. 2d at 319. Therefore, we "dispose of [this] ineffectiveness claim on the ground of lack of sufficient prejudice." *Braswell*, 312 N.C. at 563, 324 S.E.2d at 248.

B. Counsel's Admission of Guilt

[3] Defendant also argues that his counsel gave ineffective assistance when, without his consent, Defendant's counsel informed the jury during closing arguments that Defendant was driving while impaired. Defendant argues this entitles him to a new trial. Upon review of the trial transcript and record, we find the record insufficient to determine whether the error in question occurred. We therefore dismiss this assignment of error without prejudice to Defendant's rights.

"Generally, claims for ineffective assistance of counsel should be considered through a motion for appropriate relief filed in the trial court and not on direct appeal." *State v. Mills*, 205 N.C. App. 577, 586, 696 S.E.2d 742, 748 (2010) (citing *State v. Stroud*, 147 N.C. App. 549, 553, 557

S.E.2d 544, 547 (2001)); *see also State v. Dockery*, 78 N.C. App. 190, 192, 336 S.E.2d 719, 721 (1985) ("The accepted practice is to raise claims of ineffective assistance of counsel in post-conviction proceedings, rather than direct appeal."); *State v. Ware*, 125 N.C. App. 695, 697, 482 S.E.2d 14, 16 (1997) (dismissing defendant's appeal because issues could not be determined from the record on appeal and stating that "[t]o properly advance these arguments, defendant must move for appropriate relief pursuant to G.S. 15A–1415"). Our Supreme Court has instructed that "should the reviewing court determine that [ineffective assistance of counsel] claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant's right to reassert them during a subsequent [motion for appropriate relief] proceeding." *State v. Fair*, 354 N.C. 131, 167, 557 S.E.2d 500, 525 (2001).

> In order to determine whether a defendant is in a position to adequately raise an ineffective assistance of counsel claim, we stress this Court is limited to reviewing this assignment of error only on the record before us, without the benefit of information provided by defendant to trial counsel, as well as defendant's thoughts, concerns, and demeanor, that could be provided in a full evidentiary hearing on a motion for appropriate relief.

Stroud, 147 N.C. App. at 554, 557 S.E.2d at 547 (citation, quotation marks, and brackets omitted).

As stated above, Defendant must show that his counsel's conduct "fell below an objective standard of reasonableness" to prevail. *Strickland*, 466 U.S. at 688, 80 L. Ed. 2d at 693. To show this, Defendant must prove "counsel's performance was deficient," and also prove "the deficient performance prejudiced the defense." *Id.* at 687, 80 L. Ed. 2d at 693. Furthermore, in determining this objective standard of reasonableness,

> [b]ecause of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

Strickland, 466 U.S. at 689, 80 L. Ed. 2d at 694-95 (citations omitted).

However, our Supreme Court held in *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985), that

> [w]hen counsel admits his client's guilt without first obtaining the client's consent, the client's rights to a fair trial and to put the State to the burden of proof are completely swept away. The practical effect is the same as if counsel had entered a plea of guilty without the client's consent. Counsel in such situations denies the client's right to have the issue of guilt or innocence decided by a jury.

Id. at 180, 337 S.E.2d at 507 (citation omitted). While an "admission of the defendant's guilt during the closing arguments to the jury is per se prejudicial error," *Id.* at 177, 337 S.E.2d at 505, "a defendant's counsel's statement must be viewed in context to determine whether the statement was, in fact, a concession of defendant's guilt of a crime." *Mills*, 205 N.C. App. at 587, 696 S.E.2d at 748-49 (citation omitted).

Furthermore, because a *Harbison* error only occurs when counsel's admission of guilt is not consented to by Defendant, *Harbison*, 315 N.C. at 180, 337 S.E.2d at 507, "[f]or us to conclude that a defendant permitted his counsel to concede his guilt . . . , the facts must show, at a minimum, that defendant *knew* his counsel [was] going to make such a concession." *State v. Matthews*, 358 N.C. 102, 109, 591 S.E.2d 535, 540 (2004) (emphasis in original). Our Supreme Court has "previously declined to set out what constitutes an acceptable consent by a defendant in this context." *State v. McDowell*, 329 N.C. 363, 387, 407 S.E.2d 200, 213 (1991). "*Harbison* and [*State v.*] *Matthews* clearly indicate that the trial court must be satisfied that, prior to any admissions of guilt at trial by a defendant's counsel, the defendant must have given knowing and informed consent, and the defendant must be aware of the potential consequences of his decision." *State v. Maready*, 205 N.C. App. 1, 7, 695 S.E.2d 771, 776, *writ denied*, *review denied*, 364 N.C. 329, 701 S.E.2d 247 (2010).

In this case, Defendant was tried for and convicted of three offenses at trial: felony fleeing to elude arrest, resisting a public officer, and driving while impaired. When speaking to the jury during closing arguments, Defendant's counsel reviewed all elements needed to convict his client of felony fleeing to elude arrest and resisting a public officer. Then, when addressing the driving while impaired charge, he said, "I don't have much to say to you 'cause, again, I want to not play with you. Driving while impaired. Drives vehicle .08 or higher. I don't have much to say. Except why was he driving while impaired?"

"[U]nder the circumstances, [this choice of] action 'might be considered sound trial strategy[]' [as] [t]here are countless ways to provide effective assistance in any given case[]" and this "conduct [may very well] fall[] within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689, 80 L. Ed. 2d at 694-95 (citations omitted). However, there is nothing in the record by which we can definitively state that "[D]efendant knew his counsel [was] going to make such a concession." *Matthews*, 358 N.C. at 109, 591 S.E.2d at 540 (emphasis in original).

Therefore, as this Court is unable to find ineffective assistance of counsel on the face of the record, and because we are unable to find that Defendant consented to the admission of guilt made by his counsel in closing arguments, we dismiss this assignment of error without prejudice to Defendant's right to allow for him to file a motion for appropriate relief in the trial court.

Conclusion

For the reasons stated above, Defendant has waived review of the trial court's denial of his motion to suppress blood draw analysis evidence because his argument presented to the trial court was substantively different from his argument made on appeal. We find no ineffective assistance of counsel from his counsel's failure to prevail on this motion to suppress, because Defendant has failed to prove prejudice from this alleged error. Because we have found the record insufficient to determine whether Defendant is entitled to the relief sought based upon his counsel's admission of Defendant's guilt during closing arguments, we dismiss this assignment of error without prejudice.

NO ERROR.

Chief Judge McGEE and Judge DAVIS concur.

STATE OF NORTH CAROLINA
v.
FRANKLIN THOMAS STREET, DEFENDANT

No. COA16-307

Filed 20 June 2017

False Pretense—obtaining property by—doctrine of recent possession

The trial court did not err in a prosecution for obtaining property by false pretenses by instructing the jury on the doctrine of recent possession. Although defendant argued that the doctrine of recent possession does not apply to the offense of obtaining property by false pretenses, the doctrine of recent possession does not have elements that are logically inconsistent with obtaining property by false pretenses.

Appeal by defendant on petition for writ of certiorari from judgments signed on or about 7 November 2012 by Judge Abraham P. Jones in Superior Court, Durham County. Heard in the Court of Appeals 19 September 2016.

Attorney General Joshua H. Stein, by Assistant Attorney General B. Carrington Skinner IV, for the State.

Anne Bleyman, for defendant-appellant.

STROUD, Judge.

Defendant appeals from judgments convicting him of obtaining property by false pretenses and other crimes. Because the trial court properly instructed the jury, we conclude there was no error in defendant's trial.

I. Background

The State's evidence tended to show that on 30 August 2010, Mr. Carl Jones was working at North Carolina Central University with ground maintenance. Around 10:50 a.m., Mr. Jones noticed that a pair of Stihl hedge trimmers was missing from the back of his cart. Around 12:29 p.m. on the same day, J & L Jewelry and Pawn ("J & L") bought a pair of Stihl hedge trimmers. The pawn ticket listed the seller's identifying information, including name, address, height, ID number, phone

number, and date of birth; defendant was the seller. The shop purchased the trimmers from defendant for $50. In accord with State law, the pawn shop notified law enforcement of the items it purchased.

In November 2011, Officer Benjamin Coleman of the North Carolina Central University Police Department used the Police-to-Police search engine "to search through the record management systems of other departments" for stolen items and he discovered that the stolen Stihl hedge trimmers were sold to J & L. Officer Coleman contacted J & L and acquired the pawn ticket which had a serial number matching the stolen Stihl hedge trimmers as well as the name of the seller. On 25 November 2011, Officer Coleman met with defendant to investigate the stolen trimmers. Thereafter, defendant was indicted with obtaining property by false pretenses. Specifically, the indictment stated that defendant

> unlawfully, willfully and feloniously did knowingly and designedly with the intent to cheat and defraud obtain and attempt to obtain $50.00 in U.S. currency from J & L Jewelry And Pawn Inc. by means of a false pretense which was calculated to deceive and did deceive.
>
> The false pretense consisted of the following: pawning hedge trimmers that Defendant alleged that he owned which in fact he knew or should have reasonably known were in fact stolen property.

Defendant was not charged with any crime for taking the hedge trimmers.

After the evidence was presented at trial, Judge Jones discussed the proposed jury charge with both parties. Over defendant's objection, Judge Jones determined that an instruction regarding the doctrine of recent possession was appropriate in light of the offense charged and the evidence presented at trial. On 10 July 2012, the jury returned a verdict of guilty to the charge of obtaining property by false pretenses, and the trial court entered judgment. Thereafter, defendant filed a petition for writ of certiorari which this Court allowed.

II. Doctrine of Recent Possession Instruction

Defendant's only argument on appeal is that the trial court erred by giving a jury instruction on the doctrine of recent possession because "[t]his instruction was not supported by the evidence. The doctrine of recent possession does not apply to the offense of obtaining property by false pretenses." Defendant argues that if we allow the doctrine of recent possession to be used in this context, this decision will permit the doctrine to "be applied to any other crime from assault to speeding

to elude. That would be absurd, and the doctrine does indeed have limits." Defendant argues repeatedly – seven times by our count, almost verbatim – that "[t]he doctrine of recent possession does not apply to the offense of obtaining property by false pretenses[,]" but defendant does not really explain why. While from our research it is true that there are no precedential cases addressing the doctrine of recent possession instruction in the context of obtaining property by false pretenses, that does not necessarily mean that the instruction is improper.

Whether an instruction on the doctrine of recent possession may be used in a case for obtaining property by false pretenses is a question of law, and thus we review this issue *de novo*. *See generally State v. Barron*, 202 N.C. App. 686, 694, 690 S.E.2d 22, 29 (2010) ("Whether a jury instruction correctly explains the law is a question of law, reviewable by this Court *de novo*."). Again, there appear to be no North Carolina cases that have used the doctrine of recent possession in the context of obtaining property by false pretenses, but, even so, we see no directive mandating that the doctrine of recent possession cannot be used in this context. Cases describe the doctrine of recent possession as a means of creating presumption based upon certain evidence:

> The doctrine of recent possession is a rule of law creating the presumption that a person in possession of recently stolen property is guilty of its wrongful taking and of the unlawful entry associated with that taking. The presumption is strong or weak depending upon the circumstances of the case and the length of time intervening between the larceny of the goods and the discovery of them in the defendant's possession. The presumption or inference arising from recent possession of stolen property is to be considered by the jury merely as an evidential fact, along with the other evidence in the case, in determining whether the State has carried the burden of satisfying the jury beyond a reasonable doubt of the defendant's guilt.
>
> For the doctrine of recent possession to apply, the State must show: (1) the property was stolen, (2) defendant had possession of the property, subject to his control and disposition to the exclusion of others, and (3) the possession was sufficiently recent after the property was stolen, as mere possession of stolen property is insufficient to raise a presumption of guilt.

State v. McQueen, 165 N.C. App. 454, 459–60, 598 S.E.2d 672, 676–77 (2004) (citations and quotation marks omitted). "The inference derived

from recent possession is to be considered by the jury merely as an evidentiary fact, along with the other evidence in the case, in determining whether the State" has proved defendant's guilt beyond a reasonable doubt. *State v. Fair*, 291 N.C. 171, 173, 229 S.E.2d 189, 190 (1976) (citations and quotation marks omitted).

Case law shows that, if supported by the evidence, the doctrine of recent possession can be applied to a variety of property theft crimes. *See*, *e.g.*, *State v. Bell*, 270 N.C. 25, 30, 153 S.E.2d 741, 746 (1967) ("A majority of the cases which have considered the doctrine of recent possession in this jurisdiction have been cases involving breaking, entering and larceny. However, we find no valid reason why the rule does not apply to property taken in a robbery with firearms in the same manner as property taken by breaking and entering." (quotation marks omitted)); *State v. Pickard*, 143 N.C. App. 485, 487, 547 S.E.2d 102, 104 (2001) ("The doctrine of recent possession allows the jury to infer that the possessor of certain stolen property is guilty of larceny."); *State v. Brown*, 221 N.C. App. 383, 388, 732 S.E.2d 584, 588 (2012) ("The doctrine of recent possession is a rule of law that, upon an indictment for larceny, possession of recently stolen property raises a presumption of the possessor's guilt of the larceny of such property. When there is sufficient evidence that a building has been broken into and entered and thereby the property in question has been stolen, the possession of such stolen property recently after the larceny raises presumptions that the possessor is guilty of the larceny and also of the breaking and entering." (citation and quotation marks omitted)). Indeed, in accord with case law, the North Carolina Pattern Jury Instruction for the doctrine of recent possession specifically provides that "[i]f you find these things from the evidence beyond a reasonable doubt, you may consider them together with all other facts and circumstances in deciding whether or not the defendant is guilty of [robbery] [breaking or entering] [larceny] (name other crime)[;]" N.C.P.I. – Crim. 104.40. The sentence is then footnoted and provides,

> [t]his charge is adaptable to robbery, breaking or entering, and larceny; *see e.g. State v. Frazier*, 268 N.C. 249 (1966) (unlawful taking of a vehicle), but the doctrine of recent possession is not applicable to the crime of receiving stolen goods. It is also adaptable to possession of stolen goods. *State v. Griffin*, ___ N.C. App. ___, 763 S.E.2d 927 (August 5, 2014).

Id. n.1.

Defendant directs our attention to *State v. Neill*, where our Supreme Court determined that the doctrine of recent possession does not apply

to the charge of receiving stolen goods. 244 N.C. 252, 256, 93 S.E.2d 155, 158 (1956). But the reasoning in *Neill* does not help defendant because it was decided on the specific elements of receiving stolen goods and the logic of that case is not applicable here:

> It suffices here to note that the crime of receiving presupposes, as an essential element of the offense, that the property in question had been stolen by someone other than the person charged with the offense of receiving. Therefore, it is manifest that a person cannot be guilty both of stealing property and of receiving the same property knowing it to have been stolen. If the one is true, the other cannot be.
>
> It is essential to a conviction of the crime charged in the third count of the bill of indictment under consideration that the goods received by the defendants were stolen by another and retained that status until they were delivered to the defendants.

Id. at 255, 93 S.E.2d at 157–58 (citation and quotation marks omitted). In other words, the doctrine of recent possession presumes the defendant is the taker of the goods, and one cannot be both the taker of the goods *and* the receiver of the goods from the taker. *See id.*

More applicable to this case is *Fair*, where the defendant was convicted with felonious breaking and entering into a home and larceny of several items, including tape players, bicycles, radios, silver dollars, and other coins. *See Fair*, 291 N.C. at 172, 229 S.E.2d at 189. The next day, the defendant was found near the home from which the items were stolen with gold cuff links which had also been taken from the home; the cuff links were not mentioned in the warrant and defendant was not convicted of stealing them. *Id.* 229 S.E.2d at 189-90. The trial court had instructed on the doctrine of recent possession based upon the evidence that defendant possessed the cuff links, but our Supreme Court found error and granted a new trial because "[t]he jury should have been instructed that in order for the doctrine of recent possession to apply they must find beyond a reasonable doubt that the cuff links were stolen at the same time and place as the other property for which defendant stands indicted." *Id.* at 174, 229 S.E.2d at 190-91.

Although the issues in *Fair* were different than this case, we find it instructive since the court held that if the cuff links were stolen "at the same time and place as the other property for which defendant" was

charged, the doctrine of recent possession based on the cuff links would have been a proper instruction even though defendant was not charged with taking the cuff links themselves. *Id.* Thus, we conclude that use of the doctrine of recent possession instruction is not limited to charges arising solely from the item of property which the defendant is charged with stealing. *See id.* Based on *Fair*, we see no reason the State would be required to charge a defendant with the taking of the hedge trimmers to be permitted to use either the evidence or the instruction. *See id.*

Here, the State presented evidence that the hedge trimmers were stolen, defendant exclusively had possession of the property at J & L, and defendant's possession was within approximately two hours after the hedge trimmers were taken. Thus, there was evidence upon which the jury could infer that defendant was the one who took the hedge trimmers, so the trial court could properly instruct on the doctrine of recent possession. *See generally McQueen*, 165 N.C. App. at 460, 598 S.E.2d at 676–77. The elements of obtaining property by false pretense are

> [t]he crime of obtaining property by false pretenses pursuant to G.S. 14–100 is defined as follows: (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. Kilgore, 65 N.C. App. 331, 334, 308 S.E.2d 876, 878 (1983). Unlike in *Neill*, 244 N.C. 252, 93 S.E.2d 155, the doctrine of recent possession does not have elements which are logically inconsistent with obtaining property by false pretenses, so we see no reason an instruction on the doctrine of recent possession could not be used in conjunction with the crime of obtaining property by false pretenses. *Compare McQueen*, 165 N.C. App. at 460, 598 S.E.2d at 676–77; *Kilgore*, 65 N.C. App. at 334, 308 S.E.2d at 878. Thus, the trial court properly instructed the jury, and defendant's argument is overruled.

No Error.

Chief Judge McGEE and Judge INMAN concur.

STATE v. THOMPSON

[254 N.C. App. 220 (2017)]

STATE OF NORTH CAROLINA
v.
ROSHAWN THOMPSON, DEFENDANT

No. COA16-1211

Filed 20 June 2017

1. Evidence—screenshot—not authenticated—impeachment

The trial court did not abuse its discretion in an armed robbery prosecution by requiring defendant to lay a foundation before using an unauthenticated Facebook screenshot of defendant and a State's witness while cross-examining the witness. While defendant could ask about the screenshot, he could not impeach the witness's credibility with extrinsic evidence to prove the contents of the screenshot where no foundation had been laid and the materiality had not been established.

2. Evidence—photograph—illustrative purposes—no error

There was no error, including plain error, in a prosecution for armed robbery, where the trial court allowed the State to introduce a picture of defendant and an accomplice in which defendant's middle fingers are extended. The trial court properly admitted the photograph pursuant to N.C.G.S. § 8-97 to illustrate a detective's testimony that a witness used the photograph to identify defendant and an accomplice. The trial court properly gave a limiting instruction and the photograph was not unduly prejudicial.

3. Appeal and Error—remand not allowed—judicial determination—no clerical error

A case could not be remanded for correction of a clerical error where the trial court found criminal street gang activity during sentencing with no evidence.

4. Appeal and Error—preservation of issues—sentencing error—not an error at trial

An error at sentencing was preserved even though defendant did not object at the sentencing hearing because an error at sentencing is not considered an error at trial.

5. Sentencing—criminal street gang activity—no evidence

A trial judge abused his discretion at sentencing by making a criminal street gang activity finding even though there was no evidence presented at trial supporting the trial court's decision.

Appeal by Roshawn Thompson from judgment entered 24 March 2016 by Judge Marvin K. Blount, III in Pitt County Superior Court. Heard in the Court of Appeals 19 April 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Harriet F. Worley, for the State.

The Law Office of Sterling Rozear, PLLC, by Sterling Rozear, for defendant-appellant.

MURPHY, Judge.

Roshawn Thompson ("Defendant") appeals from his conviction for robbery with a dangerous weapon. On appeal, he contends that the trial court erred by (1) sustaining the State's objection to Defendant's use of an unauthenticated screenshot during cross-examination of the victim; (2) permitting the State to introduce a picture of Defendant making "the middle finger" gesture for illustrative purposes; (3) causing cumulative prejudice from evidentiary rulings; (4) finding that the offense involved criminal street gang activity pursuant to N.C.G.S. § 14-50.25 (2015); and (5) violating his rights under the Fifth and Sixth Amendments to the United States Constitution by making the criminal street gang activity finding without a finding by the jury. After careful review, we hold that the trial court did not abuse its discretion in sustaining the State's objection to Defendant's use of an unauthenticated screenshot during cross-examination of the victim, or in permitting the State to introduce a picture of Defendant making "the middle finger" gesture for illustrative purposes. Since the trial court did not err in its evidentiary rulings, issues (1) and (2) did not create cumulative prejudice. While we decline to reach the constitutionality of N.C.G.S. § 14-50.25, we agree with Defendant that the trial court erred in finding that the offense involved criminal street gang activity and we remand for resentencing on the underlying felony without the criminal street gang activity finding.

Background

On 7 November 2014, Mr. Kendall Rascoe, Jr. ("Rascoe") traveled to Greenville to go to a shopping mall and to see his cousin, LaToya. As he left the mall, he saw his other cousin, Defendant, at a stop sign. Rascoe spoke with Defendant, who agreed to drive him to his brother's house. After Rascoe got in the car, Defendant received a phone call, after which Defendant told Rascoe he needed to pick up Andre Grey ("Grey"). Rascoe rode with Defendant to pick up Grey. Defendant then drove to

a dead end, and Grey pulled a gun on Rascoe, directing him to "give everything up." Defendant instructed Rascoe "to give everything up or he was going to [be shot.]" Defendant reached into Rascoe's pockets and removed Rascoe's money, identification, cell phone, and global cash card with Grey's gun still pressed against Rascoe's neck. Defendant and Grey got out of the car and opened Rascoe's passenger door. Rascoe got out and Grey pulled Rascoe's coat hood over his head and put the gun to his forehead. Defendant punched Rascoe in the face and left with Grey. Rascoe called law enforcement from a nearby home. Rascoe met with Detective Gillen and identified Defendant and Grey through Defendant's Facebook page. Subsequently, Defendant was charged with robbery with a dangerous weapon.

Defendant was convicted of robbery with a dangerous weapon. During sentencing, the State requested "gang restrictions" and Defendant's Judgment reflects a finding that the "offense(s) involved criminal street gang activity." Defendant gave oral notice of appeal.

Analysis

I. Unauthenticated Screenshot of a Facebook Message

[1] At trial, during Rascoe's cross-examination, Defendant's counsel elicited testimony that Rascoe had spoken on Facebook with Defendant on the offense date, 7 November 2014. Defendant's counsel then asked Rascoe if he went to Greenville that day to buy marijuana and whether he contacted Defendant to buy marijuana. Rascoe replied no to both questions. Defendant's counsel then asked to approach the judge outside the jury's presence. Outside the jury's presence, Defendant's counsel described a screenshot of what he alleged was a Facebook message between Defendant and Rascoe the day of the incident in question. Defendant explained that he did not seek to admit the document, he only wanted to use it to "hit [Rascoe's] incredibility, impeach his testimony and ask him some questions." The State had not received this screenshot pursuant to reciprocal discovery. The State expressed that it seriously doubted the screenshot was admissible, but that the trial court would see if it was if the Defendant put it on as evidence. Until then, Defendant's counsel could ask Rascoe questions, but was stuck with the answers. Judge Blount instructed that Defendant's counsel could not hold the screenshot in his hand. Judge Blount made it clear that Defendant could continue to ask questions, which his counsel did.

Defendant argues that the trial court abused its discretion by sustaining the State's objection to the introduction of an unauthenticated screenshot to impeach Rascoe's credibility. We disagree.

The scope of cross-examination is within the discretion of the trial judge. *State v. Forte*, 360 N.C. 427, 442, 629 S.E.2d 137, 147 (2006). A trial judge abuses his discretion when a ruling "is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Whaley*, 362 N.C. 156, 160, 655 S.E.2d 388, 390 (2008) (quoting *State v. Peterson*, 361 N.C. 587, 602-03, 652 S.E.2d 216, 227 (2007)). In reviewing whether a trial judge abused his discretion, "we consider not whether we might disagree with the trial court, but whether the trial court's actions are fairly supported by the record." *Id.* at 160, 655 S.E.2d at 390.

"[A] witness's character or propensity for telling the truth is subject to impeachment through cross-examination about prior inconsistent statements[.]" *State v. Mitchell*, 169 N.C. App. 417, 420, 610 S.E.2d 260, 263 (2005). "Whether a foundation must be laid before a prior inconsistent statement may be shown depends on whether the prior inconsistency relates to a matter pertinent and material to the pending inquiry, or is merely collateral." *State v. Mack*, 282 N.C. 334, 340, 193 S.E.2d 71, 75 (1972) (emphasis and citations omitted). For material matters, "statement[s] may be shown by other witnesses without the necessity of first laying a foundation therefor by cross-examination." *Id.* at 334, 194 S.E.2d at 75. When the impeachment about prior inconsistent statements involves only a collateral matter, the witness' answers are conclusive and extrinsic evidence may not be presented to contradict the witness. *Mitchell*, 169 N.C. App. at 420, 610 S.E.2d at 263. "The proper test for determining what is material and what is collateral is whether the evidence offered in contradiction would be admissible if tendered for some purpose other than mere contradiction; or in the case of prior inconsistent statements, whether evidence of the facts stated would be so admissible." *State v. Long*, 280 N.C. 633, 640, 187 S.E.2d 47, 51 (1972).

Defendant never sought to admit the screenshot. He only wanted to "hit [Rascoe's] incredibility, impeach his testimony and ask him some questions." This was permissible, as Rascoe's character or propensity for telling the truth was subject to impeachment about prior inconsistent statements. *See Mitchell*, 169 N.C. App. at 420, 610 S.E.2d at 263 (explaining that cross-examination of a witness may include questions about prior inconsistent statements for impeachment purposes). While Defendant could ask about the screenshot, he could not impeach Rascoe's credibility with extrinsic evidence to prove the contents of the screenshot where no foundation had been laid and the materiality of the posts had not been demonstrated by Defendant. Although this matter may have affected the jury's view of Rascoe's credibility, Defendant did

not demonstrate its admissibility as to the issue of whether Defendant and Grey robbed the victim at gunpoint. As the record demonstrates this matter could be deemed collateral, and Defendant did not argue otherwise, the trial court did not abuse its discretion in requiring Defendant to lay a foundation before using the unauthenticated screenshot as a prop while cross-examining Rascoe.

Nonetheless, Defendant had the opportunity to ask Rascoe whatever questions he wanted to about the information the screenshot contained. Defendant's argument that he was unable to conduct voir dire to establish authenticity or purpose of the document is misplaced. Defendant never requested to make an offer of proof or attempted to otherwise introduce the screenshot. The trial court's actions are fairly supported by the record, and no abuse of discretion took place.

II. Illustrative Picture of Defendant and Grey

[2] Subsequent to Rascoe's testimony, the State called Detective Brian Gillen who had investigated the incident in question. During the direct examination of the detective, he described how Rascoe showed him a picture of Defendant and Grey on Defendant's Facebook page for identity purposes. Detective Gillen described using a snipping tool and printing the exact picture that Rascoe had shown him for identity purposes. The State moved to enter the exhibit into evidence for illustrative purposes, and, although Defendant objected as to the picture's authentication, his objection was overruled, and the picture was admitted.

Defendant argues that the trial court committed plain error by allowing the State to introduce a picture of Defendant and Grey, wherein Defendant's middle fingers are extended, for illustrative purposes because it was not relevant to the trial and had a prejudicial effect. We disagree.

"[T]he plain error standard of review applies on appeal to unpreserved instructional or evidentiary error." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). Plain error exists when: (1) there is an error; (2) that is plain; (3) that affects a substantial right; (4) that must seriously affect the fairness, integrity or public reputation of judicial proceedings. *Id.*, at 515-16, 723 S.E.2d at 332-33. "[P]lain error review should be used sparingly, only in exceptional circumstances, to reverse criminal convictions on the basis of unpreserved error[.]" *Id.* at 517, 723 S.E.2d at 333. Relevant evidence – evidence having any tendency to make the existence of any fact of consequence to the determination of the action more or less probable – is admissible unless disallowed by federal or state law. N.C.G.S. § 8C-1, Rule 401-02 (2015). The trial judge

has the discretion to exclude relevant evidence when "its probative value is substantially outweighed by the danger of unfair prejudice[.]" N.C.G.S. § 8C-1, Rule 403 (2015). Photographs that are material and relevant to illustrate a witness' identification of a defendant are admissible for illustrative purposes. N.C.G.S. § 8-97 (2015); *State v. Brady*, 299 N.C. 547, 558, 264 S.E.2d 66, 72 (1980). Such photographs may be authenticated by the testimony of a witness with knowledge "that a matter is what it claimed to be." N.C.G.S. § 8C-1, Rule 901 (2015).

Here, the trial court properly admitted the photograph pursuant to N.C.G.S. § 8-97 to illustrate Detective Gillen's testimony that Rascoe used the photograph to identify Defendant and Grey. Before the trial court admitted the photograph for this purpose, Detective Gillen testified as to how Rascoe located the photograph and used it to identify Defendant and Grey, authenticating the photograph pursuant to Rule 901(b)(1) of the North Carolina Rules of Evidence. Thereafter, the trial judge properly instructed the jury that it was only to consider the photograph for its limited purpose: illustrating and explaining Detective Gillen's testimony. The photograph was relevant to the victim's identification of Defendant, and it was not unduly prejudicial. Therefore, the admission of the photograph was proper. While Defendant correctly notes that we have not considered the "prejudice involved with photographs depicting a suspect making the gesture known as 'the middle finger'," we do not conclude, given the evidence in this case, that such a picture, admitted for illustrative purposes, had a probable impact on the jury's verdict. *See Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (articulating the plain error standard of review). Therefore, we conclude that the trial court committed no error, much less plain error, in admitting the photograph for illustrative purposes.

III. Cumulative Error

Defendant avers that the trial court deprived Defendant of his due process right to a trial free from prejudicial error by limiting Defendant's cross-examination of Rascoe and admitting the illustrative picture of Defendant and Grey. We disagree. As explained above, the trial court did not err in the rulings Defendant raises as issues on appeal. Therefore, Defendant's argument has no merit.

IV. Criminal Street Gang Activity Finding

[3] During sentencing, the State requested "gang restrictions" as follows:

> [State]: The Defendant . . . has been validated by the Division of Adult Corrections as being a Blood gang member, *so we*

> *would ask for gang restrictions*. Mr. Grey, the co-defendant in this case . . . [is] also a Blood gang member, so that's definitely gang affiliation *that played a part in this*, your Honor. We would ask that you sentence accordingly.
>
> [Court]: All right, Madam Clerk, judgment in file number 14 CRS 59021. Stand up, sir. The Defendant having been found guilty of robbery with a dangerous weapon, it's a Class D felony. The Court determines prior record points to be 4, prior record level II. The sentence is in the presumptive range. The Court orders that the Defendant be in prison for a term of 65 to 90 months in the custody of the North Carolina Department of Corrections. The Defendant be given credit for any time spent in confinement prior to the date of this judgment. The Court *upon the finding of gang affiliation orders gang restrictions* . . . [.]

(Emphasis added). The Judgment includes a finding that the "offense(s) involved criminal street gang activity."

Defendant argues that the trial court erred by finding that the offense committed by Defendant involved criminal street gang activity pursuant to Section 14-50.25 of the North Carolina General Statutes. The record contains no evidence that supports the conclusion that Defendant's crime involved criminal street gang activity. The State agrees; however, it argues that the finding did not amount to error or plain error because the finding was a clerical error. We agree with Defendant that this was a judicial error and not a clerical error, and therefore we cannot remand the case as clerical error.

"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" and "include[s] mistakes such as inadvertent checking of boxes on forms or minor discrepancies between oral rulings and written orders." *In re D.D.J.*, 177 N.C. App. 441, 444, 628 S.E.2d 808, 811 (2006) (internal quotation and citations omitted). Trial court judges have the authority to correct "[c]lerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission[.]" N.C.G.S. § 1A-1, Rule (60)(a) (2015). However, trial courts do not have the power "to affect the substantive rights of the parties or correct substantive errors in their decisions." *Hinson v. Hinson*, 78 N.C. App. 613, 615, 337 S.E.2d 663, 664 (1985).

A clerical error did not occur here. The trial judge announced in open court that the court ordered gang restrictions "upon the finding

of gang affiliation." He made this determination immediately after the State remarked that Defendant's alleged gang affiliation "played a part in this." Following the State's assertion and the trial judge's order, the Judgment reflected the judicial determination that gang activity played a part in the crime through a criminal street gang activity finding pursuant to N.C.G.S. § 14-50.25. As the error resulted from a judicial determination, the case cannot be remanded as a clerical error.

[4] Accordingly, we address the trial court's error. Even though Defendant did not object to this error at sentencing, we may review this error as preserved because "[a]n error at sentencing is not considered an error at trial for the purpose of [North Carolina Rule of Appellate Procedure] 10(b)(1)[.]" *State v. Curmon*, 171 N.C. App. 697, 703, 615 S.E.2d 417, 422 (2005).

[5] N.C.G.S. § 14-50.25 provides that when a defendant is found guilty of a criminal offense relevant to the statute "the presiding judge shall determine whether the offense involved criminal street gang activity." If the judge makes this determination, then he "shall indicate on the form reflecting the judgment that the offense involved criminal street gang activity." N.C.G.S. § 14-50.25. We have previously held that "making a finding of criminal street gang activity [is] a 'substantive change' in [a judgment.]" *State v. Dubose*, 208 N.C. App. 406, 413, 702 S.E.2d 330, 335 (2010).

Determinations assigned to the trial judge are generally reviewed for abuse of discretion. *See, e.g.*, *State v. McGrady*, 368 N.C. 880, 893, 787 S.E.2d 1, 11 (2016) (reviewing a trial judge's determination as to whether the proffered expert testimony qualified under North Carolina Rule of Evidence 702(a)); *State v. Ford*, ___ N.C. App. ___, ___, 782 S.E.2d 98, 103 (2016) (reviewing a trial judge's determination as to North Carolina Rule of Evidence 403); *State v. Smith*, 241 N.C. App. 619, ___, 773 S.E.2d 114, 118-19, *review denied*, 368 N.C. 355, 776 S.E.2d 857 (2015) (reviewing a trial court judge's decision to permit a withdrawal of counsel).

The statute assigns the trial judge the task of determining whether the offense involved criminal street gang activity. The trial judge here determined that the offense involved criminal street gang activity even though there was no evidence presented at trial supporting the trial judge's decision. Therefore, because the trial judge based this determination on no evidence, he abused his discretion by making the criminal street gang activity finding. *See State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986) ("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.") Thus, we remand for a new sentencing hearing to be conducted without the finding that the offense involved criminal street gang activity.

Defendant requests that we apply Rule 2 to invalidate N.C.G.S. § 14-50.25 on constitutional grounds.[1] However, it is well-established that our Court will not decide a constitutional question when a case may be disposed on other grounds. *Dubose*, 208 N.C. App. at 413, 702 S.E.2d at 335. Thus, we decline to reach this issue, reserving the review of N.C.G.S. § 14-50.25's constitutionality for a later decision.

Conclusion

Finding no error as to the exclusion of an unauthenticated Facebook screenshot and no plain error in admitting a picture used during the identification of Defendant, we do not find any cumulative error requiring a new trial. Having resolved the evidentiary judicial error as to criminal street gang activity, we need not reach the constitutionality of the statute. For the reasons stated above, the judgment of the trial court is affirmed in part; and remanded for a new sentencing hearing consistent with this opinion.

NO ERROR IN PART; VACATED AND REMANDED IN PART FOR A NEW SENTENCING HEARING.

Judges CALABRIA and DIETZ concur.

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1. Defendant argues that N.C.G.S. § 14-50.25 is unconstitutional on its face and as applied to Defendant because it requires a judge to make factual findings that enhance the penalty for a crime in violation of the Fifth and Sixth Amendments to the United States Constitution, citing *Apprendi v. New Jersey*, 530 U.S. 466, 476, 147 L. Ed. 2d 435 (2000) in support of his argument. The State declined to brief this issue, claiming that the constitutionality of this statute does not need to be addressed in this appeal because the error was clerical. However, as discussed above, this error was clearly judicial.

WILSON v. GUINYARD

[254 N.C. App. 229 (2017)]

MARILYN LATRIECE WILSON, PLAINTIFF
v.
MARK ANTHONY GUINYARD, DEFENDANT

No. COA16-1277

Filed 20 June 2017

1. Attorneys—fees—contempt

The trial court did not err in a contempt proceeding arising from a child visitation dispute by not inquiring into defendant's desire for or ability to pay for legal representation. Defendant never represented that he was indigent or requested that the trial court appoint him an attorney prior to the hearing. He received notice of the hearing several months prior to the scheduled date and signed a motion to allow his retained counsel to withdraw.

2. Contempt—willful—child visitation

The evidence supported the findings, which supported the conclusions of willful contempt in a child visitation dispute, where defendant was habitually late for weekend pickups and drop-offs. Defendant was late for over forty exchanges and was over two hours late for several exchanges. Although the prior orders allowed for unforeseen circumstances as long as appropriate notice was given, scheduled meeting times and appointments were not suggestions.

3. Contempt—willful—child visitation—purge conditions

The trial court did not improperly modify a prior child custody order or impose improper purge conditions in an action arising from a dispute about child visitation exchanges. The purge provisions did not constitute a modification of custody, and they specified what defendant could and could not do to purge himself of contempt.

4. Attorneys—fees—requisite findings not made

The trial court abused its discretion in a willful contempt proceeding arising from a dispute over child visitation by awarding attorney fees to plaintiff without making the requisite findings.

Appeal by defendant from order entered 8 August 2016 by Judge Fred S. Battaglia, Jr. in Durham County District Court. Heard in the Court of Appeals 15 May 2017.

Edward J. Falcone for plaintiff-appellee.

The Blain Law Firm, PC, by Sabrina Blain, for defendant-appellant.

TYSON, Judge.

Mark Anthony Guinyard ("Defendant") appeals from order finding him in civil contempt. We affirm in part, vacate in part, and remand.

I. Factual Background

Defendant and Marilyn Latriece Wilson ("Plaintiff") share joint legal custody of their son, who was thirteen at the time the contempt order was entered. Plaintiff has primary physical custody and lives in Durham, North Carolina. Defendant has secondary physical custody in the form of visitation and lives in Charleston, South Carolina. Defendant's visitation includes two weekends a month to be exercised at Defendant's discretion, so long as he gives proper notice.

In relevant part, the 2011 child custody order provides:

> **j) The parties may mutually agree to change these visitation times to accommodate their schedules and for the benefit of the minor child but the change must be mutual.** (emphasis original)
>
> 11. The Plaintiff and the Defendant shall meet at South of the Border Amusement Park . . . to facilitate visitation between the minor child and the Defendant. And if at any time except for good cause shown (such as serious illness of child etc) that exchange does not occur, round trip gas expenses and hotel expenses in the amount of 279.00 are due by the end of the following week in addition to being subject to contempt of court.
>
> 16. Failure to abide by the terms of this order is grounds for contempt[.]

This order was modified in part by a consent order entered in March 2014. The consent order provided:

> The exchange for visitation with the minor child will take place at 10:00 o'clock P.M. on Friday night and 7:00 o'clock P.M. on Sunday night.

> 2. If for any reason there is a delay in the exchanged meeting time due to unforeseen circumstances, which arise before the parties have to leave for the custody exchange, the party delayed will text the other party at least two (2) hours in advance as to the circumstances causing their inability to meet at the designated time as well as to let the other party know when they would be available to make the exchange;
>
> 3. If any delays arise while the parties are on the road traveling to the exchange point, the party delayed will text the other party immediately with the same information referenced in the previous paragraph[.]
>
> 4. All other terms of the previous Order of the Court will remain in full force and effect.

Plaintiff filed a motion for contempt on 12 February 2016. The motion alleged Defendant had been "habitually late," and detailed a specific instance where their son missed a day of school after an exchange was missed on the Sunday of the Super Bowl. The hearing on the motion was scheduled for 11 July 2016.

After receiving notice of the contempt motion, Defendant requested his current attorney to withdraw from representation and signed his consent to a motion for his counsel to withdraw on 20 May 2016. On 7 July 2016, Defendant filed a motion to continue the hearing, asserting as grounds that he needed to hire an attorney to represent him. This motion was denied. The motion to withdraw consented to by Defendant was brought before the court and granted on 11 July 2016, prior to the contempt hearing.

At the hearing, Plaintiff testified she often had to text Defendant to determine whether he was on schedule. She testified since she was "generally waiting on him," she would usually wait to leave her home in Durham until she had confirmed Defendant was leaving Charleston. Plaintiff presented evidence tending to show Defendant had arrived late to over forty exchanges between May 2014 and February 2016. Defendant arrived over two hours late on several of these occasions.

Plaintiff testified Defendant made the following excuses for arriving late: (1) he was simply "running behind;" (2) a fast food restaurant messed up his order; (3) the kids needed to stop and use the bathroom; (4) he was waiting on a driver; or, (5) he was running late from work.

Defendant testified he was late to the various exchanges, "[b]ecause things happen, life happens" and because their son wanted to continue playing. He testified he was in constant communication with Plaintiff regarding the exchange times.

Regarding the missed exchange on the Sunday evening of the Super Bowl, Defendant asserted Plaintiff texted him and their son throughout the Super Bowl, and that both of them asked Plaintiff if they could wait to leave until after the game was over. After the game ended, Defendant testified he texted Plaintiff around 10 p.m. to ask whether she was ready to meet him, and asserted he and their son were in the truck ready to leave. Defendant testified they did not meet that night because Plaintiff said she was already in bed.

Plaintiff testified she and Defendant agreed prior to the Super Bowl party that Defendant would leave at 8:30 p.m. to meet Plaintiff at the exchange location. On cross-examination, Plaintiff's counsel presented text messages to refresh Defendant's recollection of the times and content of Plaintiff's text messages to him. These texts demonstrated Plaintiff had texted Defendant several times throughout the evening, including at 8:30 p.m. to see if Defendant had left as agreed upon. Between 11:00 p.m. and 11:20 p.m., Plaintiff again asked Defendant if he had left to meet her at the exchange location. When she did not receive a response and had to work the following morning, she sent the message "I'm going to bed."

Because the exchange did not occur Sunday night, their son missed attending school the next day. When Plaintiff requested a 7:00 p.m. exchange time Monday evening, Defendant responded he would meet her after he got off work. Plaintiff and her son did not arrive home in Durham until 1:15 a.m. Tuesday morning, where she had to work the following morning and their son had to attend school. Based upon the evidence presented, the trial court found Defendant in civil contempt of the child custody order. Defendant appeals.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 5A-24 (2015).

III. Issues

Defendant argues the trial court erred by: (1) failing to inquire into his desire for and ability to pay for legal representation, (2) finding him in civil contempt, (3) improperly modifying the custody order and

imposing improper purge conditions, and (4) abusing its discretion in awarding Plaintiff attorney's fees.

IV. Legal Representation

[1] Defendant argues the trial court erred when it failed to inquire into his desire for and ability to pay for legal representation.

A. Standard of Review

"Under the requirements of due process, a defendant should be advised of his or her right to have appointed counsel where the defendant cannot afford counsel on his own, and 'where the litigant may lose his physical liberty if he loses the litigation.' " *King v. King*, 144 N.C. App. 391, 393, 547 S.E.2d 846, 847 (2001) (quoting *Lassiter v. Dept. of Social Services of Durham Cty., N.C.*, 452 U.S. 18, 25, 68 L.Ed.2d 640, 648 (1981)). The burden of proof is on the litigant facing contempt to show "(1) he is indigent, and (2) his liberty interest is at stake." *Id.*

B. Analysis

This Court has held, "[i]n civil contempt proceedings, the question whether an indigent, alleged contemnor is entitled to counsel under the Due Process Clause of the Fourteenth Amendment to the United States Constitution is a determination made on a case-by-case basis." *Tyll v. Berry*, 234 N.C. App. 96, 101, 758 S.E.2d 411, 415 (2014); *see Hodges v. Hodges*, 64 N.C. App. 550, 552, 307 S.E.2d 575, 577 (1983) ("When a civil proceeding may result in imprisonment, due process requirements are met by evaluating the necessity for appointed counsel on a case-by-case basis."). "[A]ppointment of counsel for indigents is required only where assistance of counsel is necessary for an adequate presentation of the merits, or to otherwise insure fundamental fairness." *Hodges*, 64 N.C. App. at 552, 307 S.E.2d at 577 (citation and internal quotation marks omitted).

Defendant cites a recent case from this Court to support the contention that "[w]here a defendant faces the potential of incarceration if held in contempt, the *trial court must inquire* into the defendant's desire for and ability to pay for counsel to represent him as to the contempt issues." *D'Allessandro v. D'Allessandro*, 235 N.C. App. 458, 462, 762 S.E.2d 329, 332 (2014) (emphasis supplied) (citing *King v. King*, 144 N.C. App. 391, 394-95, 547 S.E.2d 846, 848 (2001)); *see also McBride v. McBride*, 334 N.C. 124, 131, 431 S.E.2d 14, 19 (1993) (holding the "principles of due process embodied in the Fourteenth Amendment require that, absent the appointment of counsel, indigent civil contemnors may not be incarcerated for failure to pay child support arrearages").

However, these cases relate specifically to civil contempt proceedings for nonsupport. Our Courts have held in cases for nonsupport:

> [w]hen a truly indigent defendant is jailed pursuant to a civil contempt order which calls upon him to do that which he cannot do -- to pay child support arrearage which he is unable to pay -- the deprivation of his physical liberty is no less than that of a criminal defendant who is incarcerated upon conviction of a criminal offense.

McBride, 334 N.C. at 130-31, S.E.2d at 19.

Here, Defendant was held in civil contempt for his failure to comply with provisions of the custody order regarding the exchange time for weekend visitations. Defendant has the ability to comply with the purge conditions as imposed and the instant case presents no "unusually complex issues of law or fact which would necessitate the appointment of counsel." *Hodges*, 64 N.C. App. at 553, 307 S.E.2d at 577.

Defendant received notice of the hearing several months prior to the scheduled date, at which time he was represented by retained counsel. On 20 May 2016, Defendant consented to and signed a motion to allow his retained counsel to withdraw. The motion indicated Defendant did "not wish for her to represent him on the current [contempt] motion and desires that she withdraw." On 7 July 2016, Defendant filed a motion to continue the hearing because he was "in the process of retaining an attorney to represent [his] case." The trial court denied this motion.

The trial court granted Defendant's attorney's motion to withdraw at the beginning of the scheduled hearing, but only after the court confirmed with Defendant that he had requested and consented to his counsel's withdrawal. The trial court also confirmed that Defendant was aware the court had denied his motion to continue. The record shows Defendant: (1) had retained his prior counsel; (2) was aware of the pending contempt motion when he consented to his counsel withdrawing; (3) owns his own business in South Carolina; and, (4) spent funds to host a Super Bowl party.

Defendant never represented he was indigent nor requested the trial court to appoint him an attorney prior to or during the hearing. After reviewing the entire record and the nature of the case, the trial court did not err by failing to inquire into Defendant's desire for or ability to pay for legal representation. *See Hodges*, 64 N.C. App. at 552, 307 S.E.2d at 577. Defendant's argument is overruled.

V. Contempt Order

[2] Defendant argues the trial court's findings of fact do not support the conclusion that Defendant was in willful contempt of the prior custody order. Defendant further argues the trial court improperly modified the underlying custody order and imposed improper purge conditions.

A. Standard of Review

The standard of review of orders from contempt proceedings is limited to determining whether competent evidence supports the findings of fact and whether those findings support the conclusions of law. *Sharpe v. Nobles*, 127 N.C. App. 705, 709, 493 S.E.2d 288, 291 (1997). Where the admitted evidence supports the trial court's findings, those findings are binding on appeal "even if the weight of the evidence might sustain findings to the contrary." *Hancock v. Hancock*, 122 N.C. App. 518, 527, 471 S.E.2d 415, 420 (1996). "[T]he credibility of the witnesses is within the trial court's purview." *Scott v. Scott*, 157 N.C. App. 382, 392, 579 S.E.2d 431, 438 (2003).

B. Findings of Fact and Conclusions of Law

N.C. Gen. Stat. § 5A-21(a) (2015) provides:

> (a) Failure to comply with an order of a court is a continuing civil contempt as long as:
>
> (1) The order remains in force;
>
> (2) The purpose of the order may still be served by compliance with the order;
>
> (2a) The noncompliance by the person to whom the order is directed is willful; and
>
> (3) The person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order.

"The purpose of civil contempt is to coerce the defendant to comply with a court order, not to punish him." *Scott*, 157 N.C. App. at 393, 579 S.E.2d at 438. "A failure to obey an order of a court cannot be punished by contempt proceedings unless the disobedience is [willful], which imports knowledge and a stubborn resistance." *Mauney v. Mauney*, 268 N.C. 254, 257, 150 S.E.2d 391, 393 (1966). The trial court is also required to make a specific finding regarding "the defendant's ability to comply

during the period in which he was in default." *Scott*, 157 N.C. App. at 394, 579 S.E.2d at 439.

Here, the trial court found Defendant had "refused to comply with the terms of the Court's prior orders by being habitually late for weekend pickups and drop-offs." The trial court's Findings of Fact 4 through 10 detail the circumstances surrounding the Super Bowl party and their son missing the following day of school. Findings of Fact 11 and 12 provide:

> 11. That the Defendant has an automobile, a driver's license, and other potential drivers available who could have taken the minor child to the drop-off point in a timely manner for the exchange of the minor child;
>
> 12. That the Defendant had the ability to comply with the Court's prior Orders, and the Defendant willfully disobeyed those Orders[.]

Defendant argues these findings do not support the conclusion of law that "Defendant is in willful contempt of the prior Orders of the Court," and asserts the order allows even habitual lateness. We disagree.

We acknowledge the orders allow for delays due to "unforeseen circumstances," so long as the appropriate notice is given. However, the trial court's findings and the evidence on the record do not demonstrate that Defendant's habitual lateness resulted from "unforeseen circumstances." The record shows Defendant was late due to bathroom stops, incorrect fast food orders, and simply because, in Defendant's own words, "things happen, life happens." The trial court did not err by holding Defendant was in contempt of the previous order based on this evidence.

The findings regarding the Super Bowl party alone would support an order holding Defendant in contempt. The original order provides either party may be held in contempt "if at any time except for good cause shown (such as serious illness of child) [an] exchange does not occur[.]" Pursuant to the orders, the parties may agree to different times for visitation.

In this case, the evidence supports the trial court's finding that although the parties agreed Defendant would leave the Super Bowl party at 8:30 p.m. to meet for the exchange, Defendant refused to leave at the agreed upon time and, as a result, the exchange did not occur.

In Findings of Fact 11 and 12, the trial court made the requisite findings regarding Defendant's ability to comply and that Defendant's

noncompliance was willful, and these findings were supported by the evidence. Compliance with scheduled meeting times and appointments are not "suggestions" or "discretionary." Other individuals' work and school schedules and appointments are equally, if not more, important as Defendant's, particularly when those required exchange times are established by court order.

The order provides flexibility for unusual circumstances and unexpected delays, which Defendant clearly and repeatedly abused. Plaintiff's evidence tended to show Defendant had arrived late to over forty exchanges between May 2014 and February 2016. Defendant arrived over two hours late on several of these occasions. The trial court's findings are supported by competent evidence, and those findings support the trial court's conclusion that Defendant was in willful contempt of the prior orders of the court. *See Sharpe*, 127 N.C. App. at 709, 493 S.E.2d at 291.

C. Improper Modification and Purge Conditions

[3] Under N.C. Gen. Stat. § 50-13.7(a) (2015), "an order of a court of this State for custody of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested." "The trial court may modify custody only upon motion by either party or anyone interested. The trial court may not *sua sponte* enter an order modifying a previously entered custody decree." *Kennedy v. Kennedy*, 107 N.C. App. 695, 703, 421 S.E.2d 795, 799 (1992) (internal citation and quotations omitted).

This Court has noted:

> When the court modifies custody or visitation because of violations of a visitation order, it must be careful not to confuse the purposes of modification and contempt. The court modifies custody or visitation because substantial changes in circumstances have made a different disposition in the best interest of the child. A custodian should not violate the visitation order, but if he or she does, then ordinarily the proper response is a finding of contempt, not modification.

Jackson v. Jackson, 192 N.C. App. 455, 463-64, 665 S.E.2d 545, 551 (2008); *see* 3 Suzanne Reynolds, *Lee's North Carolina Family Law* § 13.52 (5th ed. 2002) (when a custody order is violated "ordinarily the proper response is a finding of contempt, not modification").

Under N.C. Gen. Stat. § 5A-22(a) (2015), a contempt order "must specify how the person may purge himself of the contempt." The purge conditions cannot be impermissibly vague, but must "clearly specify what the defendant can and cannot do . . . in order to purge herself of the civil contempt." *Cox v. Cox*, 133 N.C. App. 221, 226, 515 S.E.2d 61, 65 (1999).

Here, the trial court provided that Defendant could purge himself of contempt by both picking up and dropping off their son in Durham for the next three weekend visits. The Court further provided that if Defendant was more than thirty minutes late to either pick up or drop off Mark, a weekend visitation would be forfeited. These provisions do not constitute a modification of custody. *See Tankala v. Pithavadian*, __ N.C. App. __, __, 789 S.E.2d 31, 33 (2016) (holding a trial court's order providing additional dates and locations for custodial visitation not inconsistent with the governing child custody order is not a modification of the terms of custody).

Permanent joint legal custody and secondary physical custody remained with Defendant both before and after the contempt order. These provisions more specifically identify what Defendant can and cannot do regarding the visitation times in order to purge himself of the civil contempt and insure Defendant's compliance with the previous court orders. *See Cox*, 133 N.C. App. at 226, 515 S.E.2d at 65; *Scott*, 157 N.C. App. at 394, 579 S.E.2d at 439. The trial court did not improperly modify custody or impose improper purge conditions.

VI. Attorney's Fees

[4] Defendant argues the trial court abused its discretion when it awarded Plaintiff attorney's fees.

Prior to an award of attorney's fees under N.C. Gen. Stat. § 50-13.6, the trial court must receive evidence and make findings that: (1) the interested party was acting in good faith; and (2) the interested party had insufficient means to defray the expense of that suit. *Wiggins v. Bright*, 198 N.C. App. 692, 696, 679 S.E.2d 874, 877 (2009) (upholding an award of attorney's fees to defendant where plaintiff filed a frivolous contempt action). Under N.C. Gen. Stat. § 50-13.6, the trial court's order must also include findings "upon which a determination of the requisite reasonableness can be based[.]" *Davignon v. Davignon*, __ N.C. App. __, __, 782 S.E.2d 391, 397 (2016) (quotation marks and citation omitted). If the court fails to make the necessary findings, we are effectively precluded "from determining whether the trial court abused its discretion

in setting the amount of the award." *Williamson v. Williamson*, 140 N.C. App. 362, 365, 536 S.E.2d 337, 339 (2000).

Here, the trial court failed to make any of the requisite findings necessary to award attorney's fees. We vacate the trial court's award of attorney's fees to Plaintiff and remand for further findings consistent with this opinion. *Wiggins*, 198 N.C. App. at 696-97, 679 S.E.2d at 877.

VII. Conclusion

After reviewing the entire record, and in the absence of any request by Defendant, the trial court did not err by failing to inquire into Defendant's desire or ability to pay for legal representation. Competent evidence supports the findings of fact, which support the trial court's conclusion that Defendant's actions were in willful contempt of the prior orders of the court. Furthermore, the contempt order does not improperly modify custody or impose improper purge conditions. These portions of the trial court's order are affirmed.

We vacate the award of attorney's fees and remand to the trial court to make the necessary findings as required by law. *See Wiggins*, 198 N.C. App. at 696-97, 679 S.E.2d at 877. *It is so ordered.*

AFFIRMED IN PART; VACATED IN PART; AND REMANDED.

Chief Judge McGEE and Judge INMAN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 20 JUNE 2017)

BANK OF N.C. v. 15 RIVER PROJECT, LLC No. 16-1266	Guilford (15CVS1370)	Affirmed
ELLISON v. ELLISON No. 16-914	Ashe (13CVD261)	Vacated and Remanded
IN RE A.K. No. 16-837	Rockingham (15JA97-98)	Affirmed in part and dismissed in part.
IN RE FORECLOSURE OF BOEHM No. 16-299	Buncombe (13SP258)	Dismissed
IN RE J.L.T. No. 16-1242	Wilkes (15JA199) (15JA200)	Affirmed in part, reversed in part
IN RE K.J. No. 17-138	Orange (14JT42)	Affirmed
IN RE N.A.P. No. 17-160	Wake (14JT363)	Affirmed
IN RE R.T.W. No. 16-1132	Mecklenburg (15JT667)	Affirmed
MAITRA v. QUARTER MILE MUSCLE, INC. No. 16-338	Iredell (14CVS812)	Affirmed
McLEOD v. McLEOD No. 16-871	Iredell (15CVD202)	Vacated and Remanded
PAGE v. McCABE No. 16-1143	Wake (10CVD17706) (13CVD4391)	Vacated and Remanded
PENNEY v. UNC HOSPS. No. 16-1166	N.C. Industrial Commission (13-702297)	Affirmed
RAGAVAGE v. CITY OF WILMINGTON No. 16-1028	New Hanover (15CVS939)	Affirmed

RMAH v. UNITED SERVS. AUTO. ASS'N No. 16-848	Wake (16CVD2057)	Dismissed
RMAH v. USAA CAS. INS. CO. No. 17-131	Wake (16CVD2057)	Dismissed
STATE v. BROWN No. 16-1044	Orange (12CRS53176)	Affirmed
STATE v. DUNLAP No. 16-1063	Anson (15CRS50345) (15CRS50376)	Vacated and Remanded for Resentencing
STATE v. EVANS No. 16-1216	Mecklenburg (14CRS229898-899)	No Error
STATE v. GILCHRIST No. 16-956	Mecklenburg (15CRS16968) (15CRS204994) (15CRS204995) (15CRS206987)	No Plain Error
STATE v. GONZALEZ No. 16-1325	Mecklenburg (14CRS233044) (14CRS233045) (14CRS233047)	No Error
STATE v. JOHNSON No. 16-954	Craven (14CRS53685-87) (15CRS607)	No Prejudicial Error in Part; Dismissed Without Prejudice in Part
STATE v. LAFORTUNA No. 16-1000	Guilford (12CRS86278)	No Error
STATE v. LANIER No. 16-1069	Henderson (15CRS53167)	No Error
STATE v. McCRAY No. 16-1224	Forsyth (14CRS742559)	No Error
STATE v. MELTON No. 16-1088	Transylvania (15CRS38) (15CRS50221)	No Error
STATE v. PHLOYKAEW No. 16-1148	Forsyth (15CRS53535)	Dismissed

STATE v. RHOM No. 16-929	Burke (15CRS51241) (15CRS862)	No Error in Part; Dismissed Without Prejudice in Part
STATE v. TAYLOR No. 16-1105	Pitt (14CRS53439)	No Error
TUCKER v. CLERK OF CT. OF FORSYTH CTY. EX REL FRYE No. 16-926	Forsyth (15CVS6015)	Dismissed

FARQUHAR v. FARQUHAR

[254 N.C. App. 243 (2017)]

BEVERLY SHOOK FARQUHAR, PLAINTIFF
v.
PETER MICHAEL FARQUHAR, DEFENDANT

No. COA16-1271

Filed 5 July 2017

Jurisdiction—subject matter—alimony—equitable distribution—divorce judgment—two marriages between parties—Rule 41(a)

In an action involving a couple who married and divorced twice, the trial court did not err by dismissing plaintiff wife's alimony and equitable distribution claims that were still pending after their first divorce. When the parties reconciled and entered into a second marriage, they entered into a joint voluntary dismissal of their pending claims. N.C.G.S. § 1A-1, Rule 41(a) provides that a new action asserting those claims had to be refiled within one year of the joint dismissal; the time for the claims was not tolled by the second marriage.

Appeal by plaintiff from order entered 20 July 2016 by Judge Susan R. Burch in Guilford County District Court. Heard in the Court of Appeals 17 May 2017.

Martha C. Massie for plaintiff-appellant.

Black Slaughter & Black, P.A., by Ashley D. Bennington, for defendant-appellee.

ZACHARY, Judge.

Plaintiff Beverly Farquhar (Beverly) appeals from an order dismissing her claims for alimony and equitable distribution pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure. For the reasons that follow, we affirm the district court's order of dismissal.

I. Background

Beverly and defendant Peter Farquhar (Peter) have married each other on two separate occasions. The parties were first married on 30 December 1993, and they separated approximately ten years later, on 24 January 2003. In February 2003, Beverly filed an action in Caldwell County District Court for divorce from bed and board, equitable distribution, post-separation support, alimony, and attorneys' fees (the

Caldwell County action). Three months later, Peter filed an answer in the Caldwell County action along with his own counterclaim for equitable distribution.

Beverly and Peter were divorced pursuant to a judgment entered 23 April 2004. However, Beverly's claims for alimony and equitable distribution as well as Peter's claim for equitable distribution were not resolved in any manner by the divorce judgment. All of those claims were pending in May 2005, when the parties decided to remarry. Shortly after entering their second marriage, Beverly and Peter entered into a joint voluntary dismissal of their pending claims. The joint dismissal was filed on 26 August 2005.

Beverly and Peter's second marriage lasted approximately ten years. However, on 16 February 2015, Peter filed a verified complaint in Guilford County District Court seeking divorce from bed and board, injunctive relief, and return of separate property accumulated during the second marriage. The parties then separated for the second time on or about 1 April 2015. Two weeks later, Beverly filed an answer to Peter's complaint, which included counterclaims for divorce from bed and board, post-separation support, alimony, equitable distribution, and attorneys' fees. On 3 December 2015, Beverly filed a verified complaint in Guilford County Superior Court alleging claims for equitable distribution, alimony, and attorneys' fees related to the parties' first marriage.

On 30 December 2015, Peter filed a motion to dismiss Beverly's claims arising out of the first marriage pursuant to Rules 12(b)(1) and (6) of the North Carolina Rules of Civil Procedure. The gravamen of Peter's motion was that the trial court lacked jurisdiction over Beverly's complaint because the claims arising out of the first marriage were voluntarily dismissed after the parties' second marriage and were not refiled within one year of their dismissal, as required by Civil Procedure Rule 41(a). For the same reasons, Peter contended that Beverly's complaint failed to state claims upon which relief could be granted.

After hearing the motion to dismiss on 18 February 2016, and then reconvening on 21 April 2016, the Honorable Susan R. Burch concluded that Beverly's complaint was barred by the application of Rule 41(a), which required her claims for alimony and equitable distribution arising of out the first marriage to be refiled within one year of their dismissal. According to Judge Burch, this was so even though the parties had remarried before filing the joint voluntary dismissal. On 20 July 2016, the district court entered an order that memorialized its oral ruling, concluded that the court lacked subject matter jurisdiction over the claims

set forth in Beverly's complaint, and granted Peter's motion to dismiss. Beverly now appeals from the dismissal of her complaint.

II. Standard of Review

"Subject matter jurisdiction refers to the power of the court to deal with the kind of action in question [and] is conferred upon the courts by either the North Carolina Constitution or by statute." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987) (citations omitted). An order granting a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction is subject to *de novo* review. *Burgess v. Burgess*, 205 N.C. App. 325, 327, 698 S.E.2d 666, 668 (2010). "Under the *de novo* standard of review, this Court 'considers the matter anew and freely substitutes its own judgment for that of the [trial court].' " *Id.* (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. Discussion

Rule 41(a) of the North Carolina Rules of Civil Procedure provides, in pertinent 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 . . . (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. . . . 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. . . .

"Rule 41(a)(1) extends the time within which a party may refile suit after taking a voluntary dismissal when the refiled suit involves the same parties, rights and cause of action as in the first action." *Holley v. Hercules*, Inc., 86 N.C. App. 624, 628, 359 S.E.2d 47, 50 (1987).

On appeal, Beverly acknowledges the general rule contained in Rule 41(a), but maintains that the unique factual circumstances of this case present a "loophole." Beverly contends that because the parties' second marriage occurred before the joint voluntary dismissal was filed in August 2005, she lacked the ability to refile her alimony and equitable distribution claims based on the parties' first marriage. According to Beverly, Rule 41(a)'s one-year savings provision was therefore tolled during the parties' second marriage, as she had no ability to refile her claims arising out the first marriage. We disagree.

As a general rule, a judgment for absolute divorce destroys a spouse's right to seek equitable distribution or alimony unless those claims are pending at the time that the divorce judgment is entered. N.C. Gen. Stat. § 50-11(c), (e) (2015). In *Stegall v. Stegall*, however, our Supreme Court held that "if alimony and equitable distribution claims are properly asserted, whether by the filing of an action or raising of counterclaims, and are not voluntarily dismissed pursuant to Rule 41(a)(1) until after judgment of absolute divorce is entered, a new action based on those claims may be filed within the one-year period provided by the rule." 336 N.C. 473, 479, 444 S.E.2d 177, 181 (1994). Under *Stegall*, alimony and equitable distribution claims that are pending *at the time* a divorce judgment is entered and are then later voluntarily dismissed may nonetheless survive and may be refiled within the one year period established by Rule 41(a). *Id.* Having carefully reviewed the factual and procedural background in this case, we conclude that the rule announced in *Stegall* controls this case.

Here, Beverly's alimony and equitable distribution claims based on the first marriage were pending when the parties' divorce judgment was entered in the Caldwell County action on 23 April 2004. The joint dismissal, filed 26 August 2005, caused Beverly's alimony and equitable distribution claims (arising out of the first marriage) to be dismissed. Thus, under *Stegall*, Beverly had one year within which to refile those claims; however, Beverly chose not to do so. Because it is clear that the alimony and equitable distribution claims that Beverly filed against Peter in 2015 are the same claims that she filed in 2003 (that is, based on the first marriage), they were subject to Rule 41(a)'s restrictions and were barred by the Rule.

We are cognizant that Beverly (presumably) did not refile those claims because she had reconciled with Peter and entered into a second marriage with him. However, the rule in *Stegall* is clear—because the joint dismissal followed the entry of the divorce judgment, Beverly's claims for alimony and equitable distribution survived, but a new action asserting those claims had to be re-filed within one year of the joint dismissal. Beyond that, we refuse to hold that when alimony and equitable distribution claims based on a first marriage are voluntarily dismissed after a divorce judgment, those claims are indefinitely tolled by a second marriage of the parties so that they may be tucked away and used as a sword in a hypothetical, future action. Beverly's 2015 claims for alimony and equitable distribution arising out the first marriage were barred by the application of Rule 41(a). Accordingly, the district court lacked subject matter jurisdiction to adjudicate those claims and they were properly dismissed.

IV. Conclusion

For the reasons stated above, we affirm the district court's order dismissing Beverly's claims for alimony and equitable distribution.

AFFIRMED.

Judges DILLON and BERGER, JR. concur.

BLAKE J. GEOGHAGAN, PLAINTIFF
v.
BERNADETTE M. GEOGHAGAN, DEFENDANT

No. COA16-766

Filed 5 July 2017

Divorce—equitable distribution—joinder of necessary parties—closely-held corporation—limited liability companies

An equitable distribution order was null and void where it did not include two limited liability companies that were subsidiaries to a corporation owned jointly by plaintiff and defendant. The subsidiaries were necessary parties.

Appeal by Plaintiff from judgment and order entered 12 December 2012 by Judge Christy T. Mann, and from order entered 12 February 2016 by Judge Alicia D. Brooks in District Court, Mecklenburg County. Heard in the Court of Appeals 9 February 2017.

Marshall & Taylor, PLLC, by Travis R. Taylor, for Plaintiff.

No brief for Defendant.

McGEE, Chief Judge.

Blake J. Geoghagan ("Plaintiff") appeals from an equitable distribution judgment and order ("equitable distribution order") that, *inter alia*, limited the distributions and amount of compensation he could receive from Blake Bern Partners, Inc. ("BBPI"), a closely-held corporation he jointly owned with his then-wife, Bernadette M. Geoghagan ("Defendant"). Plaintiff also appeals from an order denying his motion for relief from the equitable distribution order, pursuant to the grounds

for relief set out in N.C. Gen. Stat. § 1A-1, Rule 60 ("Rule 60 order"). We vacate both orders and remand for further proceedings.

I. Background

Plaintiff and Defendant were married on 5 April 1997. During their marriage, Plaintiff and Defendant each acquired fifty percent of the outstanding stock in BBPI, a Florida corporation "formed for the principal purpose of developing, opening and operating a series of franchised restaurants known as Five Guys Burgers and Fries" ("Five Guys") in Florida's panhandle region. BBPI was incorporated in 2006, and the corporation was the sole member of four limited liability companies (the "subsidiary LLCs"). Plaintiff acted as the manager of each of the subsidiary LLCs of which BBPI was a member.

Plaintiff filed a complaint against Defendant on 15 October 2009 in Mecklenburg County District Court seeking, *inter alia*, custody of their four children, child support, and equitable distribution of the marital estate and other divisible property and debt. Defendant filed an answer on 11 January 2010, along with counterclaims for child custody, child support, post-separation support, alimony, equitable distribution of marital and divisible property and debts, and attorney's fees. A trial was conducted on Plaintiff's and Defendant's claims for equitable distribution in June and July of 2012, and the trial court entered the equitable distribution order on 12 December 2012. The equitable distribution order contains exhaustive findings of fact, conclusions of law, and orders on the debts and assets owned by Plaintiff and Defendant; we discuss only those relevant to the resolution of this appeal. The equitable distribution order contains numerous findings of fact regarding BBPI, including, *inter alia*, findings regarding the ownership of BBPI by Plaintiff and Defendant, the franchise and development agreement between Five Guys and BBPI, current operations of BBPI, and a valuation of BBPI.

Due to Plaintiff's "hands on" operation of BBPI and his experience in the restaurant industry, the trial court distributed all of the shares of BBPI to Plaintiff. The trial court found as fact that an unequal distribution of marital and divisible property was equitable, and it was necessary for Plaintiff to pay a distributive award to Defendant in the amount of $997,494.46 primarily because "the [fair market value] of BBPI," which was distributed to Plaintiff, "[was] greater than the [fair market value] of all other items of property combined, and because BBPI is a closely-held business entity" that Plaintiff and Defendant could not "jointly own and operate . . . in a cooperative manner." As the court had distributed BBPI to Plaintiff, it ordered Plaintiff to make "good faith efforts to substitute

himself for [Defendant] as guarantor of all debts and obligations of BBPI," and further ordered Plaintiff to "indemnify [Defendant], and hold her harmless, from all liability relating to" a bank loan made to BBPI, all BBPI leases, all agreements between BBPI and its various vendors, and all other debts and liabilities of BBPI.

If Plaintiff was unable to pay the $997,494.46 distributive award to Defendant by 15 April 2013, the trial court ordered that Plaintiff sell his ownership interests in BBPI to satisfy the award. The trial court further ordered that, "[u]ntil the distributive award is paid in full, [Plaintiff] shall not receive salary, bonuses, or other compensation from BBPI or [the subsidiary LLCs] in excess of $170,000.00 per year[,]" and that "[u]ntil the distributive award is paid in full, [Plaintiff] shall not receive any distributions from BBPI, except for reimbursement of expenses he incurs on behalf of BBPI, and except for repayment of loans from shareholder."

Proceedings on Plaintiff's and Defendant's remaining claims continued in the ensuing years. On 9 June 2015, Plaintiff filed a motion for relief from the equitable distribution order pursuant to N.C.G.S. § 1A-1, Rule 60 ("Rule 60 motion"). In Plaintiff's Rule 60 motion, he contended, *inter alia*, that, although BBPI was never made a party to the proceedings, "the [trial court] exerted significant control over [BBPI's] assets and operations[,]" and he asked the trial court to vacate the equitable distribution order. The trial court entered an order denying Plaintiff's Rule 60 motion on 12 February 2016, finding that, although BBPI was never made a party to the proceedings, "the failure to join BBPI in the trial is an issue of law that should be properly addressed on appeal." Plaintiff appeals.

II. Analysis: BBPI and the Subsidiary LLCs as Necessary Parties

Plaintiff argues the equitable distribution order must be vacated because it commands BBPI and the subsidiary LLCs to refrain from taking certain actions without joining them as necessary parties to the proceedings. We agree. A "necessary party" is a party that "is so vitally interested in the controversy involved in the action that a valid judgment cannot be rendered in the action completely and finally determining the controversy without [its] presence as a party." *Booker v. Everhart*, 294 N.C. 146, 156, 240 S.E.2d 360, 365-66 (1978) (citations omitted). This Court has also described a necessary party as "one whose interest will be directly affected by the outcome of the litigation." *Begley v. Employment Security Comm.*, 50 N.C. App. 432, 438, 274 S.E.2d 370, 375 (1981) (citations and quotation marks omitted). "When a complete determination of the matter cannot be had without the presence of other

parties, the court must cause them to be brought in." *Booker*, 294 N.C. at 156, 240 S.E.2d at 366.

In the present case, we find that BBPI and the subsidiary LLCs were necessary parties to the proceedings antecedent to the equitable distribution order. The equitable distribution order states that Plaintiff "shall not receive salary, bonuses, or other compensation from BBPI or [the subsidiary LLCs] in excess of $170,000.00 per year" and "shall not receive any distributions from BBPI," beyond those specifically listed in the order, "[u]ntil the distributive award is paid in full[.]" While couched in terms suggesting the equitable distribution order was directed at Plaintiff, the trial court clearly restricted the ability of BBPI and the subsidiary LLCs to act. Just as Plaintiff was not able to "receive salary, bonuses, or other compensation" in excess of $170,000.00, BBPI and the subsidiary LLCs were not able to pay salary, bonuses, or other compensation to Plaintiff above the listed amount; likewise, since Plaintiff was forbidden to "receive" a distribution from BBPI, BBPI could not issue a distribution to him. *See Campbell v. Campbell*, 241 N.C. App. 227, 232, 773 S.E.2d 93, 96 (2015) (holding that where a corporation was "effectively ordered" to take certain actions without being joined as a party to the proceedings, the order must be vacated). Because "a complete determination" of Plaintiff's and Defendant's equitable distribution claims could not be reached without the presence of BBPI and the subsidiary LLCs, the trial court was required to cause them to be added as parties to the action. *Booker*, 294 N.C. at 156, 240 S.E.2d at 366.

We recognize that BBPI is wholly owned by Plaintiff and Defendant, and the subsidiary LLCs are, in turn, owned by BBPI. However, "[a] corporation, even one closely held, is recognized as a separate legal entity . . . [even when its members are] engaged in litigation which is personal in nature[.]" *Quick v. Quick*, 305 N.C. 446, 460, 290 S.E.2d 653, 662 (1982). And as with a corporation, our courts "are not free, for the sake of convenience, to completely ignore the existence of a legal entity, such as [an] LLC." *Keith v. Wallerich*, 201 N.C. App. 550, 558, 687 S.E.2d 299, 304 (2009). As this Court has held,

> where a separate legal entity has not been made a party to an action, the trial court does not have the authority to order that entity to act. Moreover, even where a named party to an action is a member-manager of an LLC, the assets of which are contested in a pending equitable distribution action, the trial court exceeds its authority when it orders that named party to transfer the assets of the LLC without first adding the LLC as a party to the action.

Campbell, 241 N.C. App. at 231-32, 773 S.E.2d at 96 (citation and internal brackets omitted). Thus, although BBPI was a closely-held corporation owned by Plaintiff and Defendant, and the subsidiary LLCs owned by BBPI were managed by Plaintiff, the trial court was not free to ignore the corporate form nor the existence of the subsidiary LLCs when entering the equitable distribution order.

We note in the present case that, unlike in *Campbell*, neither Plaintiff nor Defendant ever sought to add BBPI or the subsidiary LLCs as parties to the equitable distribution proceedings. However, N.C. Gen. Stat. § 1A-1, Rule 19 requires that an entity united in interest[1] "must be joined as [a] plaintiff[] or defendant[]." N.C. Gen. Stat. § 1A-1, Rule 19 (2015). This requirement applies regardless of whether a party to the lawsuit has properly moved for joinder of the necessary party:

> When there is [an] absence of necessary parties, the trial court should correct the defect *ex mero motu* upon failure of a competent person to make a proper motion. A judgment which is determinative of a claim arising in an action in which necessary parties have not been joined is null and void.

Boone v. Rogers, 210 N.C. App. 269, 271, 708 S.E.2d 103, 105 (2011) (citation omitted). Pursuant to *Boone*, it was necessary for the trial court in this matter to *ex mero motu* join BBPI and the subsidiary LLCs before ordering them to refrain from paying Plaintiff more than a certain amount in annual compensation, and before restricting whether BBPI could make a distribution to Plaintiff. Therefore, the equitable distribution order is "null and void" due to the absence of necessary parties. *Id.*

III. Conclusion

For the reasons stated, the trial court's equitable distribution order is vacated. We decline to address Plaintiff's alternative arguments as to why the equitable distribution order was entered in error. *See McCraw v. Aux*, 205 N.C. App. 717, 721, 696 S.E.2d 739, 741 (2010) ("As a necessary party was not properly joined we refuse to deal with the merits of the action until the necessary party is brought into the action." (citation and internal quotation marks omitted)). In light of this result, we also

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1. A person or entity "is 'united in interest' with another party when that person's [or entity's] presence is necessary in order for the court to determine the claim before it without prejudicing the rights of a party before it or the rights of others not before the court." *Ludwig v. Hart*, 40 N.C. App. 188, 190, 252 S.E.2d 270, 272 (1979).

vacate the trial court's Rule 60 order as moot. *See Khwaja v. Khan*, 239 N.C. App. 87, 92, 767 S.E.2d 901, 904 (2015) (vacating a Rule 60 order as moot when the order from which the movant sought relief through the Rule 60 motion had been reversed).

This case is remanded for *ex mero motu* joinder of BBPI and the subsidiary LLCs as necessary parties. Following joinder of the necessary parties, the trial court shall conduct further proceedings, as appropriate, regarding Plaintiff's and Defendant's equitable distribution claims.

VACATED AND REMANDED.

Judges DAVIS and MURPHY concur.

IN THE MATTER OF A.L.L., R.J.M., R.A.M., A.O.Z., D.A.M., O.E.J.M.

No. COA17-146

Filed 5 July 2017

1. Jurisdiction—subject matter jurisdiction—Uniform Child Custody Jurisdiction and Enforcement Act—termination of parental rights

The trial court properly exercised subject matter jurisdiction in a termination of parental rights case involving children who had been moved from Michigan to North Carolina. Michigan and North Carolina have codified the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) in virtually identical terms: North Carolina would have acquired initial jurisdiction but for an existing Michigan action, but could still assert jurisdiction once Michigan determined that North Carolina would be a more convenient forum and relinquished jurisdiction. Nothing in the UCCJEA required North Carolina's district courts to undertake a collateral review of a facially valid order from a sister state before exercising jurisdiction under N.C.G.S. § 50A-203(1).

2. Termination of Parental Rights—due process—lack of notice—child custody proceedings

The trial court did not violate respondent father's right to due process and notice in a termination of parental rights case where the children were moved from Michigan to North Carolina. To the extent that his due process rights were frustrated or denied, they

were denied in Michigan and not North Carolina. Also, the lack of service on the father for earlier custody and adjudication proceedings in North Carolina did not defeat the valid service and notice provided him in North Carolina for the termination hearing.

3. Termination of Parental Rights—permanency orders—findings—ceasing reunification efforts—failure to include or request transcript

The Court of Appeals denied respondent father's petition for certiorari challenging permanency orders in a termination of parental rights case. The contents of termination orders cure defects in a prior permanency planning order. Further, the father's failure to include the transcripts of the permanency planning hearings or request their inclusion via a motion meant the Court of Appeals was obligated to consider the court's findings at those hearings as supported by competent evidence.

4. Termination of Parental Rights—grounds—dependency

The trial court did not err by terminating respondent mother's parental rights based on dependency. The mother's longstanding mental health conditions and her repeated failures to follow recommendations for treatment necessary to care for her children safely constituted clear, cogent, and convincing evidence to support the trial court's findings of dependency.

5. Termination of Parental Rights—best interests of children—findings of fact—likelihood of adoption

The trial court did not abuse its discretion by determining that termination of respondent mother's parental rights would be in the best interests of her children even though the mother challenged the finding that their likelihood of adoption remained high. Documentary evidence and testimony produced by the children's guardian ad litem noted that with the continuation of appropriate therapies the children would be adoptable and that they had developed positive bonds with their caretakers.

6. Termination of Parental Rights—best interests of children—findings of fact—behavioral issues

The trial court did not abuse its discretion by finding termination of respondent mother's parental rights was in the best interests of the children even though the mother noted the trial court's failure to make detailed findings concerning the children's behavioral issues. The order contained a finding addressing this behavior.

IN RE A.L.L.

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

Appeals by Respondents Father and Mother from an Order to Terminate Parental Rights entered 14 November 2016 by Judge Betty J. Brown in Guilford County District Court; appeal by Respondent Father from orders entered 4 June 2015, 17 December 2015 and 3 June 2016 by Judge Angela C. Foster in Guilford County District Court. Heard in the Court of Appeals 5 June 2017.

Mercedes O. Chut, for petitioner-appellee Guilford County Department of Health and Human Services.

Lopez Law Firm, by Daniel J. Melo, for guardian ad litem.

Miller & Audino, LLP, by Jeffrey L. Miller, for respondent-appellant father.

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

INMAN, Judge.

A North Carolina court properly exercises jurisdiction over children living in this state and alleged to be abused, neglected or dependent, even if the children were previously the subject of custody orders and continuing jurisdiction by a foreign state court, once the foreign court enters a facially valid order declining further jurisdiction.

Respondent-mother ("Mother") appeals from an order terminating her parental rights as to her minor children A.L.L. ("Abigail"), R.J.M. ("Riley"), R.A.M. ("Robert"), A.O.Z. ("Ava"), D.A.M. ("Diana"), and O.E.J.M. ("Oscar"); Respondent-father ("Father") appeals the same order terminating his parental rights as to Abigail, Riley, and Robert[1] and seeks certiorari review of three permanency planning orders entered on 4 June 2015, 17 December 2015, and 3 June 2016 (the "Permanency Orders"). Mother contends that the trial court erred in finding that the children were dependent and that Mother had failed to make reasonable progress in correcting the conditions that led to their removal, and argues the trial court abused its discretion in determining the termination of parental rights would be in the best interests of Riley and Robert. Father contends that the trial court lacked subject matter jurisdiction to terminate his parental rights to Abigail, Riley, and Robert, and, in his

1. Father is the biological parent of only Riley, Robert, and Abigail; the putative and unknown fathers of Ava, Diana, and Oscar did not appeal.

petition for certiorari, contends that the trial court's permanency planning orders failed to make the requisite findings of fact to support its adjudication of the children as neglected and dependent.

After careful review, we affirm.

I. Factual and Procedural History

The evidence presented to the trial court tended to show the following:

Mother gave birth to Ava in Detroit, Michigan, on 4 January 2006. In 2007, Mother began a relationship with Father and, by the end of 2009, they had two children together, Robert and Riley, also born in Michigan. In the course of the parents' relationship, four reports were made to Michigan Child Protective Services for homelessness, domestic violence, substance abuse, and mental health issues; none of the reports resulted in intervention by the Michigan agency. Father was convicted at least three times for domestic violence, including two incidents involving Mother in 2007 and 2012; he was also convicted of concealed weapon offenses in 2003 and 2010.

Beyond domestic violence against Mother, Father also engaged in inappropriate physical disciplining of Ava and exposed the older three children to inappropriate sexual content. In August of 2012, Mother left Father and refused to allow him further contact with Robert and Riley; her departure rendered her and her children homeless. The next month, Mother gave birth to Abigail, appellants' third child in common, in Michigan.

Shortly after Abigail was born, on 31 October 2012, Mother filed a child support and custody action against Father as to Riley and Robert in the Circuit Court for Wayne County, Michigan (the "Michigan Action"). During the pendency of the Michigan Action and while the children were in Mother's custody, three more reports were made to Michigan Child Protective Services for neglect, physical abuse, and mental health issues; none of these reports resulted in intervention by the Michigan agency.

On 16 September 2013, the Michigan court awarded Mother sole legal and physical custody of Riley and Robert. Shortly after entry of the custody order in the Michigan Action, Mother fled the state with her four children to escape Father. Mother and the children settled in Guilford County, North Carolina.

Father filed a motion to modify the custody order in the Michigan Action on 4 October 2013. The Michigan court held an evidentiary hearing

on Father's motion on 16 April 2014 with Father present and Mother participating by phone. The Michigan court found that Father had not established grounds to regain custody, but granted Father supervised visitation rights in Winston-Salem, North Carolina, at his own expense.

Father never exercised the visitation rights awarded by the Michigan court in 2014. He has not seen Robert or Riley since 2012, when Robert was four and Riley was three. He has never met Abigail, who is now five.

Shortly after moving to North Carolina, Mother obtained housing assistance from Petitioner-Appellee Guilford County Department of Health and Human Services ("DHHS"), which paid her rent for three months. However, Mother was evicted in the fourth month for her failure to pay rent. Following her eviction, Mother was again living in homeless shelters with her children and became pregnant with twins by a third father in early 2014.

On 20 September 2014, DHHS received two reports concerning Mother, Abigail, Riley, Robert, and Ava. The reports indicated that Mother had slapped four-year-old Riley, resulting in charges of misdemeanor assault on a child under the age of twelve and misdemeanor child abuse. The reports also stated that Mother threatened to kill herself and her children. A mobile crisis unit evaluated Mother at the scene of the report. Mother was involuntarily committed to a local hospital for severe depression and suspected Post Traumatic Stress Disorder ("PTSD").

Two days later, DHHS filed a petition in Guilford County District Court alleging that Abigail, Riley, Robert, and Ava were abused, neglected, and dependent juveniles who should be removed from Mother's custody. DHHS was granted nonsecure custody as to all four children. The petition alleged that Mother "used cruel or grossly inappropriate devices or procedures to modify the behavior of a 4[-year old] child," that the children were living in an environment injurious to their welfare, that Mother could not provide proper care, supervision, or discipline, and that Mother could not arrange for appropriate alternative care for her children.

Mother was served with the petition on 25 September 2014 in open court during a hearing for continued nonsecure custody. Although DHHS personnel undertook diligent efforts prior to the hearing, they were unable to locate and serve Father with the petition. An adjudicatory hearing was scheduled for 20 November 2014.

Pending the adjudicatory hearing, Mother and DHHS agreed to a case plan requiring her to undergo parenting, psychological, psychiatric,

and substance abuse evaluations, to attend domestic violence counseling and parenting classes, and to secure stable housing. She was permitted visitation contingent upon a parenting/psychological evaluation and a meeting with DHHS personnel (termed a "TDM") consistent with the previously entered nonsecure custody orders. Consistent with the plan, Mother underwent all required evaluations between October and December 2014; she was diagnosed with Major Depressive Disorder, PTSD, and Alcohol Use Disorder. Mother's attendance at therapy and peer support programs was inconsistent, however, and she never enrolled in a group outpatient substance abuse program as recommended in her substance abuse evaluation.

On 12 November 2014, counsel for DHHS sent an email to District Court Judge Angela Foster notifying her of the custody order in the Michigan Action and noting the question of whether North Carolina could exercise jurisdiction over the children. Following a phone call with a judge in Michigan, Judge Foster called the adjudicatory hearing on the 20 November 2014 docket, but continued the hearing to allow the Michigan court time to enter an order relinquishing jurisdiction to North Carolina.

On 3 December 2014, following the telephone conference with Judge Foster, the Michigan court entered an order finding that "North Carolina is the more convenient and appropriate forum," and therefore the Michigan court declined and relinquished further jurisdiction over the custody actions concerning Riley, Robert, and Abigail to the North Carolina court.[2] The record does not indicate whether the Michigan court notified Father that it had relinquished jurisdiction to North Carolina.

The trial court held a pre-adjudication, adjudication and disposition hearing on 18 December 2014. Mother was present, as was a provisional attorney appointed by the court to represent Father's interests.[3] Mother consented to the adjudication of Abigail, Riley, Robert, and Ava as abused, dependent, and neglected. As memorialized by order filed

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2. It is unclear, based on the orders in the record from the Michigan court, whether Abigail was ever made subject to the Michigan Action; in any event, the Michigan court relinquished jurisdiction with respect to Abigail, Riley, and Robert.

3. Provisional counsel for Father was appointed pursuant to N.C. Gen. Stat. § 7B-1101.1 and consistent with the principle that "[p]arents have a right to counsel in all proceedings dedicated to the termination of parental rights." *In re L.C.*, 181 N.C. App. 278, 282, 638 S.E.2d 638, 641 (2007) (internal quotations omitted). There is no indication in the record that Father's provisional counsel was able to locate Father.

14 January 2015, the court acknowledged that the current plan for the four children was reunification, but found that Mother had not yet made sufficient progress on her case plan to order reunification.

On 30 January 2015, Mother delivered twins Diana and Oscar. DHHS filed juvenile petitions as to the twins alleging the newborn twins were neglected and dependent on the basis of the DHHS reports and criminal charges from September 2014 and the ongoing custody proceedings relating to Abigail, Riley, Robert, and Ava.[4]

DHHS personnel, Mother, Mother's therapists, and therapists for the children met concerning visitation on 11 February 2015. It was revealed at the meeting that Mother was not fully participating in therapy. As a result, the therapists recommended against visitation until Mother was more "fully engaged" in therapy and until recommended by the children's therapists.

The trial court held a 90-day review hearing concerning Abigail, Riley, Robert, and Ava on 12 March 2015. Counsel for Mother and provisional counsel for Father were present. DHHS personnel, despite diligent efforts to contact Father prior to the hearing, failed to locate and serve Father with notice of the hearing. Because Father had not been served with the juvenile petition or notice of any hearing, the provisional attorney for Father was released. The trial court acknowledged during the hearing that reunification remained the plan for the children, but found that Mother had not yet made sufficient progress as planned in her service agreement with DHHS.

The trial court held a permanency planning review on 7 May 2015. Neither Father nor counsel representing Father attended the hearing, and there is no indication that Father had received notice of the hearing. Mother attended the hearing with her live-in boyfriend, who had a criminal history of domestic violence. Following the presentation of testimony and other evidence, DHHS and the children's guardian ad litem recommended changing the plan from reunification to adoption in large part due to Mother's refusal to take public housing in favor of living with a man with a history of domestic violence against the recommendation of therapists, DHHS and the trial court, and despite her enrollment in a

4. Diana and Oscar were both adjudicated neglected and abused by consent of Mother, and the court ordered that reunification efforts cease at the same time it ordered that such efforts cease with respect to the other children. A recitation of the facts concerning the twins is not needed for disposition of this appeal, as Father's appeal concerns Abigail, Riley, and Robert only, and Mother's appellate brief asserts no specific argument regarding Diana or Oscar.

domestic violence education program. The trial court entered an order on 4 June 2015 changing the plan from reunification to adoption.

Mother continued to live with her boyfriend until August 2015, when she moved to Charlotte, North Carolina without informing DHHS. Mother's compliance with the DHHS case plan further declined following her move. She had ceased therapy in June 2015, and her enrollment in parenting classes was terminated for failure to cooperate with the program provider.

DHHS continued its efforts to locate Father, and in September 2015 found him living in Warren, Michigan. Father contacted DHHS for the first time on 9 September 2015, more than a year after the Michigan court had relinquished jurisdiction over the children to North Carolina. He stated that he loved his children, was unemployed and living with his sister, and disputed the facts of one of his domestic violence convictions.

Father called DHHS again on 14 September 2015, and learned that he would have to agree to a case plan with DHHS in order to reunify with his children, with visitation permitted only on the advice of the children's therapists. During the call, Father acknowledged to DHHS personnel that he had used marijuana one week prior and had been placed on probation for domestic violence against Mother while they were together in Michigan. A month after the call, DNA testing confirmed Father's paternity of Riley, Robert, and Abigail, and Father agreed to undergo a home study to facilitate reunification.

The trial court appointed an attorney for Father on 24 September 2015.

The trial court held another permanency planning review hearing on 19 November 2015. Mother and her attorney were present, as was Father's attorney. The trial court considered sworn testimony and written evidence, including a DHHS summary report identifying Father's lack of stable employment, lack of stable housing, lack of a bond with the children, illegal substance use, and domestic violence convictions as barriers to reunification. DHHS recommended that Father enter into a case plan if he wished to pursue reunification. Father's attorney requested a concurrent plan for reunification and that DHHS make reasonable efforts to assist Father. The trial court rejected that request based in part on Father's lack of a bond with the children. However, the court ordered that Father enter into a case plan with DHHS should he desire reunification. The court concluded that the primary permanent plan of adoption and termination of parental rights as to both Mother and Father remained in the best interests of the children and declined to disturb its 4 June 2015 order.

There is no indication in the record that Father or his attorney initiated contact with DHHS to develop a case plan for reunification following the hearing.

A third permanency planning review hearing was held on 10 March 2016. Mother and her attorney were present, as was Father's attorney. The trial court again received sworn testimony and written evidence in the form of court summaries from DHHS, the Guardian ad Litem, and Michigan DHHS.

A home study report by Michigan DHHS concerning Father's living arrangements concluded that there was no room in the home for Father, let alone children, and that the environment was not stable. The study also reported that Father had received no unemployment benefits for two months, and his only income was doing odd jobs. As a result, Michigan DHHS recommended against placement of the children with Father. Following notification of the home study results, Father stated he changed his living arrangements and moved in with his brother.

As for Mother, documentary evidence was introduced showing she had sought therapy and medication management for mental health issues from providers in Charlotte, although she had stopped attending both in November 2015. Despite her move to Charlotte, Mother remained in a romantic relationship with the boyfriend previously convicted of domestic violence offenses. DHHS recommended that adoption remain the primary placement plan with guardianship as the secondary plan, but also recommended that Father enter into and comply with a DHHS case plan in order to pursue reunification. The trial court took the matter under advisement.

On 23 March 2016, six months after Father was located by DHHS, in a telephone conference with his attorney and DHHS personnel, Father agreed in principle to a service agreement. On the call, Father acknowledged that he had choked Mother in 2012, but denied attempting to stab her.

Twelve days later, on 4 April 2016, before Father's service agreement was finalized, DHHS filed verified petitions to terminate Father's and Mother's parental rights. DHHS alleged in both petitions that termination of parental rights was appropriate for neglect under N.C. Gen. Stat. § 7B-1111(a)(1) (2015), willfully leaving the children in foster care for 12 months without reasonable progress under § 7B-1111(a)(2), willful failure to pay a reasonable portion of cost of care pursuant to § 7B-1111(a)(3), and incapability of providing care and supervision under § 7B-1111(a)(6). Mother and Father were served with their respective

petitions by certified mail on 11 and 14 April 2016, and both were served again personally on 21 April 2016.[5]

On 3 June 2016, the trial court entered an order—ruling on the issues it took under advisement in the March permanency planning hearing—concluding that adoption should remain the primary permanent plan. The court again ordered Father and DHHS to enter into a service agreement if Father wanted to seek reunification. Without referring directly to the petitions to terminate Mother's and Father's parental rights, the order required DHHS to continue pursuing termination.

The trial court heard evidence and argument on the petitions to terminate Mother's and Father's parental rights on 1-2 August 2016. Father did not attend the hearing; his attorney moved to allow him to appear via telephone because he was unable to attend in person. DHHS counsel objected on the grounds that Father's identity could not be verified via telephone and the hearing had been previously rescheduled for the explicit purpose of permitting Father to appear in person. The court denied Father's motion. DHHS voluntarily dismissed without prejudice its allegation that Father was incapable of caring for the children.

In the adjudicatory phase of the hearing, the trial court took judicial notice of the contents of the court file and heard testimony from Mother, a social worker assigned to the children, and an unlicensed "Peer Support Specialist" assisting Mother. The trial court found that DHHS had established by "clear, cogent, and convincing evidence" grounds to terminate Mother's and Father's parental rights.

In the dispositional phase, the trial court received the report of the guardian ad litem and heard testimony from the guardian ad litem program supervisor. The court determined that termination of parental rights was in the best interest of each of the children. The trial court's written order, entered 14 November 2016, concluded that grounds existed to terminate Mother's parental rights under N.C. Gen. Stat. §§ 7B-1111(a)(1) [abuse or neglect], (2) [lack of reasonable progress to correct conditions that led to petition], (3) [failure to pay for juvenile's cost of care], and (6) [incapability and dependency], to terminate Father's rights under N.C. Gen. Stat. §§ 7B-1111(a)(1) and (3), and that termination of parental rights was in the best interests of the children.

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5. Although Father had previously represented to DHHS that he had moved out of the home that had failed the home study in early 2016, he was served at that address by sheriff and certified mail on two separate dates.

Mother and Father appealed. Father also seeks certiorari review of the three Permanency Orders, having failed to identify them in his Notice of Appeal or state them in his Proposed Issues for Review on Appeal consistent with N.C. Gen. Stat. § 7B-1001(5)(a)(3).

II. Analysis

A. Father's Appeal

Father does not challenge any of the findings of fact or conclusions of law in the Termination Order. He contends, however, that the trial court lacked subject matter jurisdiction to determine his rights with respect to Riley, Robert, and Abigail and that the trial court violated his statutory rights to notice and due process. For reasons we will explain, we disagree.

1. Subject-Matter Jurisdiction

[1] North Carolina's Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), N.C. Gen. Stat. § 50A-101 *et seq.*, governs the district court's subject-matter jurisdiction in child custody disputes. A trial court's jurisdiction pursuant to the UCCJEA is reviewed *de novo*. *In re J.H.*, ___ N.C. App. ___, ___, 780 S.E.2d 228, 233 (2015).

Michigan and North Carolina have codified the UCCJEA in virtually identical terms. N.C. Gen. Stat. § 50A-101 *et seq.*; Mich. Comp. Laws § 722.1101 *et seq*. Although North Carolina's district courts have original and exclusive jurisdiction over juvenile abuse, neglect, and dependency cases under N.C. Gen. Stat. § 7B-200(a), "the jurisdictional requirements of the UCCJEA . . . must also be satisfied for the court to have authority to adjudicate petitions filed pursuant to our juvenile code." *In re J.W.S.*, 194 N.C. App. 439, 446, 669 S.E.2d 850, 854 (2008) (citing *In re Brode*, 151 N.C. App. 690, 566 S.E.2d 858 (2002)). The UCCJEA recognizes four modes of subject-matter jurisdiction: (1) initial child-custody jurisdiction, N.C. Gen. Stat. § 50A-201; (2) exclusive, continuing jurisdiction, N.C. Gen. Stat. § 50A-202; (3) jurisdiction to modify determination, N.C. Gen. Stat. § 50A-203; and (4) temporary emergency jurisdiction, N.C. Gen. Stat. § 50A-204.

Temporary emergency jurisdiction exists "if the child is present in this State and . . . it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse." N.C. Gen. Stat. § 50A-204(a). "A North Carolina court that does not have jurisdiction under N.C. Gen. Stat. §§ 50A-201 or 50A-203 has temporary emergency jurisdiction . . . ." *J.W.S.*, 194 N.C. App. at 449, 669 S.E.2d at 856. A district court need not

make findings of fact to exercise temporary emergency subject matter jurisdiction, *In re E.X.J.*, 191 N.C. App. 34, 40-41, 662 S.E.2d 24, 27-28 (2008), *aff'd per curiam*, 363 N.C. 9, 672 S.E.2d 19 (2009), and the entry of nonsecure custody orders is permitted thereunder provided the terms of § 50A-204(a) are satisfied. *In re J.H.*, ___ N.C. App. at ___, 780 S.E.2d at 237. Once a court exercising temporary emergency jurisdiction learns of a custody determination made in another state, however, it must communicate with the other state's court to resolve subject matter jurisdiction going forward because the other state exercises exclusive and continuing jurisdiction as a result of its prior order. N.C. Gen. Stat. §§ 50A-202, 50A-204, & 50A-110.

There is no dispute that the trial court had temporary emergency jurisdiction to enter nonsecure custody orders with respect to Riley, Robert, and Abigail: DHHS sought and procured the orders as a result of Mother's threats to kill herself and her children. But because the Michigan Action included a custody determination as to the juveniles,[6] the trial court could obtain subject matter jurisdiction over them only if North Carolina would otherwise have initial child custody jurisdiction under N.C. Gen. Stat. § 50A-201(a)(1) or (2) and if :

> (1) The court of the other state [Michigan] determines it no longer has exclusive, continuing jurisdiction under G.S. 50A-202 or that a court of this State would be a more convenient forum under G.S. 50A-207; or
>
> (2) A court of this State or a court of the other state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state.

N.C. Gen. Stat. § 50A-203(a). N.C. Gen. Stat. § 50A-201(a)(1) provides for initial custody jurisdiction if "[t]his State is the home state of the child on the date of the commencement of the proceeding . . . ." The statute defines "home state" as that "in which a child lived with a parent . . . for at least six consecutive months immediately before the commencement of a child-custody proceeding," *id.* § 50A-102(7), and we determine a child's home state jurisdiction based on the physical location of a child and their parent. *In re K.U.-S.G.*, 208 N.C. App. 128, 134, 702 S.E.2d 103,

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6. Again, it is unclear from the record whether the Michigan Action included Abigail. Mother's petition for custody which initiated the Michigan Action did not mention Abigail, who was just one month old at that time. However, the Michigan court entered an order relinquishing jurisdiction with regard to Riley, Robert, and Abigail.

107 (2010). If a parent and her children are subject to the continuing and exclusive jurisdiction of another state's custody order, our courts acquire jurisdiction if the other state's court relinquishes jurisdiction consistent with N.C. Gen. Stat. § 50A-203(a) and if North Carolina is the children's "home state" as defined in N.C. Gen. Stat. § 50A-201(a)(1). *See also In re J.H*, __ N.C. App. __, __, 780 S.E.2d 228, 235-36 (2015) (applying this analysis to a North Carolina order modifying a Texas custody order).

Abigail, Riley, Robert, and Mother lived in North Carolina for more than a year prior to the trial court's hearing on pre-adjudication, adjudication, and disposition on 18 December 2014. Thus, North Carolina would qualify as the "home state" for the juveniles pursuant to N.C. Gen. Stat. § 50A-201(a)(1) and would have acquired initial custody jurisdiction but for the Michigan Action. Once the Michigan court determined North Carolina would be a more convenient forum and relinquished jurisdiction over the three children, the district court could assert jurisdiction under N.C. Gen. Stat. § 50A-203.

We will not disturb the trial court's assertion of jurisdiction based upon a facially valid order from another state ceding jurisdiction to this State. *See, e.g.*, *In re T.R.*, ___ N.C. App. ___, ___, 792 S.E.2d 197, 201 (2016) ("Nothing in the UCCJEA requires North Carolina's district courts to undertake a collateral review of a facially valid order from a sister state before exercising jurisdiction pursuant to N.C. Gen. Stat. § 50A-203(1).") (citation omitted).

2. Notice and Due Process

[2] Father raises the issue of notice and due process in several contexts relating to the UCCJEA,[7] asserting that "[t]he UCCJEA is clear that notice and a meaningful opportunity to participate in the jurisdictional decision are mandatory before jurisdiction can be relinquished." Father also argues "[t]he UCCJEA . . . requires that before a court determines it is an inconvenient forum . . . , it must allow the parties to submit information on the relevant factors the court must consider." (emphasis in original). Father's argument is misplaced.

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7. To the extent that Father contends his Constitutional rights to due process were violated prior to the termination hearing, we note that he was served with process and represented by counsel in the termination hearing and failed to raise any such arguments. Such arguments not raised at a termination hearing may not be raised for the first time on appeal. *In re T.P.*, 217 N.C. App. 181, 186, 718 S.E.2d 716, 719 (2011).

It was the Michigan court that determined it should relinquish jurisdiction to North Carolina, as is contemplated by the statute: "the original decree state is the sole determinant of whether jurisdiction continues." Official Comment to N.C. Gen. Stat. § 50A-202. To the extent that Father's due process rights were frustrated or denied, they were denied in Michigan, not North Carolina.

Father also argues that the UCCJEA and the North Carolina Juvenile Code required notice to him in order for the trial court to assert subject matter jurisdiction following its nonsecure custody orders and before the hearing adjudicating the children abused, neglected, and dependent, as he was never served with the juvenile petitions prior to said hearing. We have previously held, however, that "there is no legal basis for the . . . suggestion that the trial court lacked jurisdiction in the termination of parental rights proceeding because the father was not served with a summons in the initial adjudication proceeding." *E.X.J.*, 191 N.C. App. at 45, 662 S.E.2d at 31. The lack of service on Father prior to earlier custody and adjudication proceedings does not defeat the valid service and notice provided him for the termination hearing.

3. Petition for Writ of Certiorari

[3] Father's petition for certiorari challenging the trial court's three permanency orders argues there was insufficient evidence to support findings ceasing reunification efforts and further asserts that the trial court failed to make findings of fact required by N.C. Gen. Stat. §§ 7B-906.1 & 7B-906.2. But the Termination Order included findings—unchallenged by Father—that support cessation of reunification efforts, and the contents of termination orders cure defects in a prior permanency planning order. *In re L.M.T.*, 367 N.C. 165, 170, 752 S.E.2d 453, 456-57 (2013). *See also In re D.C.*, 236 N.C. App. 287, 292, 763 S.E.2d 314, 317-18 (2014) (concluding inadequate findings to support cessation of reunification efforts in a permanency planning order were cured by a later termination of parental rights order that "made additional detailed findings of fact . . . continuing up to the time of the hearing on termination of parental rights."). We also note that Father has failed to include the transcripts of the permanency planning hearings or request their inclusion via a motion to this Court pursuant to N.C. R. App. P. 9(b)(5)(b); we are obligated by the absence of the transcripts to consider the court's findings at those hearings as supported by competent evidence. *See Stone v. Stone*, 181 N.C. App. 688, 691, 640 S.E.2d 826, 828 (2007). We therefore deny Father's petition in our discretion.

B. Mother's Appeal

[4] By the plain text of the statute, termination of parental rights is permitted upon a finding of any *one* ground enumerated in N.C. Gen. Stat. § 7B-1111(a). The trial court in this action found four grounds existed as to Mother: (1) dependency; (2) abuse or neglect; (3) Mother's lack of reasonable progress to correct conditions that led to DHHS' petitions for custody; and (4) Mother's failure to pay for the cost of her children's care. Appellant challenges each of these grounds. However, because the trial court's findings were based on clear, cogent, and convincing evidence of dependency as defined in N.C. Gen. Stat. § 7B-1111(a)(6), we uphold the order terminating Mother's parental rights and do not reach her challenges regarding the other three grounds.

In reviewing findings of fact in a termination of parental rights order, we must determine "whether the trial court's findings of fact are based upon clear, cogent, and convincing evidence . . . ." *In re I.T.P-L.*, 194 N.C. App. 453, 461, 670 S.E.2d 282, 287 (2008) (citation omitted). If clear, cogent, and convincing evidence is present in the record to support a finding, it will not be disturbed, even in the face of evidence to the contrary. *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997). Legal conclusions drawn from the court's factual findings are reviewed *de novo*. *In re S.N.*, 194 N.C. App. 142, 146, 669 S.E.2d 55, 59 (2008). As for a determination by the trial court that termination is in the best interests of the child, we review for abuse of discretion where it is "manifestly unsupported by reason." *In re J.A.A.*, 175 N.C. App. 66, 75, 623 S.E.2d 45, 51 (2005).

Mother's sole challenge to the trial court's order finding the children dependent disputes a detailed finding of her history of mental illness and inconsistent treatment. Mother cites the lack of evidence showing the status of her mental health at the time of her hearing and points to the trial testimony of an unlicensed "Peer Support Specialist" that Mother's mental health had improved. As a result, Mother argues, "DHHS did not prove by clear and convincing evidence that the condition still rendered her incapable of parenting . . . ."

"[I]t [is] the trial court's responsibility to weigh the conflicting testimony and make appropriate findings of fact." *In re J.C.*, 236 N.C. App. 558, 562, 783 S.E.2d 202, 205 (2014). Here, there was ample documentary evidence and sworn testimony from a DHHS social worker from which the trial court could resolve any conflicting testimony by the Peer Support Specialist. While it is true that the last clinical assessment of Mother was approximately a year prior to the termination hearing, we

have previously held that a psychological evaluation conducted a year prior to a termination hearing can support the termination of parental rights where "the persistence of her personality problems characterized in her psychological evaluation as 'not easily amenable to change[,]' together with her lack of mental health treatment, constituted clear, cogent, and convincing evidence that her mental health problems had not changed significantly since the evaluation." *In re V.L.B.*, 168 N.C. App. 679, 685, 608 S.E.2d 787, 791 (2005). This was so irrespective of recent therapy. *Id.* at 685, 608 S.E.2d at 791.

The record here is sufficiently analogous to *V.L.B.* Mother's initial mental health assessment in October 2014 indicated that she suffered from recurring severe depression and PTSD. An assessment by a licensed psychologist two months later stated:

> [U]ntil she has better control over her depression and emotional neediness, she will continue to place herself and her children at risk for further harm. . . . [Mother] will need assistance. . . . At present, she is ill equipped emotionally and cognitively to accomplish [her treatment] goals independent of ongoing support, guidance, and therapy. . . . She needs medication to address her depressive symptomatology. And . . . she needs therapy to help her develop more effective coping strategies. . . .

Mother did not follow these recommendations. A year later, another mental health assessment indicated Mother continued to suffer from these same conditions and again recommended therapy. Following the second recommendation and prior to the termination hearing, Mother still did not participate in therapy, but instead misrepresented the status of her treatment to DHHS. Mother's longstanding mental health conditions and her repeated failures to follow recommendations for treatment necessary to care for her children safely constituted clear, cogent, and convincing evidence to support the trial court's findings of dependency.

[5] Mother next contends that the trial court abused its discretion in determining that termination of her parental rights would be in the best interests of Robert and Riley.[8] Mother challenges the findings that their likelihood of adoption remains high, that Robert is showing "great improvement" in foster care, and that Riley is in "a loving, nurturing, and

8. Mother concedes that the trial court did not err in concluding that termination of parental rights was in the best interests of the other minors.

safe environment." However, documentary evidence produced by the children's guardian ad litem notes that "[w]ith therapy, this GAL believes [Robert and Riley] will be able to be adopted. . . . [Robert] has a respectable bond with [redacted],[9] his caretaker. . . . [Robert] told this GAL he likes living with [redacted]." Further, the guardian ad litem supervisor testified at trial that "with the continuation of appropriate therapies, I believe that [Robert and Riley] will be adoptable," and that they had developed positive bonds with their caretakers. In light of this evidence, we cannot hold that the challenged findings were manifestly unsupported by reason.

Mother also contends that the likelihood of adoptability is low given Robert's and Riley's past behavioral problems and urges us to follow our decision in *In re J.A.O.*, 166 N.C. App. 222, 601 S.E.2d 226 (2004). That decision is inapposite. The teenage juvenile in *J.A.O.* had been in foster care for fourteen years, transferred caretakers nineteen times, lacked sufficient support, had a history of physical and verbal aggression, and suffered from a total of six medical conditions, both physical and mental. 166 N.C. App. at 227-28, 601 S.E.2d at 230. Indeed, the guardian ad litem in that case urged *against* adoption, and the mother "had made reasonable progress to correct the conditions that led to the petition to terminate her parental rights." *Id.* at 224-25, 601 S.E.2d at 228-29.

[6] Finally, Mother contends that the trial court's failure to make detailed findings concerning Robert and Riley's behavioral issues runs afoul of the "[a]ny relevant consideration" language of N.C. Gen. Stat. § 7B-1110(a)(6). However, the order does contain a finding addressing this behavior, stating that "[t]hey have behavioral issues related to the trauma they experienced prior to removal. With continued therapeutic treatment, the likelihood of their adoption remains high." Further, " '[t]he trial court is not required to make findings of fact on all the evidence presented, nor state every option it considered' in arriving at its disposition under N.C. Gen. Stat. § 7B-1110." *In re D.LW.*, 241 N.C. App. 32, 43, 773 S.E.2d 504, 511 (2015), *reversed in part on separate grounds*, 368 N.C. 835, 788 S.E.2d 162 (2016) (quoting *In re J.A.A.*, 175 N.C. App. 66, 75, 623 S.E.2d 45, 51 (2005)). Mother's argument on this point is overruled. As a result, we hold the trial court did not abuse its discretion in finding termination of Mother's parental rights was in the best interests of Robert and Riley.

9. The name of Robert's caretaker has been removed to protect his privacy.

IV. Conclusion

We hold that the district court properly exercised subject-matter jurisdiction regarding Father's parental rights on a temporary emergency basis and, once Michigan released continuing and exclusive jurisdiction over Father's children, under jurisdiction to modify a foreign court's determination. We further hold that despite Father's lack of notice of the initial custody proceedings, he was not denied due process in the termination proceeding because he was properly served with the petition and was represented by counsel in the proceeding. Finally, we hold that the district court did not err in its adjudication of the children or in its termination of Father's and Mother's parental rights.

AFFIRMED.

Chief Judge McGEE and Judge TYSON concur.

IN THE MATTER OF K.L. AND R.E.

No. COA17-80

Filed 5 July 2017

1. Child Abuse, Dependency, and Neglect—reunification efforts—statutory requirements

The trial court erred in a child neglect and dependency case by improperly ceasing reunification efforts with respondent mother prior to granting permanent custody of the children to their adult sibling. No evidence supported the finding that a change in the permanent plan was justified where the mother completed all required steps and completion of the final family therapy step was denied to her. Further, the court's findings did not satisfy the inquiry required under N.C.G.S. § 7B-906.1(d) where it merely adopted the findings in the previous court orders.

2. Child Abuse, Dependency, and Neglect—family therapy—placement with someone other than parent—additional findings necessary

The trial court erred in a child neglect and dependency case by concluding that "discharge" of the juveniles without family therapy having actually occurred provided support for the conclusion that returning the children to respondent mother within six months may

not have been possible or contrary to their best interests under N.C.G.S. § 7B-906.1(e) where further findings were needed before the children could be placed with their adult sibling.

3. Child Abuse, Dependency, and Neglect—assessment for changing legal custody—substantial change in circumstances—best interests of child

The trial court applied an incorrect standard of substantial change in circumstances in a child neglect and dependency case for assessing whether to change legal custody from an adult sibling of the children back to respondent mother where it should have used the best interests of the child standard under N.C.G.S. § 7B-906.1(i).

4. Child Abuse, Dependency, and Neglect—reunification efforts—findings from previous orders incorporated by reference

The trial court erred in a child neglect and dependency case by failing to make the inquiry required in N.C.G.S. § 7B-906.2 for reunification efforts where it merely incorporated by reference the findings contained in previous orders, and the Department of Social Services (DSS) conceded this error. Further, DSS offered no assistance or services to respondent mother since her notice was filed in the prior appeal and completely disregarded its statutory duty to "finalize the primary and secondary" plans until relieved by the trial court.

5. Child Abuse, Dependency, and Neglect—conclusion of law—unfit parent—constitutionally protected status as parent—responsibilities as parent

The trial court erred in a child neglect and dependency case by making a conclusion of law that respondent mother was unfit, acted inconsistently with her constitutionally protected status as a parent, and abdicated her responsibilities as a parent where no findings of fact in the trial court's order supported this conclusion.

6. Child Abuse, Dependency, and Neglect—waiver of further reviews—clear, cogent, and convincing evidence

The trial court erred in a child neglect and dependency case by waiving further reviews without clear, cogent, and convincing evidence of all five criteria under N.C.G.S. § 7B-906.1(n).

Appeal by respondent from order entered 12 May 2016 by Judge Toni S. King in Cumberland County District Court. Heard in the Court of Appeals 5 June 2017.

Christopher L. Carr for petitioner Cumberland County Department of Social Services and Beth A. Hall for guardian ad litem (joint brief).

Appellate Defender's Office, by Assistant Appellate Defender Annick Lenoir-Peek, for respondent-appellant.

TYSON, Judge.

Respondent-mother appeals from an order entered, which removed reunification as a concurrent permanent plan for her children, K.L. and R.E. We reverse and remand.

I. Background

This case returns to the Court for a second time. *In re K.L.*, __ N.C. App. __, 778 S.E.2d 104, 2015 WL 4898180 (unpublished). Cumberland County Department of Social Services ("DSS") filed a petition, which alleged Respondent-mother's children A.J., K.L. and R.E. were seriously neglected and dependent juveniles on 14 January 2014.

The allegations of neglect were asserted after DSS received reports alleging Respondent-mother had abused her autistic grandson, while he was in her care, and that her adult children also reported that she abused them as children. DSS voluntarily dismissed the allegations of serious neglect and dependency. Pursuant to stipulations between the parties, the trial court adjudicated the juveniles to be neglected at a hearing on 9 June 2014. A.J. has reached the age of majority and is no longer part of this case.

The trial court's disposition order retained physical and legal custody of the juveniles with DSS, and decreed for DSS to continue to make reasonable efforts towards reunification of the children with Respondent-mother. Following a hearing on 1 December 2014, the court entered a permanency planning order ("15 January 2015 order"). The court concluded the permanent plan was to place K.L. and R.E. into the custody of their married adult sibling ("Ms. E.") Respondent-mother appealed to this Court.

In her initial appeal, Respondent-mother argued the trial court had improperly ceased reunification efforts. She asserted no appropriate findings were made, as required by N.C. Gen. Stat. § 7B-906.1(e)(1), to explain why it would not be possible for K.L. and R.E. to be returned to her custody within the next six months. She also asserted the court

had not verified whether Ms. E. understood the legal significance of the custodianship pursuant to N.C. Gen. Stat. § 7B-906.1(j). *In re K.L.*, 2015 WL 4898180 at *4-5.

This Court held that the order appealed from did not show the trial court had ceased reunification efforts. The trial court's order specifically directed DSS to continue efforts to eliminate the need for continued placement of the juveniles outside of the home and DSS should continue efforts to reunify the juveniles with Respondent. *Id.* at *4.

This Court further held the trial court's 15 January 2015 order made minimally sufficient findings to comply with N.C. Gen. Stat. § 7B-906.1(e)(1) and (j). The case was remanded for the trial court to enter a specific visitation schedule with the juveniles. *Id.* at *5-8.

On 19 January 2016, a permanency planning hearing was held. On 12 May 2016, the court entered a subsequent permanency planning order which listed a visitation schedule, as required by this Court upon remand. The court also found that reasonable efforts to reunify the family would be futile, that the permanent plan was "previously achieved" and that legal and physical custody of K.L. and R.E. should remain with Ms. E. Respondent-mother again appeals to this Court.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7B-1001(a)(5) (2015).

III. Issues

Respondent-mother asserts the trial court improperly ceased reunification efforts and failed to follow statutory requirements, prior to granting permanent custody to Ms. E. Respondent-mother also argues the court violated the requirements of N.C. Gen. Stat. § 7B-906.1(n) and N.C. Gen. Stat. § 7B-905.1(d).

IV. Standard of Review

"This Court reviews an order that ceases reunification efforts to determine whether the trial court made appropriate findings, . . . whether the findings of fact support the trial court's conclusions, and whether the trial court abused its discretion with respect to disposition." *In re C.M.*, 183 N.C. App. 207, 213, 644 S.E.2d 588, 594 (2007). "An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *In re N.G.*, 186 N.C. App. 1, 10–11, 650 S.E.2d 45, 51 (2007) (citation and internal quotation marks omitted), *affirmed per curiam*, 362 N.C. 229, 657 S.E.2d 355 (2008). The

trial court's conclusions of law are reviewed *de novo* on appeal. *In re D.H.*, 177 N.C. App. 700, 703, 629 S.E.2d 920, 922 (2006) (citation omitted).

V. Ceasing Reunification Efforts

A. Purpose of Permanency Planning Hearing

Our Juvenile Code provides:

> Review hearings after the initial permanency planning hearing shall be designated as subsequent permanency planning hearings. The subsequent permanency planning hearings shall be held at least every six months thereafter or earlier as set by the court to review the progress made in finalizing the permanent plan for the juvenile, or if necessary, to make a new permanent plan for the juvenile.

N.C. Gen. Stat. § 7B-906.1(a) (2016).

This Court affirmed the 15 January 2015 order, which included a finding that DSS should continue reunification efforts and that custody with a relative to be the permanent plan. This Court concluded the trial court's permanency planning order did not cease reunification efforts. *In re K.L*, 2015 WL 4898180 at *4.

B. Statutory Requirements

1. N.C. Gen. Stat. § 7B-906.1(d)

[1] At each permanency planning hearing, the trial court "*shall* consider the following criteria and make written findings regarding those that are relevant:"

> (1) Services which have been offered to reunite the juvenile with either parent whether or not the juvenile resided with the parent at the time of removal or the guardian or custodian from whom the child was removed.
>
> (2) Reports on visitation that has occurred and whether there is a need to create, modify, or enforce an appropriate visitation plan in accordance with G.S. 7B-905.1.
>
> (3) Whether efforts to reunite the juvenile with either parent clearly would be unsuccessful or inconsistent with the juvenile's health or safety and need for a safe, permanent home within a reasonable period of time. The court *shall* consider efforts to reunite regardless of whether the juvenile resided with the parent, guardian, or custodian at

> the time of removal. If the court determines efforts would be unsuccessful or inconsistent, the court *shall* consider other permanent plans of care for the juvenile pursuant to G.S. 7B-906.2.
>
> (4) Reports on the placements the juvenile has had, the appropriateness of the juvenile's current foster care placement, and the goals of the juvenile's foster care plan, including the role the current foster parent will play in the planning for the juvenile.
>
> (5) If the juvenile is 16 or 17 years of age, a report on an independent living assessment of the juvenile and, if appropriate, an independent living plan developed for the juvenile.
>
> (6) When and if termination of parental rights should be considered.
>
> (7) Any other criteria the court deems necessary.

N.C. Gen. Stat. § 7B-906.1(d) (2016) (emphasis supplied).

The trial court's order is required to "make [it] clear that the trial court considered the evidence in light of whether reunification would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time. The trial court's written findings must address the statute's concerns." *In re L.M.T.*, 367 N.C. 165, 167–68, 752 S.E.2d 453, 455 (2013) (quotation marks omitted).

At the 19 January 2016 permanency planning hearing, DSS social worker Stacy Williams testified and DSS offered her report into evidence. Ms. Williams testified her recommendation was to close the case. She admitted DSS had not been working toward the juveniles' reunification with Respondent-mother. Ms. Williams acknowledged DSS had offered no services to Respondent-mother, since the entry of her prior notice of appeal in January 2015.

The court made no specific inquiry or findings regarding visitations which had already occurred. The DSS social worker testified only that the agreed upon visitation schedule included unsupervised overnight visits.

The trial court made the following finding:

> 14. That the Court finds that reasonable efforts to reunify the family would be futile and inconsistent with the

> juveniles health, safety, and need for a safe, permanent home within a reasonable period of time.

No record evidence shows any basis to support such a finding.

The trial court found Respondent-mother had completed "many Court ordered services," except family therapy, which had not been offered, prior to the permanency planning hearing. The court also found, "there has not be a substantial change in circumstances since the entry of the December 1, 2014 Permanency Planning Order."

Further hearings had been continued seven times since the 1 December 2014 hearing. No permanency planning hearing had been held since 1 December 2014. The court released the guardian *ad litem* on 8 December 2014, prior to Respondent's entry of her notice of appeal from the 15 January 2015 order.

DSS made no efforts to recommend or provide services under the ordered concurrent plan of reunification. No evidence supports and DSS cannot now assert that a change in the permanent plan was justified, based upon Respondent-mother's failure to complete steps necessary to reunify with her children, when she had completed all required steps and completion of the final family therapy step was denied to her.

The order addresses the success of the juveniles' placement with their sibling, Ms. E. The remaining statutory factors in N.C. Gen. Stat. § 7B-906.1(d) are inapplicable to the present case. However, the court's findings do not satisfy the multiple layers of inquiry and conclusions as are required by our Juvenile Code.

We reject DSS' argument that by adopting the findings in the previous court orders, the trial court accomplished its statutory duty of making findings pursuant to N.C. Gen. Stat. § 7B-906.1(d). These prior findings were the basis of the disposition order, which provided custody with Ms. E. as the primary plan, and also required reunification efforts with Respondent-mother to continue. To subsequently remove reunification as a concurrent permanent plan requires properly admitted evidence to support findings of fact to allow the court to conclude "efforts to reunite the juvenile with either parent clearly would be futile or inconsistent with the juvenile's health or safety and need for a safe, permanent home within a reasonable period of time." N.C. Gen. Stat. § 7B–906.1(d)(3).

Upon remand, no additional evidence was presented or admitted to support the trial court's finding that "efforts to reunite the family would be unsuccessful or inconsistent with the juvenile's health or safety, and

need for a safe, permanent home within a reasonable period of time." Without additional evidence and proper findings of fact in support, the trial court's conclusion to cease reunification efforts must be vacated.

2. N.C. Gen. Stat. § 7B-906.1(e)

[2] 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:

> (1) Whether it is possible for the juvenile to be placed with a parent within the next six months and, if not, why such placement is not in the juvenile's best interests.
>
> (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.
>
> (3) Where the juvenile's placement with a parent is unlikely within six months, whether adoption should be pursued and, if so, any barriers to the juvenile's adoption.
>
> (4) Where the juvenile's placement with a parent is unlikely within six months, whether the juvenile should remain in the current placement, or be placed in another permanent living arrangement and why.
>
> (5) Whether the county department of social services has since the initial permanency plan hearing made reasonable efforts to implement the permanent plan for the juvenile.
>
> (6) Any other criteria the court deems necessary.

N.C. Gen. Stat. § 7B-906.1(e) (2015) (emphasis supplied).

The trial court concluded that return of the juvenile to Respondent-mother's custody "would be contrary to the welfare and best interest of the juvenile[s]." Respondent-mother argues the trial court failed to make the relevant inquiries required by N.C. Gen. Stat. § 7B-901.1(e) when a child is not placed with a parent.

This Court addressed a similar argument in Respondent's previous appeal. We held that evidence in the record minimally supported the

trial court's finding, "[t]hat return of the juveniles would be contrary to the welfare and best interests of the juveniles inasmuch as the juveniles are in need of more adequate care and supervision than can be provided by [Respondent-mother] at this time and [Respondent-mother is] in need of additional services." *In re K.L.*, 2015 WL 4898180 at *5.

This Court's prior opinion further specified that Respondent-mother's psychological assessment recommended she participate in family counseling and that the juveniles' therapist should determine when such therapy was appropriate. In December 2014, DSS informed the court that the juveniles' therapist believed "that the children were not ready to engage in family therapy at this time."

At the January 2016 hearing, DSS social worker Williams testified "the last service the Respondent-mother was supposed to complete" was family therapy. Ms. Williams testified she had "spoken to the therapist on several different occasions" and the therapist indicated "it was not a good time to have [Respondent-mother] in therapy sessions." She also stated the juveniles were no longer in regular therapy sessions. She indicated the therapist "really didn't have an opinion" on the children spending more time with their mother, because she had not met Respondent-mother.

In the order currently before us, the trial court found the juveniles' therapist had "discharged" them from therapy services, while also finding that it had previously "found that Respondent-mother and the juveniles should engage in therapy."

While this "discharge" of the juveniles without the family therapy having actually occurred is questionable, this finding provides minimal support for the conclusion that returning K.L. and R.E. to Respondent-mother within six months may not have been possible or contrary to their best interests. Upon remand and at future permanency planning hearings, the trial court should further inquire whether family therapy remains necessary. If not, it should be removed from the plan as a step Respondent-mother is to accomplish.

3. N.C. Gen. Stat. § 7B-906.1(i)

[3] Respondent asserts the trial court applied the incorrect standard in assessing whether or not to change legal custody from Ms. E. back to Respondent-mother. As this issue needs to be addressed on remand, we agree.

Here, the trial court found there had not been "a substantial change in circumstances" since the 15 January 2015 order providing Ms. E.

primary custody of K.L. and R.E. "Substantial change in circumstances" is the legal test to review a change of custody between two parties in a Chapter 50 civil custody action.

DSS argues the present case is controlled by *In re A.C.*, __ N.C. App. __, 786 S.E.2d 728 (2016). In the case of *In re A.C.*, the trial court had previously, by written order, awarded the respondent-mother sole legal and physical custody of A.C. *Id.* at __, 786 S.E.2d at 733. In the same written order, the court had waived further review hearings and relieved DSS of its responsibilities. *Id.* at __, 786 S.E.2d at 732.

The trial court in *In re A.C.* had not entered a civil custody order pursuant to N.C. Gen. Stat. § 7B–911, but expressly retained juvenile court jurisdiction pursuant to N.C. Gen. Stat. § 7B–201. *Id.* at __, 786 S.E.2d at 733.

After receiving sole custody, the respondent-mother left A.C. in the care of A.C.'s aunt. The aunt filed a "Motion to Reopen, Motion to Intervene, and Motion in the Cause for Child Custody" within the juvenile proceeding. The motion alleged "a substantial change in circumstances" since the earlier order had granted respondent-mother sole custody of A.C. *Id.* at __, 786 S.E.2d at 732. The court conducted a hearing on the aunt's motion to modify custody and entered a "Review Order" granting aunt "the sole legal and physical custody of [A.C.]" *Id.* at __, 786 S.E.2d at 732. Our Court held "the court was obliged to resolve a custody dispute between a parent and a nonparent in the context of a proceeding under Chapter 7B." *Id.* at __, 786 S.E.2d at 733.

Because the trial court had allowed A.C.'s aunt and caretaker to intervene and seek custody of A.C. from the respondent-mother after custody had been awarded to the respondent-mother, the appellate court's review of the trial court's review order awarding custody to the aunt as intervenor also required "recourse to legal principles typically applied in custody proceedings under N.C. Gen. Stat. Chapter 50, in addition to those governing abuse, neglect, and dependency proceedings under Chapter 7B." *Id.* at __, 786 S.E.2d at 733. "[O]nce the custody of a minor child is judicially determined, that order of the court cannot be modified until it is determined that (1) there has been a substantial change in circumstances affecting the welfare of the child; and (2) a change in custody is in the best interest of the child." *Id.* at __, 786 S.E.2d at 742 (citing *Hibshman v. Hibshman*, 212 N.C. App. 113, 121, 710 S.E.2d 438, 443 (2011) (citation and ellipsis omitted)).

The trial court in *In re A.C.*, was controlled by N.C. Gen. Stat. § 7B-1000(a) (2015) which provides that the "court may modify or vacate

the order in light of changes in circumstances or the needs of the juvenile." *See id.* at __, 786 S.E.2d at 734. This Court held "the burden fell upon intervenor to demonstrate 'changes' warranting a modification of the custody arrangement established by the . . . review order." *Id.* at __, 786 S.E.2d at 734. Further, "such changes must have either occurred or come to light subsequent to the establishment of the *status quo* which [aunt] sought to modify." *Id.* at __, 786 S.E.2d at 734 (citation omitted).

The trial court in *In re A.C.* had previously relieved DSS of further duties and waived further review hearings. The court modified its previous award of custody in response to a "Motion to Reopen, Motion to Intervene and Motion in the Cause." *Id.* at __, 786 S.E.2d at 732.

Here, the parties were before the trial court at a subsequent permanency planning review hearing after remand from this Court. At this subsequent permanency planning hearing, the trial court appears to have attempted to cease reunification efforts based upon a lack of substantial change in circumstances since the entry of the previous order. The analysis in *In re A.C.* is inapplicable. Respondent-mother was not required to show a substantial change in circumstances to retain the concurrent plan of reunification.

This Court's decision in *In re J.S.*, __ N.C. __, 792 S.E.2d 861 (2016) is relevant here. "The plain language of § 7B–1000(a) states that it is applicable to an order entered after a review hearing at which the trial court considers whether to modify or vacate a previously entered order 'in light of changes in circumstances or the needs of the juvenile.' " *Id.* at __, 792 S.E.2d at 863. The permanency planning order in *In re J.S.* stated it was "entered pursuant to N.C. Gen. Stat. § 7B–906.1." *Id.* at __, 792 S.E.2d at 864. We held "that entry of a permanency planning order is governed by N.C. Gen. Stat. § 7B–906.1 and not by N.C. Gen. Stat. § 7B–1000." *Id.* at __, 792 S.E.2d at 864. Here the court's order is titled, "Permanency Planning Order" and indicates the "hearing is being held pursuant to N.C. Gen. Stat. § 7B-906.1(e)."

At a permanency planning hearing:

> (i) The court may maintain the juvenile's placement under review or order a different placement, appoint a guardian of the person for the juvenile pursuant to G.S. 7B-600, or order any disposition authorized by G.S. 7B-903, including the authority to place the child in the custody of either parent or any relative found by the court to be suitable and found by the court to be in the best interests of the juvenile.

N.C. Gen. Stat. § 7B-906.1(i) (2016).

Neither Respondent-mother nor DSS need show a "substantial change in circumstances" to seek modification under the statute. The trial court was required to address custody and reunification as permanent plans and to consider the best interest of the juveniles. The trial court found it was "in the best interests of [the juveniles] that permanent legal and physical custody remain" with Ms. E.

The trial court conflated the requirements of Chapters 50 and 7B and included an unnecessary and improper test of "substantial change in circumstances" at this stage of permanency planning. It is unclear from the brief transcript and minimal findings whether the inclusion of this erroneous standard impacted the permanent plan ordered by the court. Upon remand the court is to review the permanent plans of custody with a relative and reunification with Respondent-mother under only the correct statutory standard set forth in § 7B-906.1(i).

4. N.C. Gen. Stat. § 7B-906.2

[4] Respondent-mother contends the trial court failed to make the inquiry required in N.C. Gen. Stat. § 7B-906.2. DSS concedes N.C. Gen. Stat. § 7B-906.2 is applicable since the case was pending on 1 October 2015.

a. § 7B-906.2(b)

N.C. Gen. Stat. § 7B-906.2(b) requires reunification remain a primary or secondary plan, unless the court makes the requisite findings of fact showing that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety. N.C. Gen. Stat. § 7B-906.2(b) (2016). DSS argues the trial court's order complied with § 7B-906.2(b) by incorporating by reference the findings contained in previous orders.

Rule 52 of the Rules of Civil Procedure requires that in all actions tried upon the facts without a jury, "the court shall find the facts specially and state separately its conclusions of law . . . ." N.C. Gen. Stat. § 1A-1, Rule 52(a)(1) (2015). The documents incorporated may support a finding of fact; however, merely incorporating the documents by reference is not a sufficient finding of fact.

"[A] proper finding of facts requires a specific statement of the facts on which the rights of the parties are to be determined, and those findings must be sufficiently specific to enable an appellate court to review the decision and test the correctness of the judgment." *Quick v. Quick*, 305 N.C. 446, 451, 290 S.E.2d 653, 657 (1982).

Findings of fact must show that the trial court has reviewed the evidence presented and found the facts through a process of logical reasoning. *In re O.W.*, 164 N.C. App. 699, 702, 596 S.E.2d 851, 853 (2004) ("the trial court must, through 'processes of logical reasoning,' based on the evidentiary facts before it, 'find the ultimate facts essential to support the conclusions of law.' ") (quoting *In re Harton*, 156 N.C. App. 655, 660, 577 S.E.2d 334, 337 (2003)).

This Court has repeatedly stated that "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. at 702, 596 S.E.2d at 853; *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980) ("The requirement for appropriately detailed findings is thus not a mere formality or a rule of empty ritual; it is designed instead 'to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system.' " (citation omitted)).

Here, the trial court's unsupported conclusory statement that "reasonable efforts to reunify the family would be futile and inconsistent with the juveniles' health [or] safety" does not meet the statutory or prior case law's requirements and must be vacated.

b. § 7B-906.2(d)

N.C. Gen. Stat. § 7B-906.2(d) requires the court make specific written findings as to each of the following, "which shall demonstrate [the parent's] lack of success":

> (1) Whether the parent is making adequate progress within a reasonable period of time under the plan.
>
> (2) Whether the parent is actively participating in or cooperating with the plan, the department, and the guardian ad litem for the juvenile.
>
> (3) Whether the parent remains available to the court, the department, and the guardian ad litem for the juvenile.
>
> (4) Whether the parent is acting in a manner inconsistent with the health or safety of the juvenile.

Here, the trial court's order contains a finding of fact that prior to the initial appeal, Respondent-mother completed many "Court ordered services." No other finding mentions Respondent-mother's progress, shortcomings, or failures to accomplish, with respect to the permanent plan.

Unchallenged testimony shows DSS had offered no assistance or services to Respondent-mother since her notice was filed in the prior appeal.

The court's order makes no mention of Respondent-mother's cooperation or lack of cooperation with DSS. Ms. Williams, DSS' only witness at the hearing, offered no testimony in this regard.

Respondent-mother testified at the hearing she remained willing to "do whatever that was asked of her" and that she had completed all of the other services and steps DSS had asked her to complete. She testified she had not been asked to do anything since January 2015. DSS did not cross-examine Respondent-mother nor offer any rebuttal evidence to refute her testimony.

c. § 7B-906.2(c)

N.C. Gen. Stat. § 7B-906.2(c) provides that "[i]n every subsequent permanency planning hearing," "the court shall make written findings" about the efforts DSS has made towards achieving the primary and secondary plans in effect prior to the hearing. The trial court made no findings of whether DSS had made reasonable efforts to reunite Respondent with her children.

The trial court's order "must make [it] clear that the trial court considered the evidence in light of whether reunification would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time." *In re A.E.C.*, 239 N.C. App. 36, 42, 768 S.E.2d 166, 170 (2015), *cert. allowed*, __ N.C.__, 796 S.E.2d 791 (2017). While the written findings do not need to quote the exact language of the statute, the trial "court's written findings must address the statute's concerns." *Id.*

As stated previously, Ms. Williams testified DSS had provided no reunification efforts following the 15 January 2015 order. The record on appeal shows DSS completely disregarded its statutory duty to "finalize the primary and secondary" plans until relieved by the trial court. *See* N.C. Gen. Stat. § 7B-906.2(b).

This Court cannot infer from the minimal findings that reunification efforts would be futile or inconsistent with the juveniles' health or safety. *See In re A.E.C.*, 239 N.C. App. at 43, 768 S.E.2d at 171. *See also*, *In re T.W.* __ N.C. App. __, __, 796 S.E.2d 792, 795-96 (2016) (holding "if reunification efforts are not foreclosed as part of the initial disposition pursuant to N.C. Gen. Stat. § 7B–901(c), the court may eliminate reunification as a goal of the permanent plan only upon a finding made under N.C. Gen. Stat. § 7B–906.2(b). Only when reunification is eliminated

from the permanent plan is the department of social services relieved from undertaking reasonable efforts to reunify the parent and child.").

The trial court's conclusion of law that reunification would be futile is error without any evidence in the record to support the findings of fact. *In re J.T.*, __ N.C. __, __, 796 S.E.2d 534, 536 (2017). We reverse the trial court's order as it relates to cessation of reunification efforts.

C. Constitutionally Protected Status

[5] Respondent also argues the trial court's conclusion of law that she is unfit, has acted inconsistently with her constitutionally protected status as a parent, and has abdicated her responsibilities as a parent is completely unsupported by any finding of fact. We agree.

The trial court must clearly "address whether respondent is unfit as a parent or if her conduct has been inconsistent with her constitutionally protected status as a parent, should the trial court . . . consider granting custody or guardianship to a nonparent." *In re P.A.*, 241 N.C. App. 53, 66–67, 772 S.E.2d 240, 249 (2015).

Findings in support of the conclusion that a parent acted inconsistently with the parent's constitutionally protected status are required to be supported by clear and convincing evidence. *See Adams v. Tessener*, 354 N.C. 57, 63, 550 S.E.2d 499, 503 (2001) (holding that "a trial court's determination that a parent's conduct is inconsistent with his or her constitutionally protected status must be supported by clear and convincing evidence" (citing *Santosky v. Kramer*, 455 U.S. 745, 747-48, 71 L. Ed. 2d 599, 603 (1982)).

"The clear and convincing standard requires evidence that should fully convince. This burden is more exacting than the preponderance of the evidence standard generally applied in civil cases, but less than the beyond a reasonable doubt standard applied in criminal matters." *In re A.C.*, __ N.C. at __, 786 S.E.2d at 734 (citing *Scarborough v. Dillard's, Inc.*, 363 N.C. 715, 721, 693 S.E.2d 640, 643 (2009), *cert. denied*, 563 U.S. 988, 179 L.Ed.2d 1211 (2011)).

This Court's inquiry must be "whether the evidence presented is such that a [fact-finder] applying that evidentiary standard could reasonably find the fact in question." *Id.* at __, 786 S.E.2d at 734 (internal quotation marks and citations omitted).

No findings of fact in the trial court's order addresses, whether Respondent-mother was unfit or how she was acting inconsistently with her protected status as a parent at the time of the hearing. The trial court's conclusion is unsupported by findings of fact.

We reverse the order awarding permanent custody to Ms. E. and remand. Upon remand, the district court must "address whether respondent is unfit as a parent or if her conduct has been inconsistent with her constitutionally protected status as a parent." *In re P.A.*, 241 N.C. App. at 66, 772 S.E.2d at 249. In light of the lack of any services offered by DSS since Respondent-mother's notice in the prior appeal, further evidence should be taken and proper findings of fact supported by the required evidentiary standard and burden must be made to support the conclusions of law. *See id.*

VI. N.C. Gen. Stat. §§ 7B-906.1(n) and 7B-905.1(d)

[6] Respondent-mother argues the trial court committed reversible error when it waived holding further reviews. We agree.

The trial court may not waive permanency planning hearings unless "the court finds by *clear*, *cogent*, *and convincing evidence each* of the following":

> (1) The juvenile has resided in the placement for a period of at least one year.
>
> (2) The placement is stable and continuation of the placement is in the juvenile's best interests.
>
> (3) Neither the juvenile's best interests nor the rights of any party require that review hearings be held every six months.
>
> (4) All parties are aware that the matter may be brought before the court for review at any time by the filing of a motion for review or on the court's own motion.
>
> (5) The court order has designated the relative or other suitable person as the juvenile's permanent custodian or guardian of the person.

N.C. Gen. Stat. § 7B-906.1(n) (2016) (emphasis supplied).

Our statutes and cases require the trial court to address all five criteria, make findings of fact to support its conclusion, and hold its failure to do so is reversible error. *In re P.A.*, 241 N.C. App. at 66, 772 S.E.2d at 249 ("The trial court must make written findings of fact satisfying each of the enumerated criteria listed in N.C. Gen. Stat. § 7B–906.1(n), and its failure to do so constitutes reversible error."). *See also In re L.B.*, 184 N.C. App. 442, 447, 646 S.E.2d 411, 413–14 (2007) (construing predecessor statute, N.C. Gen. Stat. § 7B–906(b) (2005)).

DSS concedes the trial court failed to comply with these mandatory provisions of the statute. DSS asserts even though the exact language was not set forth in the court's order, "it is clear that it was the intent of the trial court." It is not the role of the appellate court to try to interpret "the intent of the trial court."

The trial court failed to specifically address whether the juveniles best interests or a right of a party required reviews every six months under the third prong of § 7B-906.1(n) and failed to make any finding at all regarding the fourth requirement. That portion of the trial court's order purporting to end judicial review hearings in this case is reversed for lack of supported and written findings of fact on all five criteria set forth in N.C. Gen. Stat. § 7B-906.1(n).

VII. Conclusion

The Juvenile Code's requirements must be followed prior to making a supported conclusion whether to grant Ms. E. permanent custody of K.L. and R.E. We reverse and remand for additional findings in accordance with N.C. Gen. Stat. § 7B-906.2 before reunification with Respondent-mother as a goal of the permanent plan can be eliminated.

Upon remand, the trial court must also make inquiry and enter necessary findings according to N.C. Gen. Stat. §§ 7B-906.1(n) and 905.1(d) before further review hearings may be waived.

The order appealed from is vacated in part and reversed in part. This cause is remanded to the district court for further proceedings as are consistent with this opinion. *It is so ordered.*

VACATED IN PART; REVERSED IN PART AND REMANDED.

Chief Judge McGEE and Judge INMAN concur.

IN RE T.P., T.P. AND T.P., THREE MINOR JUVENILES

No. COA17-119

Filed 5 July 2017

Child Abuse, Dependency, and Neglect—removal of juvenile custody from parent—verified petition required—new adjudicatory hearing required

The trial court lacked subject matter jurisdiction to adjudicate new allegations of abuse, neglect, or dependency that fell within the parameters of N.C.G.S. § 7B-401(b) even though it had stated in a prior order that it was retaining jurisdiction. Because N.C.G.S. § 7B-401(b) was triggered, the Department of Social Services was required to file a verified petition seeking an adjudication of the juveniles and the trial court was then required to conduct an adjudicatory hearing.

Appeal by respondent from order entered 24 October 2016 by Judge H. Thomas Church in Iredell County District Court. Heard in the Court of Appeals 7 June 2017.

Lauren Vaughan for petitioner-appellee Iredell County Department of Social Services.

Melanie Stewart Cranford for guardian ad litem.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Joyce L. Terres, for respondent.

DAVIS, Judge.

T.P.[1] ("Respondent") appeals from the trial court's 24 October 2016 order placing her three children in the custody of the Iredell County Department of Social Services ("DSS") based on a report of abuse, neglect, or dependency that DSS had received from law enforcement officers. At the time this report was received, the court had previously discontinued periodic judicial reviews and released counsel in connection with proceedings stemming from a prior adjudication of the children as abused juveniles. On appeal, Respondent argues that the court

1. Pseudonyms and initials are used throughout this opinion to protect the identity of the juveniles and for ease of reading.

(1) lacked subject matter jurisdiction to enter the 24 October 2016 order; and (2) erred by failing to conduct an adjudicatory hearing pursuant to Article 8 of the Juvenile Code.

This appeal requires us to consider how a trial court obtains subject matter jurisdiction to enter an order removing the custody of juveniles from their parent in a proceeding governed by N.C. Gen. Stat. § 7B-401(b). After careful review, we vacate the trial court's order for lack of subject matter jurisdiction.

Factual and Procedural Background

"Tasha," "Tina," and "Tyler" are Respondent's children from three different fathers — G.P, P.S, and E.K.[2] On 25 August 2015, DSS filed three verified petitions alleging abuse and neglect of Tasha, Tina, and Tyler. On 20 October 2015, an adjudication hearing was held in Iredell County District Court before the Honorable H. Thomas Church. Following the hearing, the trial court entered an order adjudicating the three children to be abused. On 17 November 2015, a dispositional hearing was held, and the trial court issued an order on 1 December 2015 placing the three children in the custody of DSS. Pursuant to the trial court's order, permanency planning hearings were subsequently held every 90 days.

Following a 6 September 2016 permanency planning hearing, the trial court entered an order on 7 September 2016 determining that Respondent was "fit and proper to exercise the care, custody, and control of the juveniles" and ordering that "[t]he legal and physical custody of the juveniles . . . shall be returned to Respondent Mother." P.S. was given joint legal and physical custody of Tina. G.P. and E.K. were allowed supervised visits with their children. The 7 September 2016 order stated that the court was "retain[ing] jurisdiction" but determined that "no further regular review hearings are scheduled." The order also provided that DSS "is relieved of active monitoring responsibility, the Guardian *ad Litem* Program is relieved, and all counsel is [sic] relieved."

On 14 September 2016, DSS received a new Child Protective Services report stating that law enforcement officers had responded to a domestic altercation two days earlier between Respondent and E.K. On 15 September 2016, a DSS social worker met with Respondent, who admitted that the altercation had occurred and that same day signed a safety plan in which she agreed to obtain a domestic violence protective order ("DVPO") against E.K. Based on its investigation of the incident,

2. None of the fathers are parties to this appeal.

DSS determined that immediate removal of the minor children from Respondent's custody was not required.

On 16 September 2016, DSS filed a "Motion for Review" in the existing juvenile matters as to each of the three children, requesting the trial court "to hear and further consider the case" due to a "[c]hange in situation." The motions detailed the 14 September report from law enforcement officers, the social worker's meeting with Respondent, and the safety plan to which Respondent had agreed. The motions further stated that Respondent had denied that any of the children were present during the altercation but that E.K. had indicated to law enforcement officers that his son had, in fact, been present. The motions also asserted that Respondent had "stated that she was not going to [seek a DVPO], because she was going to move out of the county." On 3 October 2016, DSS filed a "Juvenile Court Summary" stating, in pertinent part, that despite the safety plan Respondent had signed in which she agreed that she would obtain a protective order against E.K., she had failed to follow through by actually obtaining the DVPO.

On 4 October 2016, the trial court held a hearing on the Motions for Review. The social worker, Respondent, and E.K. testified regarding the events of 12 September 2016. DSS recommended that "legal and physical custody of [Tasha] and [Tyler] be placed with [DSS] with [DSS] having placement authority" and that "legal and physical custody of [Tina be placed] with Respondent Father [P.S.]" On 24 October 2016, the court entered an order containing the following pertinent findings of fact:

> 3. This case came on for a Motion for Review filed September 16, 2016, by DSS and a Permanency Planning Review, the above-named juveniles having been found within the jurisdiction of the court as abused on October 20, 2015. The current allegations involve a physical assault that occurred on or about September 12, 2016, between Respondent Mother and [E.K.] in which it is alleged they have been violating Orders of this Court regarding visitation with [E.K.] and that the minor, [Tyler], was present during the altercation.
>
> 4. The report of the social worker, which is attached hereto, shall be admitted into evidence and incorporated herein by reference as this Court's findings of fact. Additionally, the Court takes judicial notice of the facts from prior orders entered in this matter and incorporates the same herein by reference. This Court has also

> considered the Motion for Review and Petitioner's #1 which is the police incident report.
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> . . . .
>
> 6. The allegations in the Motion for Review are consistent with the police report, testimony from the social worker, and the reluctant admission from Respondent Mother that a physical assault did occur. Therefore this Court finds that those allegations contained in the Motion for Review are true and incorporates them herein.

The trial court ultimately ordered that "[t]he legal and physical custody of [Tasha and Tyler] shall be with the Iredell County Department of Social Services" and "[t]he sole legal and physical custody of [Tina] shall be with [P.S.]" The court also ordered that a subsequent permanency planning hearing be held in 90 days. Respondent filed a timely notice of appeal.

Analysis

Respondent argues that the trial court did not possess subject matter jurisdiction to enter its 24 October 2016 order. Alternatively, she contends that even if subject matter jurisdiction existed, the court erred in failing to conduct an adjudicatory hearing pursuant to the provisions of Article 8 of the Juvenile Code. Because we conclude that the trial court did, in fact, lack subject matter jurisdiction, we must vacate the order.

"Subject matter jurisdiction refers to the power of the court to deal with the kind of action in question." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987) (citation omitted). It is well established that "[s]ubject matter jurisdiction . . . is conferred upon the courts by either the North Carolina Constitution or by statute." *In re M.B.*, 179 N.C. App. 572, 574, 635 S.E.2d 8, 10 (2006) (citation and quotation marks omitted). With regard to "matters arising under the Juvenile Code, the court's subject matter jurisdiction is established by statute." *In re K.J.L.*, 363 N.C. 343, 345, 677 S.E.2d 835, 837 (2009) (citation omitted). "Subject matter jurisdiction cannot be conferred by consent or waiver, and the issue of subject matter jurisdiction may be raised for the first time on appeal." *In re H.L.A.D.*, 184 N.C. App. 381, 385, 646 S.E.2d 425, 429 (2007), *aff'd per curiam*, 362 N.C. 170, 655 S.E.2d 712 (2008) (citation omitted). Whether a court has jurisdiction is a question of law reviewable *de novo* on appeal. *In re K.U.-S.G., D.L.L.G., & P.T.D.G.*, 208 N.C. App. 128, 131, 702 S.E.2d 103, 105 (2010) (citation omitted).

Our Supreme Court has held that a trial court must have subject matter jurisdiction "over the nature of the case and the type of relief sought, in order to decide a case." *In re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d 787, 790 (2006) (citation and quotation marks omitted).

> A court cannot undertake to adjudicate a controversy on its own motion; rather, it can adjudicate a controversy only when a party presents the controversy to it, and then, *only if it is presented in the form of a proper pleading*. Thus, before a court may act there must be some appropriate application invoking the judicial power of the court with respect to the matter in question.

In re Transp. of Juveniles, 102 N.C. App. 806, 808, 403 S.E.2d 557, 558 (1991) (citation omitted and emphasis added).

Thus, "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). "The instant that the court perceives that it is exercising, or is about to exercise, a forbidden or ungranted power, it ought to stay its action, and, if it does not, such action is, in law, a nullity." *In re Officials of Kill Devil Hills Police Dep't*, 223 N.C. App. 113, 117, 733 S.E.2d 582, 586 (2012) (citation and quotation marks omitted) (holding trial court lacked jurisdiction to enter order permitting employees with grievances against police department to present complaint).

We have applied this rule in cases arising under the Juvenile Code. *See*, *e.g.*, *McKinney*, 158 N.C. App. at 446-47, 581 S.E.2d at 796-97 (holding that trial court lacked jurisdiction to enter order terminating parental rights where DSS filed "Motion in the Cause" that did not reference pertinent statutory provisions or seek relief in form of termination of parental rights); *see also Transp. of Juveniles*, 102 N.C. App. at 808, 403 S.E.2d at 559 (ruling that trial court did not possess jurisdiction to enter order transporting delinquent juveniles where no complaint or motion was filed seeking such relief).

In the present case, our jurisdictional analysis is impacted by the General Assembly's recent amendment to N.C. Gen. Stat. § 7B-401 for the purpose of adding subsection (b). *See* 2013 N.C. Sess. Laws 305, 308, ch. 129, § 8 (codified as N.C. Gen. Stat. § 7B-401 (2015)). Section 7B-401(b) states as follows:

> If the court has retained jurisdiction over a juvenile whose custody was granted to a parent and there are no periodic

> judicial reviews of the placement, the provisions of Article 8 of this subchapter shall apply to any subsequent report of abuse, neglect, or dependency determined by the director of social services to require court action pursuant to G.S. 7B-302.[3]

N.C. Gen. Stat. § 7B-401(b) (footnote added).

In order for § 7B-401(b) to apply, four requirements must be met: (1) the court must have "retained jurisdiction over a juvenile whose custody was granted to a parent"; (2) the court must no longer be holding "periodic judicial reviews of the placement" of the juvenile; (3) after the court discontinued periodic judicial reviews, DSS must have received a new report of abuse, neglect, or dependency; and (4) the director of social services must have determined based on an assessment conducted pursuant to § 7B-302 that court action was required.

In cases where § 7B-401(b) is applicable, the director (or his designee) must file a petition in the existing case setting out the new allegations of abuse, neglect, or dependency in order for the trial court to have subject matter jurisdiction to adjudicate the juvenile. Once the petition is filed, the trial court is required to follow the provisions of Article 8 and conduct an adjudicatory hearing. If the court determines that the allegations in the petition were proved by clear and convincing evidence and adjudicates the juvenile as abused, neglected, or dependent, it must then conduct an initial dispositional hearing. *See* N.C. Gen. Stat. § 7B-807(a) (2015); N.C. Gen. Stat. § 7B-808(a) (2015); *see also* N.C. Gen. Stat. § 7B-901(a) (2015) ("The dispositional hearing shall take place immediately following the adjudicatory hearing and shall be concluded within 30 days of the conclusion of the adjudicatory hearing.").

The criteria set out in § 7B-401(b) were met in this case. In its 7 September 2016 order, the trial court stated that "[w]hile the Court retains jurisdiction, no further regular review hearings are scheduled." On 14 September 2016, DSS received a new Child Protective Services report from law enforcement officers. Two days later, DSS filed three motions for review based on this report as well as the social worker's

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3. N.C. Gen. Stat. § 7B-302 provides the procedure by which the director of DSS must conduct an 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, in order to determine whether protective services should be provided or the complaint filed as a petition." N.C. Gen. Stat. § 7B-302(a) (2015). This statute also provides that if abuse, neglect, or dependency has occurred, the director must determine whether immediate removal is required or otherwise arrange protective services for the care of the juvenile. N.C. Gen. Stat. § 7B-302(c)-(d).

subsequent meeting with Respondent. Thus, because § 7B-401(b) was triggered, DSS was required to file a verified petition seeking an adjudication of the juveniles. The trial court was then required to conduct an adjudicatory hearing pursuant to the provisions of Article 8 to determine if an adjudication of abuse, neglect, or dependency was appropriate and — if so — to then conduct a dispositional hearing.

However, rather than filing a petition seeking such an adjudication, DSS instead merely submitted motions for review requesting that the trial court "hear and further consider the case of the juvenile . . . [due to a c]hange in situation." Therefore, based on N.C. Gen. Stat. § 7B-401(b), despite the fact that the trial court's 7 September 2016 order stated that the court was "retain[ing] jurisdiction," the court lacked subject matter jurisdiction to adjudicate the new allegations of abuse, neglect, or dependency absent a verified petition filed by DSS, which would — in turn — have implicated the provisions of Article 8.

Accordingly, even if DSS *had* properly filed a petition as required by § 7B-401(b), the trial court would have been required to then conduct a new *adjudicatory* hearing pursuant to Article 8, which it did not do in this case. Instead, the trial court simply conducted a *dispositional* hearing, determining that a change in circumstances had occurred that affected the best interests of the children and that — for this reason — removal of the children from Respondent's custody was necessary. *See T.R.P.*, 360 N.C. at 593, 636 S.E.2d at 792 ("[A] dispositional hearing . . . must be preceded by the filing of a petition and an adjudication.").

Thus, the trial court's error was twofold: (1) it took action based on the new allegations of abuse, neglect, or dependency without DSS having filed a verified petition that would have conferred subject matter jurisdiction upon it to do so; and (2) it conducted a dispositional hearing and subsequently entered a dispositional order removing custody of the juveniles from Respondent without first conducting a new adjudicatory hearing and actually adjudicating the children to be abused, neglected, or dependent.

Our ruling on this issue is supported by the language used by the General Assembly both in § 7B-401(b) and Article 8 of the Juvenile Code. As noted above, § 7B-401(b) expressly incorporates Article 8. *See* N.C. Gen. Stat. § 7B-401(b) (" . . . [T]he provisions of Article 8 of this subchapter shall apply to any subsequent report of abuse, neglect, or dependency . . . ."). Article 8 of the Juvenile Code guarantees a parent the right to a hearing before her child is adjudicated abused, neglected, or dependent. *See* N.C. Gen. Stat. § 7B-802 (2015).

Article 8 also makes the filing of a verified petition a mandatory prerequisite to such a hearing, stating, in pertinent part, that an adjudicatory hearing "shall be a judicial process designed to adjudicate the existence or nonexistence of any of the conditions alleged *in a petition*" and that "[t]he allegations *in a petition* alleging that a juvenile is abused, neglected, or dependent shall be proved by clear and convincing evidence." *Id.* (emphasis added); N.C. Gen. Stat. § 7B-805 (2015) (emphasis added). Article 8 further provides that "[i]f the court finds from the evidence, including stipulations by a party, that the allegations *in the petition* have been proven by clear and convincing evidence, the court shall so state." N.C. Gen. Stat. § 7B-807(a) (emphasis added); *see also T.R.P.*, 360 N.C. at 598, 636 S.E.2d at 795 (holding "the trial court has no power to act" where verified petition invoking subject matter jurisdiction was not filed prior to order removing custody).

It is important to note that a petition is not a mere technical requirement. To the contrary, a petition in the form required by N.C. Gen. Stat. § 7B-402 ensures that the due process rights of a parent are protected by requiring a petitioner to make specific allegations of abuse, neglect or dependency and set out the relief it is seeking from the court in connection with the juvenile at issue. *See T.R.P.*, 360 N.C. at 592, 636 S.E.2d at 791 ("[G]iven the magnitude of the interests at stake in juvenile cases and the potentially devastating consequences of any errors, the General Assembly's requirement of a verified petition is a reasonable method of assuring that our courts exercise their power only when an identifiable government actor 'vouches' for the validity of the allegations in such a freighted action."). Thus, the petition allows a parent to fully understand the allegations being made and the relief being sought so as to provide her with a full and fair opportunity to rebut those allegations.

We note that our ruling in the present case is consistent with our decision in *McKinney*. In that case, the Orange County DSS filed a document captioned "Motion in the Cause" in an ongoing neglect and dependency action pursuant to N.C. Gen. Stat. § 7B-1102. *McKinney*, 158 N.C. App. at 443, 581 S.E.2d at 794. Although the motion contained various factual allegations, it failed to (1) state that it was a petition for termination of parental rights; (2) reference the statutory provisions governing termination of parental rights; or (3) request any specific relief from the court. *Id.* at 446, 581 S.E.2d at 796-97. After a hearing was held on DSS's motion, the trial court entered an order terminating the respondent-mother's parental rights to the juvenile. *Id.* at 443, 581 S.E.2d at 794.

On appeal, the respondent-mother asserted errors "not associated with subject matter jurisdiction[,]" but we nevertheless determined *ex mero motu* that the trial court lacked jurisdiction to enter its order. *Id.*

at 443, 581 S.E.2d at 794-95. In our decision, we stated that "[t]o be valid, a pleading or motion must include a request or demand for the relief sought, or for the order the party desires the trial court to enter[.]" *Id.* at 444, 581 S.E.2d at 795. We ruled that "an examination of petitioner's motion reveal[ed] that it nowhere ask[ed] for the termination of respondent's parental rights" and did not "reference any of the statutory provisions governing termination of parental rights." *Id.* at 445-46, 581 S.E.2d at 796-97. Indeed, we noted that the motion "fail[ed] to request *any* relief, judgment, or order from the trial court." *Id.* at 446, 581 S.E.2d at 797. Notably, in holding that the trial court lacked subject matter jurisdiction to enter the order, we stated that "a trial court's general jurisdiction over the type of proceeding or over the parties *does not confer jurisdiction over the specific action*." *Id.* at 447, 581 S.E.2d at 797 (citation omitted and emphasis added).

We wish to emphasize that our decision today applies only to proceedings that fall within the purview of § 7B-401(b). Nothing in our ruling should be construed as holding that the trial court is divested of general jurisdiction in an abuse, neglect, or dependency action simply because it discontinues periodic judicial reviews. *See* N.C. Gen. Stat. § 7B-201 ("When the court obtains jurisdiction over a juvenile, jurisdiction shall continue until terminated by order of the court or until the juvenile reaches the age of 18 years or is otherwise emancipated, whichever occurs first."). Rather, we are simply holding that in cases where — as here — a director of social services seeks court action based on a new report of abuse, neglect, or dependency in a case that falls within the parameters of N.C. Gen. Stat. § 7B-401(b), the trial court lacks subject matter jurisdiction to adjudicate the juvenile as abused, neglected, or dependent absent the prior filing of a verified petition by DSS as required by Article 8. Moreover, a trial court in such circumstances cannot proceed directly to a dispositional hearing without first conducting an adjudicatory hearing and actually adjudicating the juvenile as abused, neglected, or dependent.

Accordingly, the trial court's 24 October 2016 order is vacated. *See McKinney*, 158 N.C. App. at 448, 581 S.E.2d at 798 (vacating trial court's order for lack of subject matter jurisdiction).

Conclusion

For the reasons stated above, we vacate the trial court's 24 October 2016 order.

VACATED.

Judges HUNTER, JR. and MURPHY concur.

JOHNSON v. WAYNE MEM'L HOSP., INC.

[254 N.C. App. 295 (2017)]

TRACIE JOHNSON, ADMINISTRATOR OF THE ESTATE OF MARIO JOHNSON, DECEASED, PLAINTIFF
v.
WAYNE MEMORIAL HOSPITAL, INC., TERRY A. GRANT, M.D., IMMEDIATE CARE OF GOLDSBORO, PLLC, GOLDSBORO EMERGENCY MEDICAL SPECIALISTS, INC., DENNIS A. ISENHOWER, P.A., LLOYD SMITH, M.D., PHILIP D. MAYO, M.D., AND EASTERN MEDICAL ASSOCIATES, P.A., DEFENDANTS

No. COA17-106

Filed 5 July 2017

Medical Malpractice—medical negligence—directed verdict—emergency room—X-ray reading—discrepancies

The trial court did not err in a medical negligence case by granting directed verdict in favor of defendant hospital arising from its policy for review discrepancies between the reading of X-rays by an emergency room physician and a radiologist. Plaintiff estate administrator failed to offer competent testimony as to the standard of care or the hospital's breach of that standard.

Appeal by plaintiff from order entered 19 February 2016 by Judge Beecher R. Gray in Wayne County Superior Court. Heard in the Court of Appeals 8 June 2017.

The Melvin Law Firm, P.A., by R. Bailey Melvin, for plaintiff-appellant.

McGuireWoods LLP, by Patrick M. Meacham and Kayla Marshall, for defendant-appellee Wayne Memorial Hospital, Inc.

ZACHARY, Judge.

Tracie Johnson, Administrator of the Estate of Mario Johnson (plaintiff), appeals from an order granting directed verdict in favor of Wayne Memorial Hospital, Inc. (defendant, hereafter "the hospital") on plaintiff's claim of medical negligence. Plaintiff alleged that the hospital's process for review of X-ray over-read discrepancies did not meet the standard of care for hospitals in the same or similar communities. On appeal, plaintiff contends that the court erred by ruling that plaintiff failed to present competent evidence of the relevant standard of care and by ruling that the hospital was insulated from liability arising from its allegedly negligent policy for review of X-ray over-read discrepancies by the subsequent intervening negligence of the physicians who treated

Mario Johnson (Mr. Johnson) prior to his death. After careful review of plaintiff's arguments in light of the record on appeal and the applicable law, we conclude that the trial court did not err by granting directed verdict for the hospital based on plaintiff's failure to offer competent testimony as to the standard of care or the hospital's breach of that standard. Having affirmed the court's order on this basis, we find it unnecessary to reach plaintiff's other argument.

I. Factual and Procedural History

At around 3:00 a.m. on 11 February 2011, Mr. Johnson came to the emergency department of the hospital seeking treatment for pain. Mr. Johnson suffered from sickle cell anemia, an inherited blood disorder that affects red blood cells. At the emergency room, Mr. Johnson was treated by Dr. Terry Grant, M.D., who administered pain medication and a saline solution, and ordered various tests for Mr. Johnson, including blood tests, an EKG, a test for influenza, and a chest X-ray. The results of these tests showed that Mr. Johnson's temperature, respiration, blood pressure, and blood oxygen level were normal. The blood test results indicated that Mr. Johnson's white blood cell count was elevated, which can be caused by a variety of medical conditions; however, other blood tests indicated that Mr. Johnson's red blood cells were normal and that he was not showing signs of inflammation. Dr. Grant's interpretation of the X-ray of Mr. Johnson's chest was that the results were normal. Dr. Grant concluded that because Mr. Johnson "did not appear overtly ill" and that because his "vital signs were normal" he did not need to be admitted to the hospital. Mr. Johnson was discharged from the hospital at around 5:00 a.m., with instructions to return if his condition worsened. Mr. Johnson returned to the hospital on 12 February 2011, at which time health care providers in the emergency room determined that he was suffering from "acute chest syndrome," a life-threatening complication of sickle cell anemia. Mr. Johnson was admitted to the intensive care department of the hospital. Despite further treatment, Mr. Johnson died during the early morning hours of 13 February 2011.

On 11 February 2013, plaintiff filed suit against Wayne Memorial Hospital, Inc.; Dr. Terry Grant; Dr. Paul Willman; Dennis Isenhower, P.A.; Dr. Lloyd Smith; Dr. Philip Mayo; Immediate Care of Goldsboro, PLLC; Goldsboro Emergency Medical Specialists, Inc.; Wayne Radiologists, P.A.; and Eastern Medical Associates, P.A. Dr. Smith, Dr. Mayo, Dr. Willman, and Physician's Assistant Isenhower[1] were health care providers who

1. The term "PA" refers to a physician's assistant. A PA, although not licensed to practice medicine, has extensive training in providing health care to patients.

treated Mr. Johnson on 12 and 13 February 2011. Plaintiff's complaint alleged that (1) all of the individual defendants were agents or employees of the hospital; (2) Dr. Grant was an agent, employee, or owner of Immediate Care of Goldsboro, PLLC, and of Goldsboro Emergency Medical Specialists, Inc.; (3) Dr. Willman was an agent, employee, or owner of Wayne Radiologists, P.A.; (4) PA Isenhower and Dr. Smith were agents or employees of Immediate Care of Goldsboro, PLLC, and of Goldsboro Emergency Medical Specialists, Inc.; and (5) Dr. Mayo was an agent, employee, or owner of Eastern Medical Associates, P.A. Plaintiff sought damages for medical malpractice, based upon the alleged negligence of the individual defendants as well as the derivative liability of the hospital and the medical practices with which plaintiff alleged that the individual defendants were associated. With respect to the individual defendants, plaintiff alleged that each had failed to provide appropriate care to Mr. Johnson or to meet the relevant standard of care and that the individual's negligence was a proximate cause of Mr. Johnson's death. Plaintiff sought damages against the hospital based upon allegations of medical malpractice arising from negligent treatment of Mr. Johnson, together with allegations that the hospital was negligent in that its policy for review of discrepancies between an emergency room physician's interpretation of an X-ray and that of a radiologist did not meet the relevant standard of care. The plaintiff later dismissed all claims against defendants Immediate Care of Goldsboro, PLLC, Dr. Willman, and Wayne Radiologists, P.A.

Plaintiff's claims against the remaining defendants were tried before the trial court and a jury beginning on 25 January 2016. The evidence offered at trial is discussed below, as relevant to the issues raised on appeal. At the close of plaintiff's evidence, the trial court granted directed verdict in favor of the hospital on plaintiff's allegations that the individual defendants were actual or apparent agents of the hospital, and on plaintiff's claims of clinical malpractice of the hospital arising from the individual health care providers' treatment of Mr. Johnson. The trial court did not dismiss plaintiff's negligence claim against the hospital based on the hospital's process for review of X-ray over-read discrepancies. At the close of all the evidence, however, the trial court granted directed verdict in favor of the hospital on this claim as well. As a result, the only claims submitted to the jury were the allegations of negligence on the part of the individual defendants.

The jury returned verdicts finding that the individual defendants were not negligent. The trial court signed an order on 8 February 2016, which was filed on 8 March 2016, dismissing all of plaintiff's claims with prejudice. On 18 February 2016, plaintiff filed a motion asking the trial

court to reconsider its entry of directed verdict in favor of the hospital on plaintiff's claim that the hospital's process for review of X-ray over-read discrepancies did not meet the standard of care. The trial court denied plaintiff's motion on 8 March 2016. On the same day, plaintiff noted an appeal to this Court "from the [trial court's] Order for a Directed Verdict for [the hospital], entered on February 10, 2016[.]" The directed verdict to which plaintiff's notice of appeal refers is the order directing a verdict in favor of the hospital on plaintiff's claim arising from the hospital's policy for review of X-ray over-read discrepancies. Plaintiff has not appealed from the trial court's order granting directed verdict for the hospital on plaintiff's claim for liability based on agency, from the verdicts finding the individual defendants not negligent, or from the judgment entered by the trial court after the trial. Therefore, the only issue before us on appeal is plaintiff's challenge to the order that effectively dismissed the claim that the hospital was negligent in its X-ray over-read discrepancy review policy.

II. Standard of Review

Plaintiff has appealed from an order granting directed verdict for the hospital. "The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Green v. Freeman*, 367 N.C. 136, 140, 749 S.E.2d 262, 267 (2013) (internal quotation omitted).

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

Maxwell v. Michael P. Doyle, Inc., 164 N.C. App. 319, 322-23, 595 S.E.2d 759, 761 (2004) (citations omitted). "A motion for directed verdict 'tests the legal sufficiency of the evidence to take the case to the jury and support a verdict' for the nonmovant." *Scarborough v. Dillard's, Inc.*, 363 N.C. 715, 720, 693 S.E.2d 640, 643 (2009) (quoting *Manganello v. Permastone, Inc.*, 291 N.C. 666, 670, 231 S.E.2d 678, 680 (1977)).

On appeal, plaintiff challenges certain findings of fact made by the trial court in its directed verdict order. "However, this Court, in reviewing trial court rulings on motions for directed verdict and judgment notwithstanding the verdict, has held that the trial court should not make findings of fact, and if the trial court finds facts, they are not binding on the appellate court. . . . [T]hese findings are not binding on the appellate court even if unchallenged by the appellant." *Scarborough*, 363 N.C. at 722-23, 693 S.E.2d at 644 (citation omitted). As a result, our review of the propriety of the trial court's directed verdict order is not dependent upon the evidentiary support for or the legal relevance of the court's findings of fact.

III. Medical Malpractice Claim Against the Hospital

A. Legal Principles

In reviewing a trial court's ruling on a motion for directed verdict, "our *de novo* inquiry is whether the evidence, taken in a light most favorable to plaintiff, provides more than a scintilla of evidence to support each element of plaintiff's claim. If that burden is satisfied, the motion for directed verdict should be denied[.]" *Heller v. Somdahl*, 206 N.C. App. 313, 314, 696 S.E.2d 857, 860 (2010) (citation omitted).

"Evidence of medical negligence or malpractice adequate to withstand a motion for directed verdict must establish each of the following elements: '(1) the standard of care [duty owed]; (2) breach of the standard of care; (3) proximate causation; and (4) damages.' Failure to make a *prima facie* evidentiary showing in support of even one element is fatal." *Clark v. Perry*, 114 N.C. App. 297, 304-05, 442 S.E.2d 57, 61 (1994) (quoting *Lowery v. Newton*, 52 N.C. App. 234, 237, 278 S.E.2d 566, 570 (1981) (other citation omitted).

"One of the essential elements of a claim for medical negligence is that the defendant breached the applicable standard of medical care owed to the plaintiff." *Goins v. Puleo*, 350 N.C. 277, 281, 512 S.E.2d 748, 751 (1999). "Plaintiffs must establish the relevant standard of care through expert testimony." *Crocker v. Roethling*, 363 N.C. 140, 142, 675 S.E.2d 625, 628 (2009) (citations omitted). "To meet their burden of proving the applicable standard of care, plaintiffs must satisfy the requirements of N.C.G.S. § 90-21.12[.]" *Id.* At the time that plaintiff's claim arose,[2] N.C. Gen. Stat. § 90-21.12(a) provided that:

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2. N.C. Gen. Stat. § 90-21.2 was amended effective 1 October 2011, and "apply[ing] to causes of action arising on or after that date." Because plaintiff's claim arose in February, 2011, it is governed by the earlier version of N.C. Gen. Stat. § 90-21.2.

> In any action for damages for personal injury or death arising out of the furnishing or the failure to furnish professional services in the performance of medical . . . care, the defendant shall not be liable for the payment of damages unless the trier of the facts is satisfied 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 at the time of the alleged act giving rise to the cause of action.

B. Discussion

Plaintiff alleges that the hospital was negligent in its process for review by a radiologist of X-rays that were originally interpreted by an emergency room physician and subsequent communication of any discrepancy in the radiologist's interpretation to emergency room personnel. The dispositive issue is whether plaintiff produced evidence that the hospital's policy or practice "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 at the time of the alleged act giving rise to the cause of action[.]" N.C. Gen. Stat. § 90-21.12(a) (2011). We conclude that plaintiff failed to offer any evidence of either (1) the standard of care to which a hospital in the same or similar community should adhere in its process for the review of X-rays, or (2) the hospital's breach of the standard of care.

The hospital policy at issue becomes relevant in the following circumstances. When a patient, such as Mr. Johnson, is treated in the hospital's emergency room, the physician who is treating the patient may order an X-ray. The emergency room physician reviews, or "reads," the X-ray as part of the physician's determination of the appropriate treatment for the patient. The X-ray is later provided to a radiologist, who is a physician specializing in the interpretation and analysis of X-rays and other scans. The radiologist's review of the X-ray that was originally interpreted by the emergency room physician is referred to as an "over-read." If the radiologist's interpretation of the X-ray differs from that of the emergency room physician, this difference is termed a "discrepancy." Plaintiff alleges that the hospital's process for informing emergency room personnel about a discrepancy observed by the radiologist in the over-read did not meet the applicable standard of care.

The general structure of the hospital's policy at the time of Mr. Johnson's treatment at the hospital in regard to communication about

discrepancies detected in a radiologist's over-read is set out in the hospital's Policy Number ED-019, which states, in relevant part, that:

> Purpose: To provide a system for follow up of diagnostic tests. . . . To provide guidelines for contacting patients when additional or alternative treatment is necessary following an Emergency Department visit.
>
> . . .
>
> Policy:
>
> A. Follow up of diagnostic tests will be done in the Emergency Department under the direction of a physician.
>
> B. The Emergency Department Supervisor will review all . . . radiologist interpretations[.] . . . Discrepancies will be reported to the Emergency Department physician/PA.
>
> . . .
>
> E. The Emergency Department physician/PA will review the corresponding patient's record to decide whether the variance is clinically significant and requires contacting the patient, or whether a variance exists, but [is] not clinically relevant to the Emergency Department visit and requires no further treatment.
>
> Radiology:
>
> 1. X-rays ordered by an Emergency Department physician or PA are initially interpreted by the Emergency Department physician with final interpretation by a radiologist.
>
> . . .
>
> 4. The ED supervisor compares the Emergency Department physician's preliminary findings . . . with the final radiologist interpretation. If a discrepancy exists, the "Emergency Department Radiology Follow-up Form" will be completed.

Plaintiff's negligence claim against the hospital is not based upon a challenge to the general parameters of the hospital's policy for review of discrepancies. Nor does plaintiff allege that the hospital failed to implement its policy in this case. Plaintiff instead contends that that the hospital's negligence "is not based upon the policy itself but on the timeframe

established by the hospital to carry out the policy." Thus, plaintiff does not allege that the hospital was negligent for utilizing a sequence of successive reviews by the emergency room physician, the radiologist, a nurse, and then emergency room personnel. Plaintiff's claim is narrowly focused upon the fact that, unless the radiologist determined that the emergency room should be contacted immediately, it typically took about 24 hours after an emergency room physician's initial read of an X-ray before the emergency room staff would be informed of the radiologist's differing interpretation.

The schedule or timeline of the hospital's process for review of X-ray over-read discrepancies was established through the testimony of Nurse Laura Bruce, the Clinical Director of the hospital's emergency department, and Dr. Paul Willman, the radiologist who reviewed Mr. Johnson's X-ray. Dr. Willman testified that the radiologist would contact the emergency department directly if, in the opinion of the radiologist, the X-ray revealed a life-threatening situation or a medical condition for which a patient required immediate attention. Nurse Bruce described the hospital's process for the further review of X-rays that had been read by an emergency room physician and subsequently reviewed by a radiologist in situations in which the radiologist did not find it necessary to contact the emergency room immediately. Each morning the nurse supervisor reviewed the X-rays that were taken between midnight the day before until midnight of that day. If there was a discrepancy between the X-ray interpretation of the emergency department physician and that of the radiologist, the nurse supervisor would complete a form detailing the situation. The form would then be reviewed by an emergency room PA or physician, who would determine what, if anything, should be done in response to the discrepancy. Thus, if the radiologist did not perceive the need for immediate intervention, it would typically be at least 24 hours between the emergency room physician's initial reading of an X-ray and the opportunity for a physician to compare that review with the results of the radiologist's reading of the X-ray.

In this case, X-rays were taken between 3:00 and 5:00 a.m. on 11 February 2011, and Mr. Johnson was discharged from the emergency room at around 5:30 a.m. At approximately 8:00 a.m. that morning, Mr. Johnson's X-ray was reviewed by Dr. Paul Willman, a radiologist who practiced at the hospital and testified at trial as an expert in radiology. In February 2011, Dr. Willman's duties included a review each morning of the X-rays taken during the previous night. On 11 February 2011, Dr. Willman reviewed the X-ray of Mr. Johnson's chest and lungs and observed a "very subtle" abnormality, which he characterized as a "left

lobe infiltrate." Because Dr. Willman did not consider this finding to be "dangerous, ominous, or concerning," he did not report it directly to the emergency department. The discrepancy was provided to the nurse supervisor about 14 hours later, just after midnight on 12 February 2011. She shared the results with the emergency room PA when he arrived for work on the morning of 12 February 2011. However, Mr. Johnson had already returned to the emergency room during the morning of 12 February 2011, "before it got to [the] stage of the process" in which a PA would conduct further review.

Plaintiff contends that the hospital's process for communication of discrepancies in review of X-rays failed to meet the proper standard of care in regard to the "timeframe" within which such discrepancies should be brought to the attention of an emergency room physician. Specifically, plaintiff alleges that the hospital breached the standard of care because, unless the radiologist found a discrepancy that appeared to require urgent treatment, it could be 24 hours between the time that an emergency room physician reviewed an X-ray and the time that emergency room personnel received a copy of the radiologist's description of the over-read showing a discrepancy.

In order to meet the standard for recovery enunciated in N.C. Gen. Stat. § 90-21.12, plaintiff was required to establish that the hospital's policy did not meet "the standards of practice among [other hospitals] . . . situated in the same or similar communities at the time of the alleged act giving rise to the cause of action." Accordingly, to establish the standard of care, plaintiff was required to produce evidence showing whether the hospital met the standard of care for similar hospitals in regard to the timely communication of information about over-read discrepancies between the radiologist and the emergency room personnel. This Court held in *Tripp v. Pate*, 49 N.C. App. 329, 333, 271 S.E.2d 407, 409-10 (1980), a case bearing some factual similarity to the present case, that the failure to produce such evidence supported entry of directed verdict in favor of the hospital:

> First, plaintiff argues she presented evidence the hospital was negligent in not reporting promptly the results of certain tests ordered by plaintiff's doctors after her surgery, thereby causing a delay in the diagnosis of plaintiff's condition. In order to withstand a motion for directed verdict on this issue, however, plaintiff was required by N.C. Gen. Stat. § 90-21.12, *supra*, to offer some evidence that the care of the defendant hospital was not in accordance with the standards of practice among other hospitals in

> the same or similar communities. Plaintiff failed to present any evidence of the standard of care for a hospital in Kinston or similar communities regarding time necessary to report test results. (Emphasis added).

In the instant case, plaintiff offered the testimony of Dr. Brian Quigley to establish the standard of care for a hospital's policy for communication of discrepancies found in a radiologist's over-read, and the hospital's breach of that standard. On appeal, the parties have offered arguments as to whether Dr. Quigley was qualified to offer expert testimony on the standard of care for timely communication between the radiologist and the emergency room staff of an X-ray over-read discrepancy. Upon review of the transcript, however, we conclude that Dr. Quigley did not offer testimony establishing either the standard of care or the hospital's breach of the standard. As a result, we find it unnecessary to address the parties' arguments concerning whether he would have been qualified to give such testimony.

Dr. Quigley, who testified as an expert in emergency medicine, testified that he had reviewed information about Goldsboro and about Wayne Memorial Hospital and specifically its emergency room, and was "familiar with the type of policies and procedures that hospitals like Wayne Memorial should have in their emergency room." When asked by plaintiff's counsel, Dr. Quigley agreed that a hospital should "have a system set up to make sure there's good communication between radiology and emergency medicine when there's this kind of discrepancy between the [physicians' interpretation of X-rays]." Dr. Quigley testified as follows when asked by plaintiff's counsel to "explain the system, the policy that Wayne Memorial had set up regarding these over, over -- X-Ray overreads and the discrepancies."

> [DR. QUIGLEY]: Well, a discrepancy policy means that there is a discrepancy between . . . an emergency physician's reading versus what the radiologist's is, and from what I understand, the policy was that they collected the X-rays from one midnight to the next midnight, and then they matched up what the radiologist's reading was with what the emergency physician's reading was, and if there was a discrepancy between the two, then they brought those up to the emergency department, they're pulled by the nurse supervisor, and brought up to the emergency department, and then the physician assistant would review these discrepancies, look at the chart, look at the overread of the radiologist, and then make a determination

> whether clinically they were of concern, whether or not to call the patient back or have them come back to the emergency department.

Dr. Quigley's testimony reflects a general understanding of the hospital's policy, with one significant omission: Dr. Quigley did not acknowledge that, in the event that the radiologist determined that a discrepancy indicated a medical condition requiring urgent attention, he would contact the emergency room staff directly.

On direct examination, Dr. Quigley indicated that he was generally "familiar with the standard of care in February of 2011 in Goldsboro, North Carolina or similar communities as it applies to the type of care and treatment that Mario Johnson received." However, when he was questioned specifically about the X-ray over-read discrepancy policies or practices of hospitals in the same or similar communities in 2011, Dr. Quigley conceded that he had no information on the subject:

> Q. Do you agree that Wayne Memorial Hospital followed their discrepancy policy as it was written?
>
> A. As it was written, yes.
>
> . . .
>
> Q. Yesterday I believe, when you were answering Mr. Melvin's questions, you said something to the effect that the Wayne Memorial discrepancy policy was an archaic system as it existed in February of 2011. Do you recall that?
>
> A. Yes, sir.
>
> Q. Now, did you make any effort to call around to any hospitals other than Rex to find out what type of systems they were using for discrepancies?
>
> A. No, I didn't make any specific phone calls.
>
> Q. Okay. So you don't know if this Rex policy is similar to the type of policies that are being used in other hospitals throughout Eastern North Carolina?
>
> A. Well, I think every hospital operates a little differently. I can only speak for the fact that we have 24 hour coverage currently, and in 2011.
>
> . . .

> Q. Okay? You cannot say, as you sit here today, whether the policy that Wayne Memorial Hospital had in February of 2011 is similar to that of other hospitals similarly situated in Eastern North Carolina at that same time.
>
> A. No, I would have had to go back in time in 2011 and call each specific Emergency Department and find out what their policies were.
>
> Q. Well, you could have done that in advance of your deposition two years ago. Correct?
>
> A. Yes.
>
> Q. You did not.
>
> A. No, I didn't make any calls.
>
> Q. And you haven't made any such calls or made any inquiry since May 13, 2014. Correct?
>
> A. That's correct.

Dr. Quigley did not offer any testimony at trial that could establish the standard of care applicable to the policies or practices of hospitals in similar communities in 2011 concerning the time frame for communication of an over-read discrepancy between a radiologist and the emergency room staff. The absence of any testimony on the standard of care is consistent with Dr. Quigley's admission that he had not made any inquiries to determine the practices of other hospitals in 2011. We conclude that Dr. Quigley failed to offer evidence on the relevant standard of care and that, because Dr. Quigley was plaintiff's only witness on this issue, the trial court did not err by granting directed verdict in favor of the hospital.

In urging us to reach a different conclusion, plaintiff asserts that:

> Dr. Quigley testified that he was familiar with the standard of care in Goldsboro, N.C. and similar communities and that Wayne Memorial had violated the standard of care by having a system that allowed for a 28-hour delay in informing the emergency department that the X-ray had been misread. Dr. Quigley testified that in order to comply with the standard of care Wayne Memorial needed a system where the radiologist's interrogation [sic] of the X-ray needed to be brought to the attention of the emergency department within 4-5 hours.

Plaintiff's appellate brief cites pages 15, 55, and 61 of the trial transcript as the sources for these contentions. Plaintiff accurately cites page 15 for the statement that Dr. Quigley testified to his familiarity with the standard of care in Goldsboro and similar communities. However, the testimony presented on the other pages cited by plaintiff does not support plaintiff's position. Following is the testimony to which plaintiff refers:

> Q. Now this system that Wayne Memorial has about getting this information from Radiology to the Emergency Room, in your opinion, is that system within the standard of care for a hospital emergency room?
>
> A. No, especially not in 2011.
>
> Q. Why not?
>
> A. Well, if you look at the record it was actually read by the radiologist . . . [Mr. Johnson] was discharged early morning on the 11th, and was discharged home at that time at about 5 a.m. The radiologist over-read the film and had a report in the system electronically at 7:58 a.m. . . . [B]ut then there's a delay with this process with the midnight to midnight, then no one sees the discrepancy on the over-read for 24, 28 hours. And this makes a difference clinically.
>
> . . .
>
> Q. . . . Now, to have a system or a policy that meets the standard of care, in your opinion, how long can the delay be? We've got about a 28 to 30 hour in Mario's case. If they're going to have a system that meets the standard of care, how long should the delay be?
>
> A. I would say that, in 2011, with the electronic dictations into the chart, maybe 4 or 5 hours.
>
> Q. All right. And that would -- I'm sorry.
>
> A. Roughly. Roughly.
>
> Q. Okay.
>
> A. That's a guess.
>
> Q. And that would mean, in Mario's case, that should have come to somebody's attention by what time?

> A. Well, if you -- if you go by this system, if they read at 7:58 and someone's ongoingly pulling up these discrepancies, it should have occurred earlier on February 11.
>
> Q. All right.
>
> A. Sometime maybe early morning, late morning, early afternoon.

We conclude for several reasons that Dr. Quigley's testimony did not constitute competent evidence of the relevant standard of care or of the hospital's breach of that standard. First, Dr. Quigley offered no testimony or other evidence as to the policies in effect at other hospitals in similar communities in 2011. In fact, as discussed above, Dr. Quigley admitted that he had never tried to obtain information on the subject. Dr. Quigley was asked how long the delay "should be," and not how long the delay actually was in comparable hospitals. As a result, the jury would have had no way to compare the time frame of this hospital's policy to that of other hospitals. Secondly, when asked how long the delay should be, Dr. Quigley candidly admitted that he could only guess. He estimated that the emergency room should be made aware of the radiologist's over-read within "roughly, roughly" "maybe 4-5 hours," which he conceded was "a guess." Taking into consideration Dr. Quigley's admitted lack of information about the pertinent standard of care, the absence of testimony establishing the standard, and Dr. Quigley's characterization of an appropriate time frame as a rough guess, we conclude that Dr. Quigley did not offer competent evidence on the standard of care or the hospital's breach of that standard.

IV. Conclusion

Having reached this conclusion, we find it unnecessary to reach the parties' other arguments. We conclude that the trial court did not err by granting directed verdict in favor of the hospital and that its order should be

AFFIRMED.

Judges DILLON concurs.

Judge BERGER, JR. concurs in result only.

O'NEAL v. O'NEAL

[254 N.C. App. 309 (2017)]

BARBARA G. O'NEAL, BY AND THROUGH G. ELVIN SMALL, III, GUARDIAN OF THE ESTATE OF BARBARA G. O'NEAL, PLAINTIFF

v.

PAMELA SUE O'NEAL; PAMELA SUE O'NEAL, AS TRUSTEE OF BARBARA O'NEAL LAND TRUST; PAMELA SUE O'NEAL, AS TRUSTEE OF BARBARA O'NEAL FARM LAND TRUST; PAMELA SUE O'NEAL, AS TRUSTEE OF BARBARA O'NEAL BARCO LAND TRUST; BARBARA O'NEAL LAND TRUST; BARBARA O'NEAL FARM LAND TRUST; BARBARA O'NEAL BARCO LAND TRUST; AND LORI ANN CHAPPELLE, DEFENDANTS

No. COA16-1299

Filed 5 July 2017

1. Powers of Attorney—attorney-in-fact—incompetency—void power of attorney—void deeds

The trial court did not err in an action to have a power of attorney and three deeds declared void by granting judgment on the pleadings in favor of plaintiff grandmother where plaintiff's adjudication of incompetency rendered her incapable of executing a legally operative power of attorney in favor of her granddaughter. The deeds that the granddaughter executed as her grandmother's attorney-in-fact (in favor of herself two days before the granddaughter's four-year general guardianship of the grandmother revocation was recorded) were also void.

2. Powers of Attorney—incompetency—subsequent good faith purchasers of real property—constructive notice

The trial court did not err in an action to have a power of attorney and three deeds declared void by granting judgment on the pleadings in favor of plaintiff grandmother where a power of attorney executed by a person who had been adjudicated incompetent was void and posed no threat to subsequent good faith purchasers of real property. Potential purchasers are on constructive notice of all information properly recorded in the land and court records of the pertinent county and the relevant special proceedings index. Defendant granddaughter, while serving as her grandmother's guardian, could have petitioned the clerk for the authority to execute the deeds.

Appeal by defendants from order entered 8 August 2016 by Judge Walter H. Godwin in Currituck County Superior Court. Heard in the Court of Appeals 1 May 2017.

G. Elvin Small, III, for plaintiff-appellee.

John M. Kirby for defendants-appellants.[1]

ZACHARY, Judge.

Barbara G. O'Neal was adjudicated incompetent and defendant Pamela Sue O'Neal was appointed as Barbara's general guardian. Pamela was later removed from that position. An attorney was then appointed guardian of Barbara's estate, and the Currituck County Department of Social Services was appointed guardian of Barbara's person. Shortly before Pamela was removed as Barbara's guardian, Barbara executed a power of attorney appointing Pamela as her attorney-in-fact. Acting as Barbara's attorney-in-fact, Pamela executed three deeds transferring real property owned by Barbara to different land trusts. The guardian of Barbara's estate revoked the power of attorney. Barbara, by and through the guardian of her estate (plaintiff),[2] then brought an action to have the power of attorney and the deeds declared void. After plaintiff filed her complaint and defendants filed their answer, the superior court entered an order granting judgment on the pleadings in favor of plaintiff. For the reasons that follow, we affirm the superior court's order.

I. Background

Pamela is the granddaughter of Barbara. In July 2011, Pamela filed a petition to have Barbara, who was seventy-nine years old at the time, adjudicated incompetent. The petition stated, *inter alia*, that Barbara suffered from "a long history of prescription substance abuse[,]" that she had been transferred "to Currituck House Assisted Living," and that she suffered from "[m]ajor [d]epression with chronic anxiety, seizure disorder, memory loss, hypothyroidism[,] and diabetes." Pamela also alleged that Barbara lacked the capacity to handle her financial affairs or to "resist attempts of financial exploitation" by others. As a result, the Currituck County Clerk of Superior Court entered an order on 17 August 2011, which adjudicated Barbara incompetent, retaining no rights or privileges. The order also appointed Pamela as Barbara's general guardian.

Four years later, the clerk revoked Pamela's letters of general guardianship in an order entered 12 October 2015. The clerk found that, as

1. The record indicates that defendant Lori Ann Chappelle is not represented by Mr. Kirby, and this Court's docket sheet specifies that Ms. Chappelle is a *pro se* defendant.

2. In this opinion, we refer to Barbara O'Neal and her guardian collectively as "plaintiff" and to Barbara O'Neal individually as "Barbara."

"the sole heir at law of Barbara O'Neal[,]" Pamela had a "private interest in [Barbara's estate,]" and that "this private interest might tend to hinder or be adverse to Pamela O'Neal in the carrying out of her duties as General Guardian[.]" However, on 10 October 2015, two days before the clerk's revocation order was entered, Barbara executed a durable power of attorney appointing Pamela as her attorney-in-fact. The power of attorney was recorded in the Office of the Currituck County Register of Deeds on 30 October 2015. That same day, two quitclaim deeds were executed by Pamela as attorney-in-fact for Barbara. The first deed conveyed certain real property owned by Barbara to the "Barbara O'Neal Land Trust[,]" and the second deed conveyed a 13.10-acre parcel owned by Barbara to the "Barbara O'Neal Farm Land Trust[.]" On 10 November 2015, Pamela, as attorney-in-fact for Barbara, executed a quitclaim deed conveying Barbara's interest in a 87-acre parcel to the "Barbara O'Neal Barco Land Trust." Pamela was named trustee of all the aforementioned land trusts. All three deeds were recorded in the Office of the Currituck County Register of Deeds.

On 18 November 2015, attorney G. Elvin Small, III was appointed the guardian of Barbara's estate. Acting on behalf of Barbara, Small revoked the October 2015 power of attorney executed in favor of Pamela. Pamela then procured Barbara's signature on a second power of attorney on 4 December 2015, again naming Pamela as Barbara's attorney-in-fact. The second power of attorney, which was also revoked by Small, was not used to conduct any transactions on Barbara's behalf.

On 1 April 2016, Small, as guardian of Barbara's estate, instituted the present action in Currituck County Superior Court seeking, *inter alia*, a judgment declaring both of Pamela's powers of attorney as well as the 30 October 2015 and the 10 November 2015 deeds to be null and void. In her answer to plaintiff's complaint, Pamela admitted that Barbara had been adjudicated incompetent on 17 August 2011, and that Barbara's competence had not been restored. In June 2016, plaintiff filed a motion for judgment on the pleadings pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure.

A hearing was conducted by Judge Walter H. Godwin, who entered an order granting plaintiff's motion for judgment on the pleadings. The superior court's order, filed 8 August 2016, provided that the two powers of attorney executed by Barbara appointing Pamela as attorney-in-fact were void *ab initio*, as were the three deeds that Pamela executed as Barbara's attorney-in-fact in October and November 2015. The superior court ruled that these instruments were void because they were "executed by Barbara G. O'Neal, a person who was adjudicated incompetent

on August 18, 2011, and whose legal competency has not been restored, or they . . . were executed on her behalf by the attorney in fact named in a power of attorney executed by said incompetent person." Pamela and the other named defendants appeal from the superior court's order granting judgment on the pleadings in favor of plaintiff.

II. Standard of Review

This Court reviews a trial court's ruling on a Rule 12(c) motion for judgment on the pleadings *de novo*. *Toomer v. Branch Banking & Trust Co.*, 171 N.C. App. 58, 66, 614 S.E.2d 328, 335 (2005). Because "[j]udgments on the pleadings are disfavored in law, . . . the trial court must view the facts and permissible inferences in the light most favorable to the non-moving party." *Groves v. Community Hous. Corp.*, 144 N.C. App. 79, 87, 548 S.E.2d 535, 540 (2001) (citation omitted). Even so, judgment on the pleadings "is appropriate when all the material allegations of fact are admitted in the pleadings and only questions of law remain." *Id.* (internal citations and quotation marks omitted).

III. Powers of Attorney

"A power of attorney is an instrument in writing granting power in an agent to transact business for his principal." *Cabarrus Bank & Trust Co. v. Chandler*, 63 N.C. App. 724, 726, 306 S.E.2d 184, 185 (1983) (citations omitted). The agency relationship that results is between "one who gives the power, the principal, and one who exercises authority under the power of attorney, the agent." *Whitford v. Gaskill*, 119 N.C. App. 790, 793, 460 S.E.2d 346, 348 (1995), *rev'd on other grounds*, 345 N.C. 475, 480 S.E.2d 690 (1997). Any act performed by the agent is as if the principal had performed it. *See Branch Banking and Trust Co. v. Creasy*, 301 N.C. 44, 56, 269 S.E.2d 117, 124 (1980) ("An agent is one who acts for or in the place of another by authority from him."). Although special rules apply to the fiduciary relationship between a principal and agent, there is, as a general matter, little reason to draw distinctions between powers of attorney and contracts. *See Hedgepeth v. Home Savs. & Loan Ass'n*, 87 N.C. App. 610, 612, 361 S.E.2d 888, 890 (1987) (determining that power of attorney at issue "should be treated the same as any other contract") (citations omitted); 12 *Williston on Contracts* § 35:1, at 202 (4th ed. 2012) ("An agency contract is formed according to the same rules that are applicable to any other contract; an agency is created in much the same manner as a contract is made, in that the agency results from an agreement between the principal and the agent to serve in that capacity."). As a result, we will apply general principles of contract law to the power of attorney that Barbara executed appointing Pamela her attorney-in-fact.

IV. Discussion

[1] Defendants' principal argument on appeal is that the superior court erred in declaring Pamela's first power of attorney (and the deeds she executed pursuant to that power) void *ab initio*. According to defendants, "[a]lthough a person declared incompetent lacks the capacity to enter contracts, such that contracts are *voidable* . . . , an incompetent person retains many rights and powers to direct their care and finances." In support of this assertion, defendants cite case law holding that allegations concerning an incompetent person's ability to make a will or enter into marriage merely create an issue of fact as to whether the person possessed the necessary capacity to make the transaction at the time it was made. *See Geitner v. Townsend*, 67 N.C. App. 159, 312 S.E.2d 236 (1984); *In re Will of Maynard*, 64 N.C. App. 211, 307 S.E.2d 416 (1983). We disagree, and find that *Geitner* is inapposite to this case and that *Maynard* actually cuts against defendants' argument.

In *Geitner*, a man married a woman after he had been adjudicated incompetent and placed under guardianship, and the question on appeal was whether the jury properly determined that the man had sufficient mental capacity to enter into the marriage. 67 N.C. App. at 160-161, 312 S.E.2d at 237-38. This Court went on to affirm the judgment entered upon the jury's verdict finding that the man had sufficient mental capacity to contract a valid marriage. *Id.* at 162, 312 S.E.2d at 239. In doing so, the *Geitner* Court specifically observed that " '*unlike other transactions*, an insane person's capacity to marry is not necessarily affected by guardianship . . . . (R)easons why guardianship removes from the insane person *all capacity to contract* do not apply to marriage.' " *Id.* (emphasis added) (quoting *Lee's North Carolina Family Law*, § 24 n. 119 (4th ed. 1979) (citation omitted). Thus, the capacity to marry stands on an entirely different footing than one's ability to make contracts or appoint agents.

In *Maynard*, the testatrix executed a will, was later adjudicated incompetent, and then executed a second will expressly revoking the first will. 64 N.C. App. at 212, 307 S.E.2d at 419. In the caveat proceeding, the trial court submitted to the jury the issue of which will should be admitted to probate, and the jury found that the second will was a valid Last Will and Testament. This Court affirmed. After noting that there is a presumption "that a testator possessed testamentary capacity" and that any party alleging otherwise bears the burden of proving a lack of capacity, *id.* at 225, 307 S.E.2d at 426, the *Maynard* Court determined that a declaration that one is incompetent to manage his affairs does not, by itself, establish a lack of testamentary capacity; rather, it is simply

prima facie evidence of incapacity. *Id.* at 225, 307 S.E.2d at 427. In this way, the Court drew a critical distinction between the capacity to manage one's own affairs and the capacity to make a will:

> [W]here a person has been declared incompetent to *manage his affairs*, and a guardian appointed, the person is presumed to lack mental capacity to *manage his affairs*, and *this presumption is conclusive as to parties and privies to the guardianship proceedings* and rebuttable as to all others. As to *testamentary capacity*, a person for whom a guardian has been appointed is presumed "*in the absence of proof to the contrary*" to lack *testamentary capacity*. The presumption as to *testamentary incapacity* is necessarily a rebuttable one, or there could be no "proof to the contrary."

Id. at 225, 307 S.E.2d at 426-27 (third emphasis added).

Under the rules set forth in *Maynard*, a person who has been declared incompetent and placed under a guardianship may possess sufficient testamentary capacity, but the adjudication of incompetence conclusively establishes the person's incapacity to manage his affairs as to parties to the guardianship proceedings. In the present case, Pamela was not only a party to Barbara's initial guardianship proceeding, *Pamela instituted the guardianship proceedings and served as Barbara's guardian for four years*. Barbara's incapacity was, therefore, conclusively established as to Pamela. Accordingly, we examine the effect of Barbara's adjudication of incompetency on her capacity to execute a power of attorney, and Pamela's authority to execute deeds as Barbara's attorney-in-fact.

After a careful examination of the relevant North Carolina jurisprudence, we find that the following principles apply to this case. Although "[t]he law presumes that every person is sane in the absence of evidence to the contrary[,] . . . after a person has . . . been found to be mentally incompetent[,] there is a presumption that the mental incapacity continues." *Davis v. Davis*, 223 N.C. 36, 38, 25 S.E.2d 181, 183 (1943). Ordinarily, when a mentally incompetent person executes a contract or deed before their condition has been formally declared, the resulting agreement or transaction is voidable and not void. *E.g.*, *Chesson v. Pilot Life Ins. Co.*, 268 N.C. 98, 102, 150 S.E.2d 40, 43 (1966); *Reynolds v. Earley*, 241 N.C. 521, 524, 85 S.E.2d 904, 906 (1955); *Wadford v. Gillette*, 193 N.C. 413, 420, 137 S.E. 314, 317 (1927). But a contract or deed executed after a person has been adjudicated incompetent is absolutely void absent proof that

the person's mental capacity was restored prior to executing the instrument. *Tomlins v. Cranford*, 227 N.C. 323, 326, 42 S.E.2d 100, 101 (1947); *Wadford*, 193 N.C. at 420, 137 S.E. at 317.

As mentioned above, we treat the power of attorney at issue in this case the same as any other contract. Under *Maynard*, the clerk's 2011 order, which formally adjudicated Barbara incompetent and placed her under a guardianship, conclusively established (as to Pamela) Barbara's incapacity to enter into legally-binding contracts. In other words, this incapacity was established as a matter of law. Because there is no evidence in the record that Barbara's competency was restored before she executed the power of attorney on 10 October 2015, the power of attorney was a nullity and of no legal effect. As such, Pamela had no legal authority to act as Barbara's attorney-in-fact when she executed the three deeds at issue and purported to convey property to the relevant land trusts of which she was trustee. Our conclusion rests upon the notion that when the principal is adjudicated incompetent before executing a power of attorney in favor of the agent, the principal cannot give a legally operative consent, and no agency relationship results. Accordingly, because Barbara's power of attorney and the deeds that Pamela executed pursuant to it were void *ab initio*, the superior court properly granted judgment on the pleadings in favor of plaintiff.

[2] Finally, we address two concerns that arise from defendants' arguments on appeal. First, defendants concern for innocent third parties is misplaced. Concluding that a power of attorney executed by a person who has been adjudicated incompetent is void poses no threat to subsequent good faith purchasers of real property. Indeed, it is already well established that a deed executed by a person who has been judicially declared incompetent is void. *Tomlins*, 227 N.C. at 326, 42 S.E.2d at 101; *Wadford*, 193 N.C. at 420, 137 S.E. at 317. Beyond that, a diligent potential purchaser of real property would discover an attorney-in-fact's inability to execute a valid deed on behalf of a previously-adjudicated incompetent person via the court order adjudicating the person to be incompetent, to be found in the special proceedings index. Potential purchasers are on constructive notice of all information properly recorded in the land and court records of the county in which the property is located as well as the relevant special proceedings index. *See Stegall v. Robinson*, 81 N.C. App. 617, 619, 344 S.E.2d 803, 804 (1986) ("A purchaser . . . has constructive notice of all duly recorded documents that a proper examination of the title should reveal.").

Second, defendants proclaim that "[c]onsistent with the public policy of North Carolina, Barbara O'Neal should be able to appoint her

granddaughter as her power of attorney, and to instruct her as to how she wants her property handled." However, the court and Pamela agreed that Barbara was unable to manage her financial affairs. Moreover, Pamela may have made the conveyances pursuant to this State's guardianship statutes, if doing so would have "materially promoted" Barbara's interests. Pamela, while serving as Barbara's guardian, could have petitioned the clerk for the authority to execute the deeds. *See* N.C. Gen. Stat. § 35A-1301(b) (2015) (permitting a guardian to apply to the clerk to, *inter alia*, "sell . . . any part of his ward's real estate," and authorizing the clerk to "order a sale . . . to be made by the guardian in such way and on such terms that may be most advantageous to the interest of the ward, upon finding by satisfactory proof that" the guardian's application meets certain criteria). What Pamela could *not* do was sign the deeds pursuant to a power of attorney that was executed well after Barbara was adjudicated incompetent.

V. Conclusion

For the reasons explained above, we conclude that Barbara's adjudication of incompetency rendered her incapable of executing a legally operative power of attorney. The power of attorney was void. Consequently, the deeds that Pamela executed as Barbara's attorney-in-fact were also void, and the superior court properly granted plaintiff's motion for judgment on the pleadings. The order of the superior court is affirmed.

AFFIRMED.

Chief Judge McGEE and Judge HUNTER, JR. concur.

STATE OF NORTH CAROLINA
v.
ROBERT JEROME COBB, DEFENDANT, SURETY: ULONDA T. HILL,
BAIL AGENT FOR 1ST ATLANTIC SURETY COMPANY; JUDGMENT CREDITOR: WATAUGA
COUNTY BOARD OF EDUCATION

No. COA16-990

Filed 5 July 2017

Penalties, Fines, and Forfeitures—forfeiture of appearance bond—missing documentation to support grounds

The trial court lacked statutory authority under N.C.G.S. § 15A-544.5 to set aside a forfeiture of an appearance bond in the amount of $30,000 where it did not contain the required documentation to support any ground set forth. The bail agent erroneously submitted an ACIS printout that did not meet the requirement of a sheriff's receipt (evidence defendant was surrendered by a surety) on the bail bond rather than the required AOC-CR-214 form.

Judge ZACHARY dissenting.

Appeal by judgment creditor from order entered 6 July 2016 by Judge Gary M. Gavenus in Watauga County Superior Court. Heard in the Court of Appeals 7 March 2017.

No brief was filed for Surety 1st Atlantic Surety Company.

Miller & Johnson, PLLC, by Nathan A. Miller, for Judgment Creditor Watauga County Board of Education.

BRYANT, Judge.

Where the motion to set aside the forfeiture of an appearance bond did not contain the required documentation to support any ground set forth in North Carolina General Statutes, section 15A-544.5, the trial court lacked statutory authority to set aside the forfeiture of the appearance bond. Accordingly, we vacate the trial court's order setting aside the forfeiture of the bond.

An appearance bond in the amount of $30,000.00 was placed for Robert Jerome Cobb to appear in Watauga County Superior Court on 12 January 2016 on a felony charge in case number 15 CRS 050271. Due

to Cobb's failure to appear, the Honorable Gary M. Gavenus, Superior Court judge, ordered that Cobb's $30,000.00 appearance bond in that case be forfeited. On 14 January 2016, a Deputy Clerk of Watauga County Superior Court issued a bond forfeiture notice to Cobb, as well as to 1st Atlantic Surety Company via first-class mail. On 8 June 2016, Ulonda Hill, a bail agent, moved the court to set aside the forfeiture. In the motion, which was filed on form AOC-CR-213—a form with pre-set options and check boxes—Hill checked that "defendant has been surrendered by a surety on the bail bond as provided by G.S. 15A-540, as evidenced on the attached 'Surrender Of Defendant By Surety' (AOC-CR-214)." However, instead of a Form CR-214, attached to the motion was a printout from the Automated Criminal/Infractions System (ACIS). On 14 June 2016, an attorney for the school board filed an objection and notice of hearing. The hearing was set for 5 July 2016. On 6 July 2016, the trial court entered an order finding "that the moving party has established one or more of the reasons specified in G. S. 15A-544.5 for setting aside the forfeiture. . . . The . . . Motion is allowed and the forfeiture is set aside." Judgment creditor Watauga County Board of Education ("the Board") appeals.

On appeal, the Board argues that the trial court erred by finding that the moving party established a reason for setting aside the bond forfeiture, pursuant to N.C. Gen. Stat. § 15A-544.5. More specifically, the Board contends that by submitting an ACIS printout rather than the required AOC-CR-214 form, the bail agent failed to comply with section 15A-544.5 in seeking to aside the bond forfeiture. We agree in part.

General Statutes Chapter 15A, Article 26, Part 2 governs bail bond forfeiture. "By executing a bail bond the defendant and each surety submit to the jurisdiction of the court. . . . The liability of the defendant and each surety may be enforced as provided in this Part . . . ." N.C. Gen. Stat. § 15A-544.1 (2015). "If a defendant . . . released . . . upon execution of a bail bond fails on any occasion to appear before the court as required, the court shall enter a forfeiture for the amount of that bail bond . . . ." *Id.* § 15A-544.3(a). "There shall be no relief from a forfeiture except as provided in [section 15A-544.5]." *Id.* § 15A-544.5(a); *see also State v. Williams*, 218 N.C. App. 450, 451, 725 S.E.2d 7, 9 (2012) (holding where forfeiture of an appearance bond has not become a final judgment, G.S. § 15A-544.5 offers "[t]he exclusive avenue for relief"); *State v. Sanchez*, 175 N.C. App. 214, 623 S.E.2d 780 (2005) (holding the trial court lacked authority to grant the surety's motion to set aside forfeiture of an appearance bond where the motion was not premised on any ground set forth in G.S. § 15A-544.5).

Pursuant to subsection (b) of General Statutes, section 15A-544.5,

> Except as provided by subsection (f)[(which is not applicable here)] . . . a forfeiture shall be set aside for any one of the following reasons, and none other:
>
> (1) The defendant's failure to appear has been set aside by the court and any order for arrest issued for that failure to appear has been recalled, as evidenced by a copy of an official court record, including an electronic record.
>
> (2) All charges for which the defendant was bonded to appear have been finally disposed by the court other than by the State's taking dismissal with leave, as evidenced by a copy of an official court record, including an electronic record.
>
> (3) *The defendant has been surrendered by a surety on the bail bond as provided by G.S. 15A-540, as evidenced by the sheriff's receipt provided for in that section.*
>
> (4) The defendant has been served with an Order for Arrest for the Failure to Appear on the criminal charge in the case in question as evidenced by a copy of an official court record, including an electronic record.
>
> (5) The defendant died before or within the period between the forfeiture and the final judgment as demonstrated by the presentation of a death certificate.
>
> (6) The defendant was incarcerated in a unit of the Division of Adult Correction of the Department of Public Safety and is serving a sentence or in a unit of the Federal Bureau of Prisons located within the borders of the State at the time of the failure to appear as evidenced by a copy of an official court record or a copy of a document from the Division of Adult Correction of the Department of Public Safety or Federal Bureau of Prisons, including an electronic record.
>
> (7) The defendant was incarcerated in a local, state, or federal detention center, jail, or prison located anywhere within the borders of the United States at the time of the failure to appear, and the district attorney for the county in which the charges are pending was notified of the defendant's incarceration while the defendant was still

> incarcerated and the defendant remains incarcerated for a period of 10 days following the district attorney's receipt of notice, as evidenced by a copy of the written notice served on the district attorney via hand delivery or certified mail and written documentation of date upon which the defendant was released from incarceration, if the defendant was released prior to the time the motion to set aside was filed.

N.C.G.S. § 15A-544.5(b) (emphasis added). Within 150 days of the notice of forfeiture being given, the defendant, surety, professional bondsman, or bail agent may move for the bond forfeiture to be set aside. "[A] written motion shall state the reason for the motion and attach to the motion the evidence specified in subsection (b) of this section." *Id.* § 15A-544.5(d)(1).

The record before us indicates that the bail agent moved to set aside the bond forfeiture on the ground that "defendant has been surrendered by a surety on the bail bond as provided by G.S. 15A-540, as evidenced by the attached 'Surrender of Defendant By Surety' (AOC-CR-214)" (ground (b)(3) under section 15A-544.5). However, no AOC form 214 was attached to the motion. Instead, attached to the motion was an ACIS printout indicating that defendant had been charged with a traffic offense, driving while license revoked, on 18 May 2015 and that the disposition date was 18 May 2016. The ACIS printout reflected that the traffic charge was assigned Watauga case number 15 CR 00508, that defendant pled guilty to the charge on 18 May 2016, and that, as part of the disposition, defendant agreed to plead guilty in Watauga case number 14 CRS 50747. The ACIS printout included no reference to case number 15 CRS 050271, the case in which the bond was forfeited. The ACIS printout did not indicate that defendant was taken into custody or had been surrendered to a sheriff or other agency official authorized to arrest individuals.

The issue now before us is whether the trial court erred by setting aside the bond forfeiture where the record reflects only the ACIS statement as evidence "defendant has been surrendered by a surety on the bail bond," in lieu of a sheriff's receipt.[1] *See id.* § 15A-544.5(b)(3). We

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1. The Board argues that the failure to attach the specific form AOC-CR-214 as evidence of surrender to the sheriff by a surety amounts to a failure to meet the statutory requirement of a sheriff's receipt set out in section 15A-544.5(b)(3). However, we need not reach this specific issue to resolve the matter before us. *See Hayes v. City of Wilmington*, 243 N.C. 525, 536, 91 S.E.2d 673, 682 (1956) ("In every case what is actually decided is the law applicable to the particular facts; all other legal conclusions therein are but *obiter dicta*.").

hold the ACIS statement in the instant case did not meet the requirement of a sheriff's receipt contemplated by the statute; i.e., evidence defendant was surrendered by a surety on the bail bond. We note that bail agent Hill's motion to set aside the forfeiture of an appearance bond was premised on section 15A-544.5(b)(3), but where the facts of record do not support the asserted ground for the motion or any other ground set forth in subsection (b), we see no basis on this record for the trial court to exercise statutory authority to set aside the bond forfeiture.

The dissenting opinion asserts that because "there is no evidence upon which to assess the validity of the trial court's ruling, we should not presume that the trial court erred but should instead affirm the trial court's order." In particular, the dissent cites *Phelps v. McCotter*, 252 N.C. 66, 67, 112 S.E.2d 736, 737 (1960) (per curiam), for the "well established principle that there is a presumption in favor of the regularity and validity of the proceedings in the lower court"; *King v. King*, 146 N.C. App. 442, 445–46, 552 S.E.2d 262, 265 (2001) ("[I]t is generally the appellant's duty and responsibility to see that the record is in proper form and complete and this Court will not presume error by the trial court *when none appears on the record to this Court*." (emphasis added) (citation omitted); and *Granville Med. Ctr. v. Tipton*, 160 N.C. App. 484, 488–89, 586 S.E.2d 791, 795 (2003) (stating that "[w]here the record is silent on a particular point, we presume that the trial court acted correctly," then holding this Court would not presume the trial court erred by applying an incorrect legal standard where the record was silent as to which standard the lower court applied). We note *In re A.R.H.B.*, for the proposition that "[u]nless the record reveals otherwise, we presume that judicial acts and duties have been duly and regularly performed." 186 N.C. App. 211, 219, 651 S.E.2d 247, 253 (2007) (citation omitted). However, here, the record is not silent; the record reflects only error. For that reason, *King*, *Phelps*, *Granville*, and *A.R.H.B.* are distinguishable.

The dissenting opinion points out that the record before this Court does not include a transcript or a Rule 9(a) narration of any proceedings before the trial court. The majority does acknowledge herein that as the appellant, the Board of Education had a duty to provide a complete record and that failure to do so should be met with strong disapproval. However, appellant Board compiled a proposed record on appeal, and when the time for response to appellant Board's proposed record expired without comment from the surety, the record was settled by operation of the Rules of Appellate Procedure. Thereafter, only appellant Board filed a brief in this matter.

The record as submitted by appellant Board shows error on its face. Unlike the dissent, we will not speculate on what if anything else *may* have occurred before the trial court. *See Joines v. Moffitt*, 226 N.C. App. 61, 67, 739 S.E.2d 177, 182 (2013) (stating that "[a]ppellate review is based solely upon the record on appeal; it is the duty of the appellant[] to see that the record is complete. This Court will not engage in speculation as to what arguments may have been presented . . . ." (alteration in original) (citation omitted)). This record as reviewed on appeal and argued by appellant, contains documentary evidence which, on its face, does not support the ruling of the trial court. The evidence of record shows the bail agent presented to the court a printout showing that defendant had been charged with a misdemeanor traffic offense on 18 May 2015, almost eight months prior to his failure to appear on 12 January 2016. Further, the printout did not reflect that defendant had been incarcerated on 12 January 2016 or at any subsequent time up to the date of the bond hearing. Thus, based on this record, error does appear and we cannot presume the court acted in accordance with statutory authority. *Cf. In re A.R.H.B.*, 186 N.C. App. at 219, 651 S.E.2d at 253 ("Unless the record reveals otherwise, we presume that judicial acts and duties have been duly and regularly performed." (citation omitted)). This record supports a conclusion, not a presumption, that the trial court erred, as there is not sufficient basis in the record to warrant the exercise of statutory authority to set aside a bond forfeiture. Accordingly, the trial court's 6 July 2016 order allowing the bail agent's motion to set aside the bond forfeiture is

VACATED.

Judge INMAN concurs.

Judge ZACHARY dissents with a separate opinion.

Judge ZACHARY, dissenting.

The majority opinion holds that the motion filed by 1st Atlantic Surety Company ("the surety") to set aside the forfeiture of an appearance bond "was not premised upon any ground set out under [N.C. Gen. Stat. §] 15A-544.5" and that, as a result, "the trial court lacked statutory authority to set aside the forfeiture of the appearance bond." The surety's original motion was explicitly based upon N.C. Gen. Stat. § 15A-544.5(b)(3) (2015), which allows a surety to apply to have a bond forfeiture set aside on the grounds that "[t]he defendant has been surrendered by a surety on the bail bond as provided by G.S. 15A-540, as evidenced by the sheriff's

receipt provided for in that section." Therefore, the issue litigated at the hearing before the trial court was not whether the surety's motion to set aside the bond forfeiture was premised upon an authorized basis, but whether the surety properly supported its motion by producing the appropriate documentation.

The record establishes that Robert Cobb was charged with an unspecified criminal offense in Watauga County File No. 15 CRS 50271, and that a secured appearance bond was set at $30,000, for which the surety posted bond for Mr. Cobb. Mr. Cobb failed to appear in court on the scheduled trial date of 12 January 2016, and on 14 January 2016 forfeiture of the bond was ordered and the surety was notified. On 8 June 2016, the surety moved to have the bond forfeiture set aside. Upon the objection of the Watauga County Board of Education ("appellant") to the surety's motion to set aside the forfeiture of the bond, a hearing on the surety's motion was conducted by the Honorable Gary M. Gavenus of the Superior Court of Watauga County. The appellant has appealed from an order of the trial court ruling that the surety had established the existence of one or more statutorily-permissible reasons for setting aside the bond forfeiture. The question before this Court is whether this order was supported by evidence adduced at the hearing *conducted by the trial court*. However, the record on appeal does not include any information concerning the testimony, evidence, or arguments presented at that hearing. Given the complete absence of any record of the evidence presented to the trial court, any conclusion reached by this Court regarding the merits of the trial court's order will, of necessity, be based upon assumption or speculation. That is, we can either presume that the trial court acted correctly, or presume that the court erred. It is a long-standing rule of our appellate courts that we do not presume error upon a silent record. "In *State v. Fennell*, 307 N.C. 258, 262, 297 S.E.2d 393, 396 (1982), this Court noted the presumption of regularity in a trial, stating that 'where the record is silent on a particular point, it will be presumed that the trial court acted correctly.' " *State v. Thomas*, 344 N.C. 639, 646, 477 S.E.2d 450, 453 (1996). Because the majority's holding is based upon the presumption that the trial court erred, I must respectfully dissent.

It is undisputed that "[i]n North Carolina, forfeiture of an appearance bond is controlled by statute." *State v. Robertson*, 166 N.C. App. 669, 670, 603 S.E.2d 400, 401 (2004). "If a defendant who was released . . . upon execution of a bail bond fails on any occasion to appear before the court as required, the court shall enter a forfeiture for the amount of that bail bond in favor of the State against the defendant and against each surety on the bail bond." G.S. § 15A-544.3(a) (2015). "The exclusive

avenue for relief from forfeiture of an appearance bond . . . is provided in G.S. § 15A-544.5. The reasons for setting aside a forfeiture are those specified in subsection (b)[.]" *Robertson*, 166 N.C. App. at 670-71, 603 S.E.2d at 401. N.C. Gen. Stat. § 15A-544.5 "clearly states that 'there shall be no relief from a forfeiture' except as provided in the statute, and that a forfeiture 'shall be set aside for any one of the [reasons set forth in Section (b)(1-7)], and none other.' " *State v. Sanchez*, 175 N.C. App. 214, 218, 623 S.E.2d 780, 782 (2005).

N.C. Gen. Stat. § 15A-544.5 provides in relevant part that the procedure governing a surety's request to have a bond forfeiture set aside is as follows:

> (1) . . . [A]ny of the following parties on a bail bond may make a written motion that the forfeiture be set aside: . . . Any surety. . . . The written motion shall state the reason for the motion and attach to the motion the evidence specified in subsection (b) of this section.
>
> (2) The motion shall be filed in the office of the clerk of superior court[.] . . . The moving party shall, under G.S. 1A-1, Rule 5, serve a copy of the motion on the district attorney for that county and on the attorney for the county board of education.
>
> (3) Either the district attorney or the county board of education may object to the motion by filing a written objection in the office of the clerk and serving a copy on the moving party.
>
> (4) If neither the district attorney nor the attorney for the board of education has filed a written objection to the motion by the twentieth day after a copy of the motion is served by the moving party . . . the clerk shall enter an order setting aside the forfeiture, regardless of the basis for relief asserted in the motion, the evidence attached, or the absence of either.
>
> (5) If either the district attorney or the county board of education files a written objection to the motion, then . . . a hearing on the motion and objection shall be held in the county, in the trial division in which the defendant was bonded to appear.
>
> (6) If at the hearing the court allows the motion, the court shall enter an order setting aside the forfeiture.

> (7) If at the hearing the court does not enter an order setting aside the forfeiture, the forfeiture shall become a final judgment of forfeiture[.]
>
> (8) If at the hearing the court determines that the motion to set aside was not signed or that the documentation required to be attached pursuant to subdivision (1) of this subsection is fraudulent or was not attached to the motion at the time the motion was filed, the court may order monetary sanctions against the surety filing the motion, unless the court also finds that the failure to sign the motion or attach the required documentation was unintentional. . . .

"The standard of review on appeal where a trial court sits without a jury is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *State v. Lazaro*, 190 N.C. App. 670, 660 S.E.2d 618 (2008) (citation omitted). N.C. Gen. Stat. § 15A-544.5(h) states that an "order on a motion to set aside a forfeiture is a final order or judgment of the trial court for purposes of appeal. Appeal is the same as provided for appeals in civil actions." Accordingly, this Court has reviewed appeals from a trial court's ruling on a motion to set aside a bond forfeiture in the same manner as other orders or judgments entered in a bench trial.

For example, in *Lazaro*, the surety moved to have the bond forfeiture set aside on the grounds that the defendant had failed to appear in court because he was incarcerated in a state or federal prison, which is listed in N.C. Gen. Stat. § 15A-544.5(b)(6) as a permissible basis to have a bond forfeiture set aside. On appeal, the Board of Education argued that the "surety's evidence does not support a finding that the defendant was incarcerated . . . within the borders of North Carolina at the time of his failure to appear on 7 November 2006." *Lazaro*, 190 N.C. App. at 671, 660 S.E.2d at 619. We reviewed the evidence that the surety had proffered, which consisted of "computer printouts of inmate records from the Mecklenburg County Sheriff's Office[.]" *Lazaro* at 673, 660 S.E.2d at 620. Based upon the evidence offered at the hearing, we concluded that "the trial court's findings were not supported by competent evidence" given that "[t]he surety presented no additional evidence other than the printouts." *Id.*

Similarly, in *State v. Belton*, 169 N.C. App. 350, 610 S.E.2d 283 (2005), the surety moved to set aside a final judgment of forfeiture, on the grounds that the surety had never been given notice of the forfeiture. At the hearing, the surety produced an affidavit from its employee which

"tended to show that [the] surety did not receive the notice of forfeiture[.]" *Belton*, 169 N.C. App. at 357, 610 S.E.2d at 288. Other testimony was offered by an Assistant Clerk of Court, who testified in detail concerning the practices of the Clerk's office with regard to mailing notices of forfeiture. We held that the trial court, "after considering [the surety's affidavit] along with the other evidence in the record, could properly conclude that the clerk had given notice[.]" *Id.* Thus, in our review of appeals from a trial court's ruling on a motion to set aside a bond forfeiture, as in all other appeals from a bench trial, we review whether the evidence supported the trial court's findings and whether these findings supported its conclusions of law.

In this case, the surety filed a motion to set aside the bond forfeiture on 8 June 2016 using an Administrative Office of the Courts (AOC) Form AOC-CR-213, on which the surety indicated that it sought to have the bond forfeiture set aside on the grounds that "[t]he defendant has been surrendered by a surety on the bail bond as provided by G.S. 15A-540, as evidenced by the attached Surrender of Defendant by Surety (AOC-CR-214)." The surety attached to the motion a computer printout from the Watauga County Sheriff's Office, referred to as an ACIS form. The majority holds that the surety's use of an ACIS form did not satisfy the requirement of N.C. Gen. Stat. § 15A-544.5(b)(3) that the surety produce a "sheriff's receipt." Examination of the attachment submitted by the surety reveals that it references two Watauga County criminal cases, identified as Files Nos. 15 CR 508 and 14 CRS 50747. The form does not, however, contain information about the disposition of the offense charged in File No. 15 CRS 50271, which is the subject of the present appeal. As a result, regardless of whether an ACIS form might, as a general proposition, satisfy the requirement that a surety attach a "sheriff's receipt" to a motion to have a bond forfeiture set aside, it appears that the specific ACIS form submitted in this case would not establish that Mr. Cobb had been surrendered to the sheriff with respect to File No. 15 CRS 50271.

However, the holding that the trial court erred by setting aside the bond forfeiture is based exclusively upon the documentation that the surety attached to the motion that was submitted to the clerk of court. On the facts of this case, we should not reach the issue of whether an ACIS form might meet the definition of a sheriff's receipt.

On 14 June 2016, the appellant filed its objection to the surety's motion, and a hearing was scheduled for 5 July 2016. The matter was heard by Judge Gavenus in Watauga County Superior Court on 5 July 2016. On 6 July 2016, Judge Gavenus entered an order allowing the

surety's motion and setting aside the bond forfeiture, based upon a finding and conclusion that:

> Upon due notice, *a hearing was held* on the above Objection to the Motion To Set Aside Forfeiture. The Court finds on the "Date of Bond" shown on the reverse the moving party named above executed a bond for the defendant's appearance in the case(s) identified[.] . . . On the "Failure to Appear" date shown on the reverse, the defendant failed to appear to answer the charges in the case(s), and forfeiture of the bond was entered on that date. Notice of forfeiture was mailed to the moving party[.] . . .
>
> *The Court finds . . . that the moving party has established one or more of the reasons specified in [N.C. Gen. Stat. §] 15A-544.5 for setting aside that forfeiture.* . . . The above Motion is allowed and the forfeiture is set aside.
>
> (emphasis added).

As discussed above, the only relevant issue before this Court is whether the trial court's order was properly entered in light of the evidence adduced at the hearing. The propriety of the trial court's order cannot be determined merely by review of the documentation that the surety attached to its motion, because the trial court's order was entered following a hearing at which the parties would have been allowed to present additional testimony or evidence.

This Court has often held that " '[i]t is the appellant's duty and responsibility to see that the record is in proper form and complete.' " *State v. Williamson*, 220 N.C. App. 512, 516, 727 S.E.2d 358, 361 (2012) (quoting *State v. Alston*, 307 N.C. 321, 341, 298 S.E.2d 631, 644 (1983)). There are several ways in which the appellant might have created a record of the hearing before the trial court. The clearest record is often established by a transcript of the proceedings. In the event that a transcript is unavailable, N.C. R. App. P. 9(c)(1) (2015) permits a party to prepare a narration of the proceedings. In the course of settling the record on appeal, pursuant to N.C. R. App. P. 11 (2015), the appellant might have submitted an affidavit from the appellant's trial counsel regarding the evidence that the surety submitted at the hearing, or if the parties agreed on the evidentiary history of this matter, they might have stipulated to the identity of the documents or testimony offered at the hearing. Alternatively, the appellant might have filed a motion pursuant to N.C. Gen. Stat. § 1A-1, Rule 52(b) (2015), asking the court to "amend its findings or make additional findings[.]"

Unfortunately, in this case the appellate record does not contain any indication of the evidence or testimony offered at the hearing in addition to, or instead of, the ACIS statement attached to the surety's motion. The record fails to include a transcript of the hearing conducted by the trial court, a reconstruction by the parties of the events that transpired at the hearing, an affidavit attesting to the testimony and documentary evidence proffered before the trial court, or any other evidence from which we might determine what evidence was presented by the parties at the hearing.

"[I]t is generally the appellant's duty and responsibility to see that the record is in proper form and complete and this Court will not presume error by the trial court when none appears on the record to this Court." *King v. King*, 146 N.C. 442, 445-46, 552 S.E.2d 262, 264 (2001) (internal quotation omitted). Instead, "[w]here the record is silent on a particular point, we presume that the trial court acted correctly." *Granville Med. Ctr. v. Tipton*, 160 N.C. App. 484, 488-89, 586 S.E.2d 791, 795 (2003) (citing *State v. Reaves*, 132 N.C. App. 615, 620, 513 S.E.2d 562, 565 (1999)). *See also Phelps v. McCotter*, 252 N.C. 66, 67, 112 S.E.2d 736, 737 (1960) (noting the "well established principle that there is a presumption in favor of the regularity and validity of the proceedings in the lower court").

The majority opinion states that the "record as submitted by appellant Board shows error on its face." In fact, the record provides nothing regarding the only pertinent question, which is the evidence provided by the surety *at the hearing before the trial court*. " 'The longstanding rule is that there is a presumption in favor of regularity and correctness in proceedings in the trial court, with the burden on the appellant to show error.' Unless the record reveals otherwise, we presume 'that judicial acts and duties have been duly and regularly performed.' " *In re A.R.H.B.*, 186 N.C. App. 211, 219, 651 S.E.2d 247, 253 (2007) (quoting *L. Harvey & Son Co. v. Jarman*, 76 N.C. App. 191, 195-96, 333 S.E.2d 47, 50 (1985), and *Lovett v. Stone*, 239 N.C. 206, 212, 79 S.E.2d 479, 483 (1954)). The majority holds that the documentation provided by the surety to the clerk requires a "conclusion, not a presumption" that the trial court erred. This conclusion ignores the crucial fact that we are not reviewing a determination by the clerk of court, but by the *trial court following a hearing* at which the parties had an opportunity to offer testimony and documentary evidence. It is impossible for us to reach a conclusion on the validity of the trial court's order without a record of what transpired at the hearing.

In the absence of any record of the proceedings before the trial court, this Court should follow the well-established rule and should not presume that the trial court erred. I believe that because there is no evidence upon which to assess the validity of the trial court's ruling, we should not presume that the trial court erred but should instead affirm the trial court's order. For this reason, I must respectfully dissent.

STATE OF NORTH CAROLINA
v.
MICHAEL AYODEJI FALANA, DEFENDANT

No. COA16-1306

Filed 5 July 2017

Conversion—felony—motion to dismiss—sufficiency of evidence—ownership—fatal variance between indictment and evidence

The trial court erred by denying defendant car business owner's motion to dismiss the charge of felony conversion under N.C.G.S. § 14-168.1 where the State failed to establish ownership, an essential element of felony conversion. There was a fatal variance between the indictment and the evidence presented at trial regarding ownership of a vehicle since the indictment charged defendant with a crime against someone who did not have title to the pertinent vehicle.

Appeal by Michael Ayodeji Falana from judgment entered 14 January 2016 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 17 May 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General M. Denise Stanford, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jillian C. Katz, for the Defendant.

MURPHY, Judge.

Michael Ayodeji Falana ("Defendant") appeals from the judgment below in which a jury found him guilty of felony conversion. Defendant argues that the trial court erred by denying his Motion to Dismiss

because: (1) the State failed to establish an essential element of felony conversion; and (2) the State's evidence at trial fatally varied from the indictment. Defendant argues further that the trial court's jury instructions were in error because: (1) the trial judge instructed the jury on felony conversion based on the evidence presented at trial, which fatally varied from the indictment; (2) the trial court answered a question from the jury in violation of N.C.G.S. § 15A-1234(c) (2015); and (3) the trial court's supplemental instruction in response to a question from the jury was legally erroneous and resulted in a coerced verdict. We agree with Defendant that the trial court erred by denying Defendant's Motion to Dismiss, and vacate the judgment.

Background

In 2011, Defendant opened a business, Micdina Motors, that buys cars at live and online auctions. To carry out his business, Defendant subscribed to various online auction sites, including Copart. Copart is a marketing company that liquidates total loss vehicles through online auctions. Only members that have provided proof of licensing and paid associated fees can access and participate in Copart's auctions.

Around 2012, Defendant permitted Mr. Olamide Olamosu ("Olamosu") to use his auction accounts for Olamosu to conduct his own business in exchange for a portion of Olamosu's sales. Defendant also permitted Olamosu to register as a licensed sales representative with Micdina Motors at the North Carolina Department of Motor Vehicles. Although Olamosu's transactions went through Defendant's online accounts and he had access to one of Micdina Motors' email accounts, Defendant testified that Olamosu generally did not discuss his customers with Defendant in detail.

In May or June 2013, Olamosu assisted Mr. Ezuma Igwe ("Igwe") in the acquisition of a 2012 Honda Pilot ("Pilot"), which he found using Defendant's account on the Copart auction site. The purchase price was $15,200. When Olamosu and Igwe picked up the Pilot, it did not run. In addition, Igwe was unable to get title to the car as it was subject to a lien. Falsely identifying himself as Defendant, Olamosu arranged a refund with Copart for Igwe. Defendant disputed whether he knew the details of this purchase and subsequent need for a refund.

In November 2013, Defendant and Olamosu began to have financial disputes over various transactions, which led Defendant to believe Olamosu owed him over $10,000. Olamosu told Defendant that he would pay Defendant what he owed before he left the country in January 2014.

In January 2014, Olamosu coordinated the refund with Copart, which was to be sent to Olamosu's home address. Defendant testified that

Olamosu told him about the check at this time, suggesting Defendant call Copart to ensure it sent the check. On 10 January 2014, Defendant called Copart, and requested that Copart send the check to his address instead. When the check arrived, Defendant deposited it in his personal bank account. Defendant denied knowing the check was Igwe's refund. He claimed he never met Igwe, and believed the check would constitute money Defendant owed him.

The State charged Defendant with felony conversion in violation of N.C.G.S. § 14-168.1 (2015). The indictment read in pertinent part:

> that on or about January 23, 2014, in Wake County the defendant named above unlawfully, willfully, and feloniously did being entrusted with property, 2012 Honda Pilot, *owned by Ezuma Igwe*, as a person with power of attorney to sell or transfer the property, fraudulently convert the proceeds of the property to the defendant's own use. The value of the property was in excess of $400[.]

(Emphasis added). At the conclusion of the State's evidence, Defendant moved to dismiss the charge, arguing that (1) there was insufficient evidence that Igwe owned the Pilot; and (2) there was a fatal variance between the indictment and the evidence presented at trial because there was insufficient evidence that Defendant converted the Pilot. The trial court denied the motion. At the close of all evidence, Defendant renewed the Motion to Dismiss, which the trial court again denied. Defendant was convicted of felony conversion. After Defendant paid restitution to Igwe in full, the trial court sentenced Defendant to a minimum 6 months, maximum 17 months imprisonment, which it suspended, placing Defendant on 24 months supervised probation. On 14 January 2016, Defendant entered oral notice of appeal.

Analysis

Defendant argues *inter alia* that the Motion to Dismiss should have been granted because the State failed to establish an essential element of felony conversion – ownership – and there was a fatal variance between the indictment and the evidence presented at trial as to ownership. We agree.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). "[T]he question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the

perpetrator of such offense." *State v. Marley*, 227 N.C. App. 613, 614-15, 742 S.E.2d 634, 636 (2013) (citation omitted). Substantial evidence exists if there is "relevant evidence that [a] reasonable mind might accept as adequate to support a conclusion." *Id.* at 614, 742 S.E.2d at 635 (citation omitted). A variance between the indictment and the evidence presented at trial "occurs where the allegations in an indictment, although they may be sufficiently specific on their face, do not conform to the evidence actually established at trial." *State v. Norman*, 149 N.C. App. 588, 594, 562 S.E.2d 453, 457 (2002). Where such a variance is material, it warrants a reversal because of the concern that the defendant be "able to prepare his defense against the crime with which he is charged, and to protect the defendant from another prosecution for the same incident." *Id.* at 594, 562 S.E.2d at 457 (citations omitted).

Defendant was charged with felony conversion pursuant to N.C.G.S. § 14-168.1, which states:

> Every person entrusted with any property as bailee, lessee, tenant or lodger, or with any power of attorney for the sale or transfer thereof, who fraudulently converts the same, or the proceeds thereof, to his own use, or secretes it with a fraudulent intent to convert it to his own use, shall be guilty of a Class 3 misdemeanor.
>
> If, however, the value of the property converted or secreted, or the proceeds thereof, is in excess of four hundred dollars ($400.00), every person so converting or secreting it is guilty of a Class H felony. In all cases of doubt the jury shall, in the verdict, fix the value of the property converted or secreted.

Felony conversion "occurs when a defendant offends the ownership rights of another." *State v. Woody*, 132 N.C. App. 788, 789, 513 S.E.2d 801, 803 (1999).

> [A]n essential component of the crime is the intent to convert or the act of conversion, which by definition requires proof that someone other than a defendant owned the relevant property. Because the State is required to prove ownership, a proper indictment must identify as victim a legal entity capable of owning property. An indictment that insufficiently alleges the identity of the victim is fatally defective and cannot support conviction of either a misdemeanor or a felony.

Id. at 789-90, 513 S.E.2d at 803. "Where an indictment charges the defendant with a crime against someone other than the actual victim, such a variance is fatal." *Id.* at 790, 513 S.E.2d at 803 (quoting *State v. Abraham*, 338 N.C. 315, 340, 451 S.E.2d 131, 144 (1994)). Thus, a proper indictment for felony conversion must identify the proper victim and the State must prove ownership. *Id.* at 789-90, 513 S.E.2d at 803.

The State failed to provide substantial evidence of each essential element of felony conversion because it failed to establish that Igwe owned the Pilot. Despite alleging that Defendant was entrusted with the Pilot "owned by Ezuma Igwe," the evidence demonstrated that Igwe was never the owner of the Pilot. North Carolina law defines the owner of a motor vehicle as "a person holding the legal title to a vehicle." N.C.G.S. § 20-4.01(26) (2015). Igwe never received title to the Pilot; thus, he did not meet the definition of owner of a motor vehicle in North Carolina as to the Pilot. Moreover, a lien encumbered the Pilot that Igwe could not remove. The lack of title statutorily precluded Igwe from qualifying as an owner, and the lien further demonstrated his lack of ownership of the Pilot. Therefore, the State did not produce sufficient evidence that Igwe owned the Pilot. Since ownership is essential to establishing the elements of felony conversion, *Woody*, 132 N.C. App. at 289-90, 513 S.E.2d at 803, there was not substantial evidence of each essential element of the offense charged. The trial court erred when it failed to grant Defendant's Motion to Dismiss.

Conclusion

For the reason stated above, the trial court should have granted Defendant's Motion to Dismiss. We need not reach the additional fatal variance issue argued by Defendant or the issues related to the jury instructions.

VACATED.

Judges HUNTER, JR. and DAVIS concur.

STATE OF NORTH CAROLINA
v.
MARIE ANTOINETTE LYNCH

No. COA17-75

Filed 5 July 2017

1. Jury—motion for mistrial—prospective juror's comments in front of jurors—belief that defendant was guilty

The trial court did not err in a case involving multiple drug trafficking charges by failing to declare a mistrial after a prospective juror, in the presence of the rest of the jury pool, stated he had seen defendant around and believed that she was guilty. The trial court immediately dismissed that prospective juror and gave a lengthy curative instruction to the jury pool. Further, the prospective juror only stated that he believed defendant was guilty based on his familiarity with her in the community and did not state any specific reasons.

2. Sentencing—no clerical error—consolidation of drug trafficking offenses—inconsistency between oral judicial pronouncements

The trial court did not make a clerical error in a case involving multiple drug trafficking charges by failing to arrest judgment on a delivery offense despite previously indicating that it would. When the trial court announced its judgment at the sentencing hearing, it stated that it would consolidate all three trafficking offenses, including the delivery offense. The judgment accurately reflected the oral pronouncement and, at most, the judgment reflected an inconsistency between two separate judicial pronouncements by the trial court.

Judge ARROWOOD concurring in part and dissenting in part.

Appeal by defendant from judgments entered 17 December 2015 by Judge Phyllis M. Gorham in Duplin County Superior Court. Heard in the Court of Appeals 7 June 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Barry Bloch, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Wyatt Orsbon, for defendant.

DIETZ, Judge.

Defendant Marie Antoinette Lynch appeals her conviction and sentence on multiple drug trafficking charges. She argues that the trial court should have declared a mistrial after a prospective juror, in the presence of the rest of the jury pool, stated that "I've seen her (Lynch) around" and "I believe she did it." The trial court immediately dismissed that prospective juror and gave a lengthy curative instruction to the jury pool.

As explained below, in light of the trial court's curative instruction, the trial court's decision not to declare a mistrial was within the court's sound discretion.

Lynch also argues that the there is a clerical error in the judgment form because the court indicated that it would arrest judgment on the trafficking by delivery charge but failed to do so on the judgment form. We reject this argument because, although the court indeed indicated that it was "going to arrest judgment" on that charge at trial, at the sentencing hearing the court stated that it would instead consolidate all the trafficking charges into a single sentence. Thus, to the extent there is an error in the court's judgment, it is not a clerical one. Because this is the only ground on which Lynch challenges her sentence on appeal, we find no error in the trial court's judgment.

Facts and Procedural History

The State indicted Lynch for a number of drug trafficking offenses involving the sale of opium. The jury acquitted Lynch of some charges but found her guilty of trafficking in opium by sale; trafficking in opium by delivery; trafficking in opium by possession; and a number of related charges. The jury also found Lynch guilty of attaining habitual felon status.

Lynch was present for the first day of trial but failed to appear on later days. After the jury returned the verdict, the court continued the proceeding in order to sentence Lynch when she was present. Several weeks later, with Lynch present, the court consolidated the three trafficking convictions and sentenced her to 70 to 93 months in prison for those charges and a concurrent sentence of 67 to 93 months in prison on other related charges. Lynch timely appealed.

Analysis

I. Motion for Mistrial

[1] Lynch first argues that the trial court erred by denying her motion for a mistrial after a prospective juror stated in the presence of the jury pool that he had seen Lynch around and "I believe she did it." Lynch contends that the prospective juror's statement prejudiced the jury and that

the trial court failed to conduct an adequate inquiry of all jurors to determine whether they heard the statement, the effect of such statement, and whether they could disabuse their minds of the harmful effects of the comments. We disagree.

It is well established that "[t]he judge must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." *State v. McCollum*, 157 N.C. App. 408, 415, 579 S.E.2d 467, 471 (2003), *aff'd*, 358 N.C. 132, 591 S.E.2d 519 (2004). But "[t]he decision whether to grant a motion for mistrial rests within the sound discretion of the trial judge and will not ordinarily be disturbed on appeal absent a showing of abuse of that discretion." *State v. Boyd*, 321 N.C. 574, 579, 364 S.E.2d 118, 120 (1988). "An abuse of discretion occurs only upon a showing that the judge's ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Salentine*, 237 N.C. App. 76, 81, 763 S.E.2d 800, 804 (2014) (citation and quotation marks omitted).

Here, a prospective juror made the unsolicited statement during jury selection that "I've seen her around Beulaville, I believe she did it." Lynch then moved for a mistrial, arguing that the statement irreparably prejudiced the jury. The trial court denied Lynch's motion and indicated that it would instruct the jury to cure any potential for prejudice. The court dismissed the juror who made the comment.

The trial court later instructed the jury pool as follows:

> All right. Ladies and gentlemen of the jury pool, I'm gonna give you an instruction. I've already instructed you earlier, but I'm going to instruct you again that the Defendant has entered a plea of not guilty. Under our system of justice a Defendant who pleads not guilty is not required to prove their innocence, but is presumed to be innocent. This presumption remains with the Defendant throughout the trial until the jury selected to hear the case is convinced from the facts and the law beyond a reasonable doubt of the guilt of the Defendant. The burden of proof is on the State to prove to you that the Defendant is guilty beyond a reasonable doubt.
>
> There's no burden or duty of any kind on the Defendant. The mere fact that a Defendant has been charged with a crime is no evidence of guilt. The charge

> is merely the mechanical or administrative way by which any person is brought to a trial.
>
> At this point, ladies and gentlemen, you are to disregard any statement that juror number nine made during this jury selection. You are not to consider any statement made by any juror during this jury selection if you are chosen to sit as a juror and hear the evidence in this case.

From the record, we see no indication that Lynch asked the trial court to conduct an inquiry into whether the statement was heard by other potential jury members, the effect of such statement, and whether the prospective jurors could disabuse their minds of any prejudice resulting from the statement.

Lynch cites *State v. Mobley*, 86 N.C. App. 528, 358 S.E.2d 689 (1987), for the proposition that the prejudicial effect of the prospective juror's statement was obvious and required a mistrial as a matter of law. In *Mobley*, a potential juror who identified himself as a police officer stated that he had "dealings with the defendant on similar charges." *Id.* at 532, 358 S.E.2d at 691. The trial court excused the juror and instructed the jury that they "strike from their mind any reference the officer may have made to the defendant because it is not evidence in the case. Completely strike it out." *Id.* at 533, 358 S.E.2d at 691. The defendant moved to dismiss the jurors based on the officer's statements and the trial court denied the motion. *Id.* at 533, 358 S.E.2d at 691–92. This Court held that the defendant was entitled to a new trial because the potential prejudice was obvious and the trial court should have dismissed the jury pool and started over:

> A statement by a police officer-juror that he knows the defendant from "similar charges" is likely to have a substantial effect on other jurors. The potential prejudice to the defendant is obvious. On the defendant's motion to dismiss the other jurors, the trial court, at the least, should have made inquiry of the other jurors as to the effect of the statement. The more prudent option for the trial court would have been to dismiss the jurors who heard the statement and start over with jury selection. In any event, the attempted curative instruction was simply not sufficient.

Id. at 533–34, 358 S.E.2d at 692.

Lynch also cites *State v. Howard*, 133 N.C. App. 614, 515 S.E.2d 740 (1999), a case that followed *Mobley*. In *Howard*, a prospective juror

stated that she had worked at the county jail and knew one of the defendants "from there." *Id.* at 615, 515 S.E.2d at 741. The trial court dismissed some jurors who heard the response and had already been seated but kept another juror who might have heard the statement. Citing *Mobley*, this Court again ordered a new trial, explaining that "[w]e do not perceive any sound reason to distinguish the situation in the case before us from that in *Mobley*." *Id.* at 618–19, 515 S.E.2d at 743.

We find these two cases distinguishable for several reasons. First, the prospective jurors who made the statements in *Mobley* and *Howard* were employed in the criminal justice system and thus their familiarity with those defendants and their criminal past likely carried more weight—and thus more potential for prejudice—than an ordinary citizen who merely knew the defendant from the community.

Second, the comments from the prospective jurors in *Mobley* and *Howard* indicated that the defendants in those cases had a criminal history. Because people assume (often incorrectly) that those with a criminal history are more likely to commit future crimes, knowledge that a defendant has a criminal past poses a significant risk of prejudice. Indeed, it is precisely because of these concerns that the Rules of Evidence restrict the State's ability to inform jurors of a defendant's criminal history or prior bad acts. *See* N.C. R. Evid. 404; *State v. Carpenter*, 361 N.C. 382, 387–88, 646 S.E.2d 105, 109–10 (2007).

Here, by contrast, the prospective juror stated only that he "believed" Lynch was guilty based on his familiarity with her in the community, without stating any specific reasons why. This is critical because it meant the jury had not learned any facts about Lynch that were outside the record in this case. They heard only the unsupported speculation of a fellow citizen.

Finally, the trial court in this case took extensive steps to remove any risk of prejudice by giving a lengthy curative instruction to ensure that the jury understood they must base their decision on the evidence presented, not on the unsupported speculation of the dismissed juror.

We note that the remark by the dismissed juror was not recorded, but that the parties agree it was made in the presence of the trial judge. Trial judges are uniquely situated to assess the potential prejudice of this sort of unsolicited statement by a member of the jury pool. In light of the trial court's curative instruction, we hold that the trial court acted well within its sound discretion in denying Lynch's motion for a mistrial. Accordingly, we reject Lynch's argument.

II. Alleged Clerical Error in the Judgment

[2] Lynch next argues that there is a clerical error in the trial court's judgments and we must remand the judgment to correct that error. Again, we disagree.

"A clerical error is defined as an error resulting from a minor mistake or inadvertence, especially in writing or copying something on the record, and not from judicial reasoning or determination." *State v. Gillespie*, 240 N.C. App. 238, 245, 771 S.E.2d 785, 790, *rev. denied*, 368 N.C. 353, 777 S.E.2d 62 (2015) (internal quotation marks and brackets omitted). "Generally, clerical errors include mistakes such as inadvertent checking of boxes on forms . . . or minor discrepancies between oral rulings and written orders . . . ." *In re D.D.J.*, 177 N.C. App. 441, 444, 628 S.E.2d 808, 811 (2006).

Here, although the trial court stated after the jury returned the verdict that it was "going to arrest judgment" on the trafficking by delivery charge, the court did not pronounce the sentence at that time because Lynch failed to appear after the first day of trial. At the sentencing hearing several weeks later, with Lynch present, the trial court announced that the jury found Lynch "guilty of Counts I, II, and III of trafficking in opium." Those counts were the charges of trafficking by sale, trafficking by delivery, and trafficking by possession. The court then stated that it was "going to consolidate the trafficking offenses into one judgment." The judgment form reflects that these three offenses were consolidated and that Lynch received a single, consolidated sentence for the three offenses.

On these facts, the trial court's failure to arrest judgment on the delivery offense was not a mere clerical error. This is not a case in which the judgment failed to conform to the court's oral ruling in a manner that suggests a mistake in recordation. Rather, despite having previously indicated that it would arrest judgment on the delivery offense, when it announced its judgment at the sentencing hearing, the court stated that it would consolidate "Counts I, II, and III"—meaning all three trafficking offenses including Count II, the delivery offense. The judgment accurately reflects that oral pronouncement. Thus, at most, the judgment reflects an inconsistency between two separate judicial pronouncements by the trial court. To the extent this is an error, it is not a clerical one. *See State v. Jarman*, 140 N.C. App. 198, 202, 535 S.E.2d 875, 878 (2000).

The dissent rightly observes that our Supreme Court has instructed us to "err on the side of caution and resolve in the defendant's favor the discrepancy between the trial court's statement in open court, as

revealed by the transcript, and the sentencing form." *State v. Morston*, 336 N.C. 381, 410, 445 S.E.2d 1, 17 (1994). But this case involves more than a mere discrepancy between the court's oral pronouncement and the judgment form; it involves a discrepancy between two separate oral pronouncements. If that type of inconsistency were treated as clerical in nature, it would greatly expand the ability of this Court to vacate and remand judgments without a showing of actual error and accompanying prejudice—something this Court has long required before vacating a trial court's judgment. Accordingly, we reject Lynch's argument that the court's judgment contains a clerical error.

Finally, we note that the reason the court initially stated that it would arrest judgment on the delivery charge was Lynch's argument (made at the conclusion of the trial but not at the sentencing hearing) that sentencing a defendant for both sale and delivery of the same controlled substance violates the Double Jeopardy Clause. Lynch does not assert a Double Jeopardy argument on appeal, instead relying solely on the clerical error argument. This Court is not permitted to address arguments not raised on appeal. N.C. R. App. P. 28(b)(6). Thus, we cannot address any potential constitutional concerns with the judgment. But because the trial court consolidated the trafficking offenses into a single sentence, there does not appear to be any prejudicial effect from the failure to arrest judgment on the delivery charge. In any event, to the extent Lynch wishes to pursue this issue, the proper vehicle to do so is a motion for appropriate relief in the trial court.

Conclusion

We find no error in the trial court's judgment.

NO ERROR.

Judge ELMORE concurs.

Judge ARROWOOD concurring in part and dissenting in part, with separate opinion.

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

I concur in the portion of the majority's opinion finding no error with respect to the issue related to defendant's motion for a mistrial. I dissent from the majority's holding that the matter should not be remanded for correction of a clerical error.

In the second issue on appeal, defendant argues that the judgment in case number 13 CRS 050960 should be remanded for correction of a clerical error.

"A clerical error is [a]n error resulting from a minor mistake or inadvertence, [especially] in writing or copying something on the record, and not from judicial reasoning or determination." *State v. Lark*, 198 N.C. App. 82, 95, 678 S.E.2d 693, 702 (2009) (citation and internal quotation marks omitted), *disc. rev. denied*, 363 N.C. 808, 692 S.E.2d 111 (2010). "It is universally recognized that a court of record has the inherent power and duty to make its records speak the truth. It has the power to amend its records, correct the mistakes of its clerk . . . , and no lapse of time will debar the court of the power to discharge this duty." *State v. Cannon*, 244 N.C. 399, 403, 94 S.E.2d 339, 342 (1956). Our Courts have stated that "[w]hen, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record 'speak the truth.' " *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696-97 (2008) (quoting *State v. Linemann*, 135 N.C. App. 734, 738, 522 S.E.2d 781, 784 (1999)). In *State v. Jarman*, 140 N.C. App. 198, 535 S.E.2d 875 (2000), this Court stated: "[w]here there has been uncertainty in whether an error was 'clerical,' the appellate courts have opted to 'err on the side of caution and resolve [the discrepancy] in the defendant's favor.' " *Id.* at 203, 535 S.E.2d at 879 (quoting *State v. Morston*, 336 N.C. 381, 410, 445 S.E.2d 1, 17 (1994)).

Defendant's judgment in case number 13 CRS 050960 lists three trafficking convictions: trafficking opium by sale, trafficking opium by delivery, and trafficking opium by possession. However, the trial court stated on 4 December 2015, immediately after the jury returned its verdict, that it intended to arrest judgment on the trafficking in opium by delivery conviction.

> [DEFENSE COUNSEL]: Your Honor, as to 12 CRS 50960, the December 17, 2012 offense, we would move to arrest judgment on the count two of the trafficking by delivery. I think there's some case law that says you can't be convicted or at least can't be sentenced for delivery and sale.
>
> THE COURT: And a sale. All right. Wish to be heard?
>
> [THE STATE]: No, Your Honor.
>
> THE COURT: All right. Court is going to arrest judgment on 12 CRS 50960, count two, trafficking in opium by delivery. All right.

Due to defendant's absence during trial, the court entered a prayer for judgment continued and an order for defendant's arrest with no bond. Defendant was subsequently arrested, and on 17 December 2015, the trial court commenced the sentencing hearing. The State, without mentioning the trial court's earlier ruling that it would arrest judgment as to count two of the trafficking charges, informed the trial court as follows:

> [THE STATE:] . . . . As you recall, Your Honor, the defendant was tried and convicted the week of November 30, 2015 in this courtroom in front of Your Honor, for three counts of tra[ffi]cking in opium or heroin or felony maintaining a place for keeping a controlled substance, possession of drug paraphernalia, and possession with intent to manufacture, sell, or deliver a Schedule II controlled substance. And a jury also found there were aggravating factors as related to this case. And the jury also found that she had reached the status of an habitual felon.

Thereafter, the trial court consolidated the trafficking convictions and sentenced defendant to a term of 70 to 93 months.

The State argues on appeal that the trial court "appears to have corrected its earlier ruling that it would be arresting judgment on one of the trafficking convictions." However, there is no indication in the record to support this contention. In addition, this argument fails because the trial court's oral ruling appears to be consistent with the North Carolina Supreme Court's ruling in *State v. Moore*, 327 N.C. 378, 395 S.E.2d 124 (1990). In *Moore*, the Supreme Court held that while a defendant may be indicted and tried under N.C. Gen. Stat. § 90-95(a)(1) for the transfer of a controlled substance, whether it be by selling, delivering, or both, a defendant could not be convicted of both the sale and delivery of a controlled substance arising from a single transfer. *Id.* at 382, 395 S.E.2d at 127.

In *Morston*, *supra*, the signed judgment did not comport with the trial court's statements in the transcript and our Supreme Court stated, "we believe that the better course is to err on the side of caution and resolve in the defendant's favor the discrepancy between the trial court's statement in open court, as revealed by the transcript, and the sentencing form." *Morston*, 336 N.C. at 410, 445 S.E.2d at 17.

In light of the principle set forth by our Supreme Court that the better course is to resolve a discrepancy in defendant's favor, combined with the fact that the trial court made no statement suggesting that it had changed its previous ruling arresting judgment on count two which

appears to be consistent with the interpretation of the law as discussed in *Moore*, I would find that the judgment in case 13 CRS 050960 fails to correctly reflect the trial court's ruling in open court. Accordingly, I would find that the trial court's written judgment contains a clerical error and remand the case to the trial court for correction of this error.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 5 JULY 2017)

BANK OF AM., N.A. v. RIVERA No. 16-166	Mecklenburg (13CVS9596)	Affirmed in Part; Remanded in Part
BARBOUR v. BARBOUR No. 16-782	Wake (15CVD5272)	Affirmed
ESTATE OF RUSSELL v. RUSSELL No. 17-21	Union (13CVS1611)	Affirmed
GECMC 2006-C1 CARRINGTON OAKS, LLC v. WEISS No. 16-669	Mecklenburg (12CVS3684)	Affirmed
HOLDEN v. INFICARE, INC. No. 16-1061	Forsyth (16CVS377)	Affirmed
IN RE A.P.C. No. 17-180	Hoke (15JT9)	Affirmed
IN RE B.T. No. 17-51	Cherokee (15JA62)	Vacated and Remanded
IN RE C.B. No. 17-41	New Hanover (16JA117)	Affirmed
IN RE C.M.D. No. 17-197	Rockingham (16JA58)	Reversed and Remanded
IN RE D.D.D. No. 16-1239	Cleveland (11JT31-33)	Affirmed
IN RE D.L.A.D. No. 17-262	Surry (16JT17)	Vacated
IN RE D.L.L.M. No. 16-1181	Burke (13JT109)	Vacated in part; Reversed and Remanded in part.
IN RE D.O. No. 16-1272	Wake (13JT338-341)	Affirmed
IN RE E.A.D. No. 17-133	Mecklenburg (15JT635)	Affirmed
IN RE E.C. No. 17-57	Orange (14JA52-53)	Affirmed

IN RE E.V.R. No. 16-1250	Forsyth (15J243-245)	Affirmed in part; Reversed and Remanded in part.
IN RE G.M.C. No. 16-1257	Wilkes (15JT03) (15JT04)	Affirmed
IN RE H.R.P.A. No. 17-72	Wake (16SPC51988)	Affirmed
IN RE K.E.J. No. 16-1223	Davidson (14JT26-29)	Affirmed
IN RE L.H. No. 16-1294	Onslow (13JA255-256)	Affirmed
IN RE L.P.T. No. 16-1246	Burke (14JT24-26)	Reversed
IN RE M.B. No. 16-1270	Johnston (14JA49-51)	Affirmed
IN RE M.L.E. No. 16-1180	Forsyth (14JT237)	Affirmed
IN RE P.B. No. 16-1261	Mecklenburg (14JA69)	Vacated and Remanded
IN RE P.L.B. No. 16-1116	Wilkes (12JT60)	Affirmed
IN RE R.R. No. 16-1240	Cabarrus (15JA19)	Vacated and Remanded
IN RE S.D.B. No. 16-1265	Burke (14JT98-99)	Affirmed
IN RE S.S.P. No. 17-191	Northampton (13JT20-24)	Affirmed
IN RE E.M.S-C. & B.O.S-C. No. 17-30	Columbus (16JT23-24)	Affirmed
JENNINGS v. UNIV. OF N.C. No. 16-1031	Washington (15CVS201)	Affirmed
McLAURIN v. MED. FACILITIES OF N.C., INC. No. 16-1161	Cumberland (16CVS524)	Affirmed

ROBERTS v. MARS HILL UNIV. No. 16-1093	Madison (14CVS178)	Affirmed
SAMPSON v. LANIER No. 16-1135	Guilford (14CVS10246)	Dismissed
STATE v. BASKINS No. 16-1237	Guilford (14CRS88608)	Affirmed
STATE v. BENTON No. 16-1238	Guilford (15CRS24403) (15CRS71890)	Dismissed
STATE v. COX No. 16-992	Henderson (12CRS53961-62)	Affirmed in part and Dismissed in part
STATE v. ELLISON No. 16-1127	New Hanover (15CRS54781)	No Error in part; Vacated and Remanded in part
STATE v. GRISSETT No. 16-1305	Brunswick (12CRS55968)	Affirmed
STATE v. GUERRERO No. 16-1227	Catawba (14CRS55436)	Affirmed in part and Remanded for correction of clerical errors
STATE v. HENLEY No. 16-1171	Mecklenburg (13CRS237820-22)	No Error
STATE v. HICKS No. 16-1033	Sampson (15CRS51898)	No Error
STATE v. ISOM No. 16-1052	Cabarrus (15CRS50855-56)	No Error
STATE v. KLUTTZ No. 16-1097	Davie (15CRS50048-50)	No Error
STATE v. KONIFKA No. 16-1013	Union (15CRS50380) (15CRS50920-21)	NO ERROR IN PART; DISMISSED WITHOUT PREJUDICE IN PART.
STATE v. MEINSEN No. 17-13	Halifax (14CRS52477)	NO PREJUDICIAL ERROR
STATE v. NEWBILL No. 16-1163	Mecklenburg (15CRS227785-87)	Affirmed

STATE v. OATES No. 16-903	Sampson (14CRS52713-14)	No Error
STATE v. PETERSON No. 17-26	Pitt (14CRS53250)	Vacated and Remanded for Resentencing

ASHEVILLE LAKEVIEW PROPERTIES, LLC, PETER PINHOLSTER, JR., ET AL., PLAINTIFFS
v.
LAKE VIEW PARK COMMISSION, INC., ROBERT H. FARBREY, ET AL., DEFENDANTS

No. COA15-1308

Filed 18 July 2017

1. Declaratory Judgments—conveyance of trust property—barred by seven-year statute of limitations

The trial court did not err in a declaratory judgment action by concluding plaintiff lot owners' challenge to a 1996 conveyance of trust property to defendant Commission was barred by the seven-year statute of limitations under N.C.G.S. § 1-38, barring claims for possession of real property against a possessor holding title.

2. Declaratory Judgments—authority to levy assessments on lot owners—members—articles of incorporation—barred by three-year or six-year statute of limitations

The trial court did not err in a declaratory judgment action by concluding plaintiff lot owners' challenge to the authority of defendant Commission to levy assessments on the lot owners, and its assertion that all lot owners were members of the Commission and subject to its Articles of Incorporation, were barred by a three-year or six-year statute of limitations. Further, plaintiffs' complaint contained facts showing they authorized the very actions for which they complained.

3. Declaratory Judgments—constructive trust—violation of express trust—barred by statute of limitations

The trial court did not err by dismissing plaintiff's claims seeking declaratory relief including a constructive trust where the statute of limitations to bring a claim for violation of an express trust is three years. Further the statute of limitations applicable to constructive trusts is ten years, and the statute runs from the time the tortious or wrongful act is committed. Plaintiffs filed their complaint almost twenty years after the deed was filed and nearly thirty years from the initial assessment rate increase.

4. Declaratory Judgments—negligent misrepresentation—Unfair and Deceptive Trade Practices Act—money assessments to lot owners—trust property

The trial court did not err in a declaratory judgment case by dismissing plaintiff lot owners' claims seeking relief on the grounds

of negligent misrepresentation and violation of the Unfair and Deceptive Trade Practices Act regarding the authority of defendant Commission to impose monetary assessments per lot, expend the collected assessments on trust property, develop a southern trail between plaintiffs' respective lots and the lake, and to generally exercise dominion and control over the pertinent trust property.

Judge TYSON dissenting.

Appeal by plaintiffs from orders entered 1 and 17 July 2015 by Judge Marvin P. Pope, Jr., in Buncombe County Superior Court. Heard in the Court of Appeals 9 August 2016.

Ward and Smith, P.A., by Grant B. Osborne and Alexander C. Dale, for plaintiff-appellants.

Deutsch & Gottschalk, P.A., by Tikkun A.S. Gottschalk and Robert J. Deutsch, for defendant-appellees.

BRYANT, Judge.

Where plaintiffs' underlying claims are barred by statutes of limitations, the Declaratory Judgments Act will not allow relief, and therefore, we affirm the trial court order granting defendants' motion to dismiss pursuant to Rule 12(b)(6).

On 28 May 2015, plaintiffs Asheville Lakeview Properties, LLC; Peter Pinholster, Jr.; Jennifer Pinholster; and John K. Mascari filed a complaint in Buncombe County Superior Court against defendants Lake View Park Commission, Inc. (the Commission); Robert H. Fabrey and Anne Robinson, as the 1996 Commissioners of the Commission (collectively, the "1996 Commissioner defendants"); and Mike Nery, Barbara Hart, Gary Ross, Kevin Saum, and Keith Pandres (all of whom are collectively referenced as the "defendants") seeking an order canceling a 1996 deed, a declaratory judgment against the levy of assessments, a declaratory judgment against compelled membership in the Commission for Lake View Park lot owners, and a declaratory judgment directing that monetary assessments be held in a constructive trust in favor of the lot owners.

Allegations of Complaint

The complaint describes Lake View Park as a residential subdivision surrounding a lake (Beaver Lake) in Asheville. The lots which plaintiffs now own were described in a deed filed with the Register of Deeds

in the Buncombe County Registry in 1938. That deed contains express covenants obligating each property owner to pay the Park Commission[1] an assessment for preservation, improvement, and repair of the public areas—sidewalks, parkways, public streets, and driveways—and establishing that the lot owners would annually elect three commissioners to administer the public property and a treasurer to disburse funds as directed. In 1942, a deed was filed conveying Beaver Lake and certain adjacent real property (the "trust property") to the Park Commission and directed that those elected members of the Park Commission and their successors hold the deeded property "in trust to be used for park purposes for the benefit of the owners of lots in the Lake View Park Subdivision." Then, in 1983, articles of incorporation were filed with the North Carolina Secretary of State for the Commission.

> [T]he Commission is formed . . . to enhance and to preserve the beauty and quality of the Lake View Park Subdivision . . . . All areas located in the geographical section of Buncombe County known as Lake View Park . . . shall be deemed the geographical area within which the Commission shall exercise its authority.

Pursuant to the articles of incorporation, the Commission was empowered to "perform all of the duties as set forth in the Lake View Park deeds" as well as "[f]ix, levy and collect property assessments." The articles further provided that " '[a]ll property owners of Lake View Park shall be members' of the [Commission]." In 1996, a deed was filed with the Buncombe County Register by the 1996 Commissioner defendants and three others [E.H. Lederer, John F. Barber, M.D., and John M. Johnston].[2] "The express purpose of the 1996 Deed was 'to transfer all real estate of the previously unincorporated Lake View Park Commission' to [the newly incorporated Commission], which 'real estate' encompasses all of the Trust Property."[3]

Posted on the Commission's website, on 20 October 2014, was a plan to assert possession of the trust property that lies adjacent to plaintiffs' properties to construct a "south trail" to run between plaintiffs' property lots and the lake. In their action for declaratory judgment, plaintiffs alleged the Commission has no authority to levy assessments

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1. The "Park Commission" is the predecessor to "the Commission"—Lake View Park Commission, Inc.—which was formed in 1983.

2. Lederer, Barber, and Johnston are now deceased (and not parties to this action).

3. The trust property consists of Beaver Lake and adjacent property.

against property owners or to build and maintain a trail on the trust property, because the Commission does not hold lawful title to the property. Plaintiffs sought equitable relief in the form of invalidating the 1996 deed.

Plaintiffs allege that neither the 1938 deed nor 1942 deed authorized the Commissioners to convey title of the deeded trust property of Lake View Park, assign the right to collect assessments from Lake View Park lot owners, or to increase the assessments to more than "ten cents per front foot of lot [(as set out in the 1938 deed)]."

On 5 June 2015, the Commission moved to dismiss the complaint pursuant to Rule 12(b)(6) asserting statute of limitations defenses. The Commission asserted its possession of Lake View Park has been "actual, open, hostile, exclusive, and continuous" since at least 1996, if not 1983. In its 12(b)(6) motion to dismiss, the Commission also noted "[p]laintiffs admit that [the Commission] was formed on December 15, 1983, and recite portions of [the Commission's] Articles of Incorporation showing that [the Commission] has 'exercised its authority' over Lake View Park since 1983."

Following a hearing in Buncombe County Superior Court before the Honorable Marvin P. Pope, Jr., Judge presiding, Judge Pope entered an order on 1 July 2015 granting defendants' motion to dismiss "as to every claim for relief set forth in the complaint." Plaintiffs filed a motion for relief pursuant to Rule 60(b)(6), or alternatively, a motion for reconsideration. The motion was denied by order entered 17 July 2015.

Plaintiffs appeal from the orders entered 1 and 17 July 2015, dismissing plaintiffs' claim and denying plaintiffs' Rule 60(b) motion and alternative motion for reconsideration.

On appeal, plaintiffs' primary argument is that the trial court erred by granting defendants' 12(b)(6) motion to dismiss. We disagree. Plaintiffs challenge the ruling that their complaint was barred by the statute of limitations and further assert the trial court erred by denying plaintiffs' motion for 60(b) relief or alternative motion for reconsideration.

Analysis

Plaintiffs argue that the trial court erred by granting defendants' Rule 12(b)(6) motion to dismiss the complaint.

> 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.

Kohn v. Firsthealth Moore Reg'l Hosp., 229 N.C. App. 19, 21, 747 S.E.2d 395, 397 (2013) (quoting *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979)).

> It is well-settled that a plaintiff's claim is properly dismissed under Rule 12(b)(6) when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the claim; (2) the complaint on its face reveals the absence of facts sufficient to make a valid claim; or (3) the complaint discloses some fact that necessarily defeats the claim.

Grich v. Mantelco, LLC, 228 N.C. App. 587, 589, 746 S.E.2d 316, 318 (2013) (citation omitted). This Court reviews a trial court's ruling on a motion for Rule 12(b)(6) de novo. *Id.* "Where a trial court has reached the correct result, the judgment will not be disturbed on appeal even where a different reason is assigned to the decision." *Eways v. Governor's Island*, 326 N.C. 552, 554, 391 S.E.2d 182, 183 (1990).

> The statute of limitations may be raised as a defense by a Rule 12(b)(6) motion to dismiss if it appears on the face of the complaint that such a statute bars the plaintiff's action. It is well-established that once a defendant raises the affirmative defense of the statute of limitations, the burden shifts to the plaintiffs to show their action was filed within the prescribed period.

Laster v. Francis, 199 N.C. App. 572, 576, 681 S.E.2d 858, 861 (2009) (citations omitted).

Plaintiffs brought forth five substantive claims, four of which seek equitable relief pursuant to declaratory judgment.

Declaratory Judgment

"The purpose of the Declaratory Judgments Act is, to settle and afford relief from uncertainty and insecurity, with respect to rights, status, and other legal relations . . . . It is to be liberally construed and administered." *York v. Newman*, 2 N.C. App. 484, 489, 163 S.E.2d 282, 286 (1968) (citations omitted). Article 26 ("Declaratory Judgments"), codified within Chapter 1, Subchapter VIII, of our General Statutes, authorizes

> [a]ny person interested as or through an . . . administrator, trustee . . . or cestui que trust, in the administration of a trust . . . may have a declaration of rights or legal relations in respect thereto:
>
> . . . .
>
> (2) To direct the . . . administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity . . . .

N.C. Gen. Stat. § 1-255 (2015). "[A] declaratory judgment should issue (1) when [it] will serve a useful purpose in clarifying and settling the legal relations at issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity and controversy giving rise to the proceeding." *Goldston v. State*, 361 N.C. 26, 33, 637 S.E.2d 876, 881 (2006) (quoting *Augur v. Augur*, 356 N.C. 582, 588, 573 S.E.2d 125, 130 (2002) (citing N.C.G.S. § 1–257 (2005))). However, "if the statute of limitations was properly applied to plaintiff's underlying claims, no relief can be afforded under the Declaratory Judgment[s] Act." *Ludlum v. State*, 227 N.C. App. 92, 94, 742 S.E.2d 580, 582 (2013).

Plaintiffs' *first* claim challenges the authority of the grantors of the 1996 deed to convey the Beaver Lake Trust to the Commission. The *second* claim challenges the authority of the Commission to levy assessments on the Lake View Park lot owners and the 1996 deed's assignment of the right to assess a levy to the Commission. Plaintiffs' *third* claim challenges the Commission's assertion (per its Articles of Incorporation) that all Lake View Park owners are members of the Commission and, thus, are subject to its Articles of Incorporation. The *fourth* claim seeks to impose a constructive trust upon the assessments levied upon the Lake View Park lot owners and retained by the Commission.[4]

[1] Plaintiffs' first claim challenging the 1996 conveyance of the trust property to the Commission must fail. Taking plaintiffs' claims as true and assuming there is any defect in the title to the trust property, property that the Commission has maintained pursuant to the deed since at least 1996, plaintiffs' claims are barred by the statute of limitations. *See*

4. Plaintiffs' five claims specifically sought (1) equitable cancellation of 1996 Deed of Trust property (action at law for declaratory judgment as to ownership of trust property); (2) declaratory judgment as to assessments; (3) declaratory judgment as to Company membership; (4) declaratory judgment as to establishment of a constructive trust in favor of plaintiffs and lot owners in Lake View Park as to assessments; and (5) negligent misrepresentation by company (a violation of the Unfair and Deceptive Trade Practices Act).

N.C. Gen. Stat. § 1–38 (imposing a seven-year statute of limitations barring claims for possession of real property against a possessor holding title); *see also Perry v. Bassenger*, 219 N.C. 838, 15 S.E.2d 365 (1941).

[2] Plaintiffs' second and third claims are each rooted in a challenge to the authority of the Commission to act as the administrative commission for Lake View Park, a function the Commission has performed and Lake View Park lot owners have apparently relied upon since at least 1996.

Per the complaint, the Commission filed articles of incorporation with the Secretary of State in 1983 providing that the Commission was empowered to "[e]xercise all of the powers and privileges and to perform all of the duties as set forth in the Lake View Park deeds with Covenants and Restrictions . . . [as well as] '[f]ix, levy and collect property assessment in accordance of the provisions of the Covenants.' " While plaintiffs assert the Commission acted without authority by increasing the amount of the assessment imposed "per front foot" of each lot from the $0.15 rate established in 1938 to the current rate of $1.20 in 2011, plaintiffs' complaint contains facts showing that plaintiffs authorized the very actions about which they complain. Assuming plaintiffs had asserted an actionable claim, they would nevertheless be barred by a three year or six year statute of limitations.

[3] Plaintiffs' fourth claim seeking a constructive trust also implies the existence of an express trust. The complaint sets out that the public property (trust property) of Lake View Park was to be administered by Lake View Park Commissioners, elected by the lot owners of Lake View Park, in trust for the benefit of Lake View Park lot owners.

> A determination of which type of trust plaintiffs have asserted would usually be paramount to the inquiry of whether the statute of limitations barred plaintiffs' action since claims involving express trusts are governed by a three-year statute of limitations, and resulting and constructive trusts are governed by a ten-year statute of limitations. *See* N.C. Gen. Stat. §§ 1-52, -56 (2005). Moreover, where there is an express trust, the statute of limitations does not begin to run until a repudiation or disavowal of the trust occurs, while in instances of a resulting or constructive trust, the statute runs from the time the tortious or wrongful act is committed.

Laster, 199 N.C. App. at 576, 681 S.E.2d at 861 (citations omitted). "[O]ur Supreme Court held that '[w]hen a trustee by devise disposes of trust property in fee simple, free from and in contradiction of the terms of

the trust, this is a repudiation or disavowal of the trust.' " *Id.* at 578, 681 S.E.2d at 862 (quoting *Sandlin v. Weaver*, 240 N.C. 703, 709, 83 S.E.2d 806, 810 (1954)). But regardless of the type of trust, plaintiffs' claims in the instant case would be barred.

Taking the allegations of the complaint as true, the Commission repudiated the terms of the Lake View Park trust by transferring the trust corpus to the Commission in 1996. If plaintiffs contend this is a violation of the terms of the trust, the purported transfer of the unencumbered trust corpus would be a repudiation or disavowal of the trust. *Id.* Such an act would commence the running of the applicable statute of limitations beginning in 1996. As the statute of limitations to bring a claim for violation of an express trust is three years, plaintiffs' claim is barred. *Id.* at 576, 681 S.E.2d at 861. Plaintiffs also contend the Commission's conduct entitled them to imposition of a constructive trust (by collecting assessments and periodically increasing the assessment rate). The statute of limitations applicable to constructive trusts is ten years, and "the statute runs from the time the tortious or wrongful act is committed." *Id.* at 576, 681 S.E.2d at 861. Here, plaintiffs filed their complaint on 28 May 2015, almost twenty years after the 1996 deed was filed, the wrongful act of which they complain, and nearly thirty years from the initial assessment rate increase that occurred in 1985. Therefore, the trial court properly dismissed plaintiffs' claims seeking declaratory relief, including a constructive trust.

[4] As for plaintiffs' final claim seeking relief on the grounds of negligent misrepresentation and violation of the Unfair and Deceptive Trade Practices Act, plaintiffs again challenge the authority of the Commission to impose monetary assessments per lot, expend the collected assessments on trust property, develop the southern trail between plaintiffs' respective lots and Beaver Lake, and generally exercise dominion and control over the trust property—administrative duties in which the Commission has been engaged since at least 1996.

"The statute of limitations applicable to negligent misrepresentation claims is three years. *See* N.C. Gen. Stat. § 1-52(5)[.]" *Guyton v. FM Lending Servs., Inc.*, 199 N.C. App. 30, 35, 681 S.E.2d 465, 470 (2009) (citation omitted). A four-year statute of limitations is applied to claims for unfair and deceptive trade practices. *See Page v. Lexington Ins. Co.*, 177 N.C. App. 246, 251, 628 S.E.2d 427, 430 (2006) (reasoning "the UDTP claim [was] . . . governed by the four-year statute of limitations"). Therefore, given the time frames at issue here, the trial court properly dismissed plaintiffs' claims for negligent misrepresentation and unfair and deceptive trade practices. Accordingly, we affirm the trial court's

order granting defendants Rule 12(b)(6) motion to dismiss all claims in plaintiffs' complaint.[5]

Having affirmed the trial court order dismissing plaintiffs' complaint, and for the reasons stated herein as to why we affirmed the trial court order, we likewise affirm the trial court order denying plaintiffs' Rule 60(b) motion or alternative motion for reconsideration.

AFFIRMED.

Judge INMAN concurs.

Judge TYSON dissents by separate opinion.

TYSON, Judge, dissenting.

The record clearly indicates the trial court's consideration of matters outside the face of the complaint converted Defendants' Rule 12(b)(6) motion to dismiss to a motion for summary judgment, and that Plaintiffs were not afforded a "reasonable opportunity to present all material made pertinent to such a motion by Rule 56." N.C. Gen. Stat. § 1A-1, Rule 12(b) (2015). I vote to reverse the trial court's order and remand and respectfully dissent.

I. Relevant Facts

On 28 May 2015, Plaintiffs filed their complaint in Buncombe County Superior Court. Approximately a week later, on 5 June 2015, Defendants filed a Rule 12(b)(6) motion to dismiss, which asserted Plaintiffs' claims were barred by the statute of limitations. On 9 June 2015, Plaintiffs filed a motion for preliminary injunction to enjoin Defendants from "trespassing on Plaintiffs' properties, from removing or tampering with certain fences . . . , and from proceeding with construction of a walking trail[.]"

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5. The dissent takes the position that the trial court's ruling should have been converted to one for summary judgment, and cites to notes taken by the trial court at the Rule 12(b)(6) hearing as proof the trial court considered matters outside the pleadings. However, where the order dismissing all claims was based on the fact that all claims were barred by statutes of limitations, the complaint on its face discloses facts that defeat all claims. Thus, the position taken by the dissent is to no avail. On this record, notwithstanding "notes" made by the trial court, the clear basis for the trial court's ruling was the failure of the complaint to "state" a claim where all claims were barred by statutes of limitations. *See Page*, 177 N.C. App. at 248, 628 S.E.2d at 428 ("On appeal of a 12(b)(6) motion to dismiss for failure to state a claim, our Court conduct[s] 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." (alteration in original) (citation omitted)).

On 24 June 2015, Defendants served Plaintiffs with a memorandum of law in support of Defendants' motion to dismiss and in opposition to Plaintiffs' motion for a preliminary injunction. Defendants' memorandum included several attached affidavits and exhibits. In response, Plaintiffs submitted a memorandum of law in opposition to Defendants' Rule 12(b)(6) motion to dismiss. Plaintiffs' memorandum specifically states the trial court's standard under Rule 12(b)(6) and asserted Defendants' arguments were not supported by a review limited to the face of the complaint.

Plaintiffs also served Defendants with a written objection to consideration of evidence on Defendants' Rule 12(b)(6) motion to dismiss on 26 June 2015 and formally filed the motion on 1 July 2015. Plaintiffs asserted the affidavits and exhibits submitted in support of Defendants' motion to dismiss constituted matters outside the face of the complaint and should be disregarded by the court in its consideration of Defendants' Rule 12(b)(6) motion.

Plaintiffs further specifically: (1) noted they had not submitted any additional evidence in response to Defendants' motion; (2) objected to the trial court's consideration of the evidence presented by Defendants; and (3) objected to the conversion of Defendants' motion to dismiss into a motion for summary judgment.

The trial court considered Defendants' Rule 12(b)(6) motion to dismiss at a hearing on 29 June 2015. At the hearing, Plaintiffs consistently reiterated, under Rule 12(b)(6), the court was to look solely at the legal sufficiency of the complaint and stated, "[a] lot of what we have heard already will be very appropriate for consideration under summary judgment when that day comes. This is not that day." After hearing the arguments, the trial court orally granted Defendants' Rule 12(b)(6) motion to dismiss and a written order was entered on 1 July 2015.

Prior to signing and entering the order on 1 July 2015, the trial judge met with the parties' counsel in his chambers to discuss the form and content of the order of dismissal. Both parties acknowledge this meeting occurred and at some point the judge shared a copy of his notes upon which he based his decision ("Rule 12(b)(6) Memo"). The Rule 12(b)(6) Memo is included in the record on appeal and begins by stating: "Basis for Rule 12(b)(6) ruling on June 29, 2015; *taking the allegations in the Complaint in light most favorable to the moving party*[.] (emphasis supplied). The Rule 12(b)(6) Memo then outlines the judge's understanding of some of the basic facts of the case, including information and facts not alleged in the complaint.

On 10 July 2015, Plaintiffs filed a motion for relief from the trial court's order pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b)(6), and, in the alternative, a motion for reconsideration. Plaintiffs again asserted the trial court had improperly considered matters outside the face of the complaint and that Defendants' motion to dismiss should have been denied under the proper standard of review applicable to Rule 12(b)(6). The trial court denied Plaintiffs' motion on 17 July 2015. Plaintiff appeals.

II. Rule 12(b)(6) Standard of Review

"A motion to dismiss under Rule 12(b)(6) is an appropriate method of determining whether the statutes of limitation bar plaintiff's claims *if the bar is disclosed in the complaint.*" *Carlisle v. Keith*, 169 N.C. App. 674, 681, 614 S.E.2d 542, 547 (2005) (emphasis supplied) (citing *Horton v. Carolina Medicorp*, 344 N.C. 133, 136, 472 S.E.2d 778, 780 (1996)).

"A Rule 12(b)(6) motion tests the legal sufficiency of the pleading." *Kemp v. Spivey*, 166 N.C. App. 456, 461, 602 S.E.2d 686, 690 (2004) (citation and quotation marks omitted). "When considering a 12(b)(6) motion to dismiss, the trial court need only look to the face of the complaint to determine whether it reveals an insurmountable bar to plaintiff's recovery." *Carlisle*, 169 N.C. App. at 681, 614 S.E.2d at 547 (citation and quotation marks omitted).

"On appeal from a motion to dismiss under Rule 12(b)(6), this Court reviews *de novo* whether, as a matter of law, the allegations of the complaint . . . are sufficient to state a claim upon which relief may be granted[.]" *Christmas v. Cabarrus Cty.*, 192 N.C. App. 227, 231, 664 S.E.2d 649, 652 (2008) (citation and internal quotation marks omitted), *disc. review denied*, 363 N.C. 372, 678 S.E.2d 234 (2009). This Court "consider[s] the allegations in the complaint true, construe[s] the complaint liberally, and only reverse[s] the trial court's denial of a motion to dismiss if plaintiff is entitled to no relief under any set of facts which could be proven in support of the claim." *Id.*

However, Rule 12(b) further provides:

> If, on a motion asserting the defense numbered (6), to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion *shall* be treated as one for summary judgment and disposed of as provided in Rule 56, and *all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.*

N.C. Gen. Stat. § 1A-1, Rule 12(b) (emphasis supplied); *see Snyder v. Freeman*, 300 N.C. 204, 208, 266 S.E.2d 593, 596 (1980) (agreeing the trial court's "dismissal on the ground of the statute of limitations was, in effect, the entry of summary judgment inasmuch as matters outside the pleadings must have been considered by [the court]"); *Williams v. Advanced Auto Parts, Inc.*, ___ N.C. App. ___, ___, 795 S.E.2d 647, 651 ("[A] Rule 12(b)(6) motion to dismiss for failure to state a claim is indeed converted to a Rule 56 motion for summary judgment when matters outside the pleadings are presented to and not excluded by the court."), *disc. review denied*, __ N.C. __, 799 S.E.2d 45 (2017).

"[T]he trial court [is] not required to convert a motion to dismiss into one for summary judgment simply because additional documents [are] submitted[.]" *Pinney v. State Farm Mut. Ins. Co.*, 146 N.C. App. 248, 252, 552 S.E.2d 186, 189 (2001), *disc. review denied*, 356 N.C. 438, 572 S.E.2d 788 (2002); *see Privette v. University of North Carolina*, 96 N.C. App. 124, 132, 385 S.E.2d 185, 189 (1989). Where the record clearly indicates the trial court did not consider the additional documents, this Court reviews the trial court's decision under Rule 12(b)(6). *Pinney*, 146 N.C. App. at 252, 552 S.E.2d at 189.

On the other hand, as here, where the record clearly demonstrates the trial court considered and did not exclude the additional documents, the Rule 12(b)(6) motion is converted to a motion for summary judgment and the opposing party must be "afforded a reasonable opportunity to present all material made pertinent to such a motion by Rule 56." *Kemp*, 166 N.C. App. at 462, 602 S.E.2d at 690 (citation and internal quotation marks omitted). If the parties are not afforded such an opportunity, this Court remands the case "so as to allow the parties full opportunity for discovery and presentation of all pertinent evidence." *Id.*

III. Rule 56 Summary Judgment Standard of Review

This Court reviews an order granting summary judgment *de novo* and views the evidence in the light most favorable to the nonmoving party. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008); *Williams v. Habul*, 219 N.C. App. 281, 289, 724 S.E.2d 104, 109 (2012). Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2015); *see Draughon v. Harnett Cty. Bd. Of Educ.*, 158 N.C. App. 208, 212, 580 S.E.2d 732, 735 (2003) *aff'd per curiam*, 358 N.C. 131, 591 S.E.2d 521 (2004).

IV. Analysis

While the trial court is not required to convert a Rule 12(b)(6) motion to a summary judgment motion based solely on the submission of additional documents, *Pinney*, 146 N.C. App. at 252, 552 S.E.2d at 189, where the trial court considered and did not exclude such documents "the motion *shall* be treated as one for summary judgment and disposed of as provided in Rule 56[.]" N.C. Gen. Stat. § 1A-1, Rule 12(b) (emphasis supplied). The record before us demonstrates the trial court clearly considered matters outside the complaint, and apparently in the light most favorable to the moving party, prior to granting Defendants' motion to dismiss.

The trial judge's Rule 12(b)(6) Memo clearly states the information contained therein was the basis upon which the trial court granted the motion to dismiss. This memo includes facts and information not found within the four corners of the complaint. Specifically, the trial judge's notes 6(b) through 6(h) pertain to fences on Plaintiffs' properties. This issue was raised primarily in Plaintiffs' motion for preliminary injunction and in the Affidavit of Billy Jenkins filed in support of Defendants' motion to dismiss, and not in Plaintiffs' complaint.

The trial judge's Rule 12(b)(6) Memo also suggests the court applied the inappropriate standard of review. The Rule 12(b)(6) Memo states the court took "the allegations in the Complaint in light *most favorable to the moving party*[.]" (emphasis supplied). When reviewing a motion under Rule 12(b)(6), the trial court looks only at the allegations in the complaint and takes them as true. *Christmas*, 192 N.C. App. at 231, 664 S.E.2d at 652. Under summary judgment, the trial court must review the evidence in the light most favorable to the *nonmoving party*, here the Plaintiff. *See Williams*, 219 N.C. App. at 289, 724 S.E.2d at 109.

Even in absence of trial judge's Rule 12(b)(6) Memo, and unlike in *Pinney* and *Privette*, the record does not clearly indicate that the trial court specifically excluded the additional affidavits and exhibits Defendants presented in support of their Rule 12(b)(6) motion to dismiss, or that the trial court refused to consider those documents when granting the motion pursuant to Rule 12(b)(6). *See Pinney*, 146 N.C. App. at 252, 552 S.E.2d at 189; *Privette*, 96 N.C. App. at 132, 385 S.E.2d at 189.

Based upon the trial court's consideration of matters outside the face and four corners of the complaint, Defendants' Rule 12(b)(6) motion was converted to a motion for summary judgment under Rule 56. *See Kemp*, 166 N.C. App. at 462, 602 S.E.2d at 690. Upon conversion

of the motion as one for summary judgment, the statute required that all parties "be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." N.C. Gen. Stat. § 1A-1, Rule 12(b).

Throughout the proceedings, Plaintiffs correctly and consistently argued and emphasized that Rule 12(b)(6) requires the trial court to look solely at the allegations in the complaint. Plaintiffs further noted they had not presented any additional evidence, which would be allowed if the court were proceeding under a summary judgment standard. Plaintiffs clearly objected to the consideration of such evidence, exhibits, and affidavits presented by Defendants. Based upon the record before us, Plaintiffs were not allowed the required "reasonable opportunity" to present material pertinent to summary judgment. *See* N.C. Gen. Stat. § 1A-1, Rule 12(b).

V. Conclusion

The trial court improperly considered matters and evidence outside the face of the complaint and failed to provide Plaintiffs with the statute's mandatory reasonable opportunity to present evidence pertinent to a motion for summary judgment. *See id.*

I respectfully dissent from the majority's analysis and ruling to affirm under Rule 12(b)(6) and vote to reverse and remand to allow both parties full opportunity for discovery and presentation of all pertinent evidence under Rule 56. *See id*; N.C. Gen. Stat. § 1A-1, Rule 56.

THOMAS BENTLEY, EMPLOYEE, PLAINTIFF
v.
JONATHAN PINER CONSTRUCTION, ALLEGED EMPLOYER, AND STONEWOOD INSURANCE COMPANY, ALLEGED CARRIER, DEFENDANTS

No. COA16-62-2

Filed 18 July 2017

1. Appeal and Error—workers' compensation—failure to raise issue before Industrial Commission—waiver

Plaintiff waived his argument that the N.C. Industrial Commission erred by basing its opinion and award on an opinion and order by a deputy commissioner who was not present at his hearing and did not hear the evidence. Plaintiff failed to raise the issue before the Commission and could not raise it for the first time before the Court of Appeals.

2. Workers' Compensation—construction injury—independent contractor

The N.C. Industrial Commission did not err by concluding that plaintiff was not an employee of Piner Construction at the time of his injury on a construction site. Plaintiff's work on the site was characterized by the independence of an independent contractor rather than an employee.

3. Workers' Compensation—statutory employment—contract for performance of work

The Court of Appeals rejected plaintiff's argument that the N.C. Industrial Commission erred by concluding that Piner Construction was not plaintiff's "statutory employer" pursuant to N.C.G.S. § 97-19. Plaintiff failed to produce evidence of any contract for the performance of the work.

Appeal by Plaintiff from opinion and award of the North Carolina Industrial Commission entered 9 October 2015. Originally heard in the Court of Appeals 8 August 2016, with an opinion filed 20 September 2016 vacating the Industrial Commission's opinion and award and remanding the case for a new hearing. Defendants' petition for rehearing was granted 17 November 2016. Reheard in the Court of Appeals 6 February 2017. This opinion supersedes and replaces the opinion filed 20 September 2016.

Dunn, Pittman, Skinner & Cushman, PLLC, by Rudolph A. Ashton, III; and Dodge Jones Law Firm, P.A., by Robert C. Dodge, for Plaintiff-Appellant.

Dickie, McCamey & Chilcote, P.C., by Michael W. Ballance and Martin R. Jernigan, for Defendants-Appellees.

Smith Moore Leatherwood LLP, by Jeri L. Whitfield, for North Carolina Association of Defense Attorneys, amicus curiae.

Law Offices of Kathleen G. Sumner, by Kathleen G. Sumner; and Law Office of David P. Stewart, by David P. Stewart, for Workers' Injury Law & Advocacy Group, amicus curiae.

McGEE, Chief Judge.

Thomas Bentley ("Plaintiff") appeals from an opinion and award of the North Carolina Industrial Commission ("the Commission") determining he was not an "employee" of Jonathan Piner Construction ("Piner Construction"), as that term is used in the North Carolina Workers' Compensation Act, N.C. Gen. Stat. § 97-1 *et seq.* In an opinion published 20 September 2016, this Court determined that the plain language of N.C. Gen. Stat. § 97-84 (2015) was violated when the Commission based its opinion and award on an opinion and order by a deputy commissioner who was not present at the hearing and did not hear the evidence. *Bentley v. Piner*, ___ N.C. App. ___, ___, 790 S.E.2d 379, 382 (2016). Defendants petitioned this Court for rehearing, which we granted. Upon rehearing, we hold that Plaintiff did not preserve his argument regarding the proper interpretation of N.C.G.S. § 97-84 due to his failure to raise it before the Commission. We further hold that the Commission did not err in concluding Plaintiff was not an employee of Piner Construction, nor did it err in holding that Piner Construction was not Plaintiff's "statutory employer" pursuant to N.C. Gen. Stat. § 97-19. Accordingly, we affirm the order of the Commission.

I. Background

In early 2014, Plaintiff and his friend, George Tucker ("Tucker"), were working "side jobs" in the construction industry in and around Newport, North Carolina. At the time, Plaintiff held himself out as the owner and operator of Bentley Construction and Maintenance ("Bentley Construction") and had distributed business cards that advertised his business services as "[r]oofing, siding, painting, pressure washing . . .

[r]emodels and renovations, [and] sheetrock work and repairs." Plaintiff also operated a website under the Bentley Construction name.

One day in February 2014, Plaintiff and Tucker were driving around in Plaintiff's truck, which had the words "Bentley Construction and Maintenance" displayed in a decal on its side, looking for work. While driving about, Plaintiff and Tucker happened upon a jobsite in the Breakwater subdivision in Newport, North Carolina (the "Breakwater jobsite").[1] Plaintiff pulled his truck over and attempted to find the person in charge to ask if he and Tucker could work on the Breakwater jobsite. Plaintiff and Tucker encountered Jonathan Piner ("Piner"), the owner and operator of Piner Construction.

Piner Construction was the subcontractor responsible for, *inter alia*, the framing of the houses being constructed at the Breakwater jobsite. After talking for a brief period of time about what type of experience Plaintiff and Tucker had in the construction industry, Plaintiff handed Piner a Bentley Construction business card and asked Piner to call if he had any framing work available. Piner responded that if "some work [came] up . . . that [he] couldn't put [his] guys on," he would call Plaintiff.

A few weeks later, Piner "felt like [he] might need to make a phone call to somebody" to assist on the framing job at the Breakwater jobsite because he believed Piner Construction would not be able to complete all of the framing work. Piner contacted Plaintiff, and gave him the option of being paid at a fixed price or being paid by the hour. Plaintiff replied that he would "get back" to Piner on his preferred method of payment. After hearing from Piner, Plaintiff contacted, among others, Tucker and Shawn Noling ("Noling") to request their assistance on the Breakwater jobsite.

When Plaintiff, Tucker, and Noling arrived at the Breakwater jobsite to begin work, Piner produced the blueprints for the house to be constructed. Noling introduced himself to Piner, read the blueprints,[2] and then suggested the hourly rate that each man should be paid: Noling was paid $18.00 per hour, Tucker was paid $14.00 per hour, and Plaintiff was paid $12.00 per hour. Piner characterized Noling as the

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1. We note that there is some discrepancy in the record about the location and name of the jobsite at issue. Tucker identified the jobsite as the "Phillips Landing subdivision" in Morehead City, North Carolina, while Piner identified the jobsite as the "Breakwater subdivision" in Newport, North Carolina. To avoid confusion and for ease of reading, we will simply refer to the jobsite as the "Breakwater jobsite."

2. At the hearing, Noling agreed that he "read the blueprints as a member of [the Bentley Construction] crew."

"lead man" and the "man running the show" due to his expertise and experience in the construction industry, and characterized Plaintiff as the "low man on the totem pole" due to his relative inexperience. Piner asked Plaintiff if he wanted a single check written to him for all of the men he had brought with him to work on the Breakwater jobsite "because [Plaintiff] was operating as [Bentley Construction]." Plaintiff requested that Piner pay each man individually, and Piner agreed to do so.

Tucker testified that he, Plaintiff, and Noling were able to set their own hours, including making decisions about when breaks were to be taken. At the Breakwater jobsite, Plaintiff brought and used his own tools, including a compressor, a nail gun, and a "sawzall." As the work progressed, Plaintiff, Tucker, and Noling were "struggling for tools" because the tools brought by Plaintiff were inadequate, so Piner brought tools from them to use. When Noling realized another worker was needed to complete the job, he enlisted the help of C.P. Hollingsworth ("Hollingsworth"). Noling testified that he did not need to ask Piner's permission to hire Hollingsworth, and that Plaintiff similarly could have hired another person to work on the Breakwater jobsite without consulting Piner. Noling also testified that Piner did not instruct him to frame the house in a specific manner, and that he, Plaintiff, Tucker, and Hollingsworth used their own special skills, knowledge, and training to frame the house. According to Noling, Piner was not interested in the method employed to frame the house, but was only interested in "[t]he finished product."

Plaintiff worked as a "cut man" on the Breakwater jobsite. While working on 3 March 2014, Plaintiff was injured when a nail he was prying from a board broke loose and struck him in the right eye. As we explained in our previous opinion in this case,

> [f]ollowing the injury, Plaintiff filed a workers' compensation claim with the Commission on 25 March 2014. Piner Construction, along with its insurance carrier, Stonewood Insurance Company (collectively, "Defendants") denied the claim for compensation, contending the injury was non-compensable under the Workers' Compensation Act because Plaintiff was not an employee of Piner Construction on the date of the accident. The claim was assigned for a hearing before Deputy Commissioner Mary C. Vilas ("Deputy Vilas").

Bentley, ___ N.C. App. at ___, 790 S.E.2d at 379. A hearing was held before Deputy Vilas on 5 December 2014. At the hearing, Tucker, Noling,

and Piner testified. Plaintiff was not present for, and did not testify at, the hearing.

> Near the end of the [5 December 2014] hearing, Deputy Vilas suggested that the jurisdictional question of whether Plaintiff was an employee of Piner Construction be bifurcated from the merits of Plaintiff's claim, because she would no longer be at the Commission after 1 February 2015. Deputy Vilas noted that she had many cases to write, but she would "try" to decide the jurisdictional question in the present case before she left the Commission. An order bifurcating the jurisdictional and merits issues was filed 9 December 2014 by Deputy Vilas, and stated that bifurcation "was appropriate given the issues for hearing and that medical testimony by deposition is not scheduled until 26 January 2015 and [Deputy Vilas] will not be at the Commission after 1 February 2015." Deputy Vilas filed an order closing the record and declaring that the jurisdictional issue was "ready for a decision" on 12 January 2015.
>
> An opinion and order was entered 16 February 2015 by Deputy Commissioner William H. Shipley ("Deputy Shipley"). Deputy Shipley concluded as a matter of law that the Commission lacked jurisdiction over Plaintiff's claim because he was not an employee of Piner Construction at the time his injury was sustained.

Id. at ___, 790 S.E.2d at 379-80. Plaintiff filed a notice of appeal to the Commission from Deputy Shipley's order. The Commission acknowledged Plaintiff's notice of appeal, and provided Plaintiff with a Form 44. Plaintiff returned the Form 44, which listed the ways in which Plaintiff believed Deputy Shipley had erred in his opinion and order. The Commission issued an opinion an award on 9 October 2015 concluding as a matter of law that: (1) the Commission lacked jurisdiction over Plaintiff's claim because he was not an employee of Piner Construction at the time his injury was sustained; and (2) Piner Construction was not Plaintiff's "statutory employer" pursuant to N.C.G.S. § 97-19. Plaintiff appeals.

II. Analysis

Plaintiff has raised three issues in his appeal to this Court. Plaintiff argues the Commission erred by: (1) basing its opinion and award on an opinion and order by a deputy commissioner who was not present at the hearing and did not hear the evidence; (2) failing to find and conclude that Plaintiff was an employee of Piner Construction at the

time of Plaintiff's injury; and (3) failing to find and conclude that Piner Construction should be held liable as a statutory employer pursuant to N.C.G.S. § 97-19.

A. Waiver of N.C. Gen. Stat. § 97-84 Argument

[1] We must first consider whether Plaintiff's argument regarding the proper interpretation of N.C.G.S. § 97-84 has been preserved for appellate review. Plaintiff has raised his statutory interpretation argument for the first time in this Court. Whether N.C.G.S. § 97-84 permits a deputy commissioner to issue an opinion and award in a case over which the deputy commissioner did not personally preside was not raised in the evidentiary hearing before Deputy Vilas, was not mentioned nor decided in the opinion and award filed by Deputy Shipley, and was not an issue included in Plaintiff's application for review to the Commission. Generally, a party may not raise an issue on appeal if that argument was not first raised in the trial court. N.C.R. App. P. 10(a)(1). Precedents of this Court hold that "where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the appellate courts." *State v. Holliman*, 155 N.C. App. 120, 123, 573 S.E.2d 682, 685 (2002) (citations and quotations omitted); *see also Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934) ("the law does not permit parties to swap horses between courts in order to get a better mount [on appeal].").

This prohibition against raising new arguments on appeal not presented to the trial court in the first instance has been applied by this Court to cases arising from the Industrial Commission. *Floyd v. Exec. Personnel Group*, 194 N.C. App. 322, 329, 669 S.E.2d 822, 828 (2008). When a party appeals a deputy commissioner's opinion and award to the Commission within the time permitted, "the full Commission shall review the award, and, if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award[.]" N.C. Gen. Stat. § 97-85 (2015). After receiving a notice of appeal, the Commission supplies the appellant with a Form 44 Application for Review, in which the appellant must "stat[e] the grounds for its appeal 'with particularity.' The appellant must then file and serve the completed Form 44 and an accompanying brief within the specified time limitations 'unless the Industrial Commission, in its discretion, waives the use of the Form 44.' " *Cooper v. BHT Enters.*, 195 N.C. App. 363, 368, 672 S.E.2d 748, 753 (2009) (citations omitted); *see also* 04 NCAC 10A .0701(d) (2015).

In the present case, Plaintiff sent a letter and notice of appeal from Deputy Shipley's opinion and order to the Commission. After receiving

an acknowledgment of his appeal, Plaintiff filed a Form 44, along with a brief, neither of which raised the issue of whether a deputy commissioner may issue an opinion and award when he or she was not present at the hearing and did not hear the evidence. We hold that Plaintiff's failure to raise this issue before the Commission bars his ability to raise it in this Court in the first instance. Therefore, we deem this argument waived.

B. Employee/Employer Relationship

[2] Plaintiff argues the Commission erred by concluding that Plaintiff was not an employee of Piner Construction at the time of the accident. We disagree. In order to maintain a proceeding for workers' compensation, "the claimant must have been an employee of the party from whom compensation is claimed." *McCown v. Hines*, 353 N.C. 683, 686, 549 S.E.2d 175, 177 (2001) (citation omitted). "[T]he existence of an employer-employee relationship at the time of the injury constitutes a jurisdictional fact." *Id.* As our Supreme Court has held,

> the finding of a jurisdictional fact by the Industrial Commission is not conclusive upon appeal even though there be evidence in the record to support such finding. The reviewing court has the right, and the duty, to make its own independent findings of such jurisdictional facts from its consideration of all the evidence in the record.

Lucas v. Li'l Gen. Stores, 289 N.C. 212, 218, 221 S.E.2d 257, 261 (1976). In *Hayes v. Elon College*, 224 N.C. 11, 16, 29 S.E.2d 137, 140 (1944), our Supreme Court set forth an eight-factor test to guide courts in determining when a plaintiff is an independent contractor:

> The person employed (a) is engaged in an independent business, calling, or occupation; (b) is to have the independent use of his special skill, knowledge, or training in the execution of the work; (c) is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis; (d) is not subject to discharge because he adopts one method of doing the work rather than another; (e) is not in the regular employ of the other contracting party; (f) is free to use such assistants as he may think proper; (g) has full control over such assistants; and (h) selects his own time.

Hayes, 224 N.C. at 16, 29 S.E.2d at 140 (citations omitted). Not all factors are required, and no one factor is controlling over another; the *Hayes* factors "are considered along with all other circumstances to determine

whether in fact there exists in the one employed that degree of independence necessary to require his classification as independent contractor rather than employee." *Id.* "The claimant has the burden of proof that the employer-employee relation existed at the time the injury by accident occurred." *Lucas*, 289 N.C. at 218, 221 S.E.2d at 261.

Applying the *Hayes* factors to the present case, and considering "all other circumstances" relevant, we hold the Commission correctly determined that Plaintiff was an independent contractor, not an employee, of Piner Construction at the time of his injury. First, Plaintiff was engaged in the independent calling of being a "cut man" in the framing process, and held himself out as the owner and operator of Bentley Construction. There was evidence presented at the hearing that Bentley Construction was more an aspiration than an actual business – Tucker testified that the business was "a dream" and "a joke" and Noling similarly testified that it was fair to characterize Bentley Construction as "a dream." Plaintiff nevertheless distributed a Bentley Construction business card to Piner, held himself out to Piner as the owner and operator of Bentley Construction, and placed a Bentley Construction decal on his truck. Further, Noling testified that when he arrived at the Breakwater jobsite, he considered himself a part of the Bentley Construction "crew." Considering the evidence presented, we find that Plaintiff was engaged in an independent business, calling, or occupation.

Second, there is no direct evidence regarding whether Plaintiff himself had the independent use of his special skill, knowledge, or training in the execution of the work done at the Breakwater jobsite, as Plaintiff did not testify at the hearing. However, testimony from Noling and Tucker suggests that he did, indeed, have the independent use of his special skill, knowledge, or training in the execution of the work done at the Breakwater jobsite. Noling testified Piner did not instruct him on how to frame the house that was being constructed and that he, as a member of Bentley Construction, used his own special skills, knowledge, and training to frame the house. Tucker similarly testified that no one told him how to frame the house that he, Noling, Hollingsworth, and Plaintiff were helping to construct. This evidence suggests that Plaintiff, like Noling and Tucker, had the independent use of his special skill, knowledge or training. At a minimum, Plaintiff has failed to meet his burden of proof as to this factor. *Lucas*, 289 N.C. at 218, 221 S.E.2d at 261.

Third, Piner Construction paid Plaintiff at an hourly rate of $12.00. Although being paid an hourly rate is more suggestive of an employee, it is not determinative. *Hayes*, 224 N.C. at 16, 29 S.E.2d at 140; *see also Youngblood v. North State Ford Truck Sales*, 321 N.C. 380, 384-85, 364

S.E.2d 433, 438 (1988). We also note that Piner gave Plaintiff the option of being paid a lump sum, and asked Plaintiff whether he would like to be paid a single check for all of the men he had brought with him "because he was operating as [Bentley Construction]." Plaintiff refused both offers.

Fourth, the evidence presented at the hearing suggested Plaintiff was not subject to discharge because he adopted one method of completing the work rather than another. Noling testified that Piner never instructed him on the method in which to frame the house, and that Piner's only concern was that the finished product correlate with the blueprints and change orders. Piner similarly testified that he was unconcerned with how the house was framed, so long as the finished project was completed consistent with the specifications provided by the general contractor.

Fifth, the evidence suggested that Plaintiff was not in the "regular employ" of Piner Construction. Tucker testified that, prior to the work on the Breakwater jobsite, he had never done any work for Piner Construction, and Piner testified he had never met or worked with Plaintiff prior to Plaintiff approaching him in February 2014 and Plaintiff's subsequent work on the Breakwater jobsite.

Sixth, the evidence suggested that Plaintiff was free to use such assistants as he thought was proper. After Piner called Plaintiff to ask him to work on the Breakwater jobsite, Plaintiff contacted Noling and Tucker to enlist their help on the project. Noling also testified that, after he realized another person would be needed to work on the Breakwater jobsite, he was able to hire Hollingsworth without Piner's permission, and that Plaintiff similarly could have hired an additional person to work on the Breakwater jobsite without consulting Piner. Piner echoed this sentiment, testifying that Plaintiff could have hired workers and added them to the Piner Construction payroll "without any communication" with him.

Seventh, the evidence suggested that Plaintiff did not have full control over the assistants he arranged to work with him on the Breakwater jobsite. However, the power to control the assistants was not wielded by Piner or anyone from Piner Construction, but rather by Noling, the "lead man" who was himself contacted by Plaintiff to work on the Breakwater jobsite. Although Plaintiff did not have complete control over his assistants, neither did Piner or anyone from Piner Construction. On balance, this evidence does not factor into the consideration of whether Plaintiff was an employee or independent contractor.

Finally, the evidence suggested that Plaintiff, Tucker, Noling, and Hollingsworth collectively selected their own time. Tucker testified he was able to make his own hours, and Noling similarly testified that no one instructed him on when to begin and finish work for the day or when to take a lunch break. Piner confirmed this testimony, stating that he did not control the time when Plaintiff, Tucker, Noling, and Hollingsworth worked.

In considering all these factors along with the entire record in this case, we hold that Plaintiff has not satisfied his burden of demonstrating that he was an employee of Piner Construction at the time of his injury. Applying the *Hayes* factors, we conclude that Plaintiff was an independent contractor not subject to the provisions of the Workers' Compensation Act. Due to Plaintiff's status as an independent contractor, the Commission did not err in determining that it lacked jurisdiction over the present case.

C. Statutory Employer

[3] In his final argument, Plaintiff contends the Commission erred in concluding Piner Construction was not Plaintiff's "statutory employer." Specifically, Plaintiff contends "if anyone subcontracted the [Breakwater] framing job from Piner Construction, it was [Noling]. As such, [Piner Construction] would be liable for [Plaintiff's] injuries" pursuant to N.C.G.S. § 97-19 unless Piner Construction obtained proof of Noling's workers' compensation insurance. We disagree and find N.C.G.S. § 97-19 inapplicable to the present case.

N.C.G.S. § 97-19, as relevant to Plaintiff's argument, provides:

> Any principal contractor, intermediate contractor, or subcontractor who shall sublet any contract for the performance of any work without obtaining from such subcontractor or obtaining from the Industrial Commission a certificate, issued by a workers' compensation insurance carrier, or a certificate of compliance issued by the Department of Insurance to a self-insured subcontractor, stating that such subcontractor has complied with G.S. 97-93 for a specified term, shall be liable . . . to the same extent as such subcontractor would be if he were subject to the provisions of this Article for the payment of compensation and other benefits under this Article on account of the injury or death of any employee of such subcontractor due to an accident arising out of and in the course of the performance of the work covered by such subcontract.

N.C. Gen. Stat. § 97-19 (2015). The "manifest purpose" of N.C.G.S. § 97-19 "is to protect employees of irresponsible and uninsured subcontractors by imposing ultimate liability on principal contractors, intermediate contractors, or subcontractors, who . . . have it within their power, in choosing subcontractors, to pass upon their financial responsibility and insist upon appropriate compensation protection for their workers." *Greene v. Spivey*, 236 N.C. 435, 443, 73 S.E.2d 488, 494 (1952). N.C.G.S. § 97-19 "applies only when two conditions are met. First, the injured employee must be working for a subcontractor doing work which has been contracted to it by a principal contractor. Second, the subcontractor does not have workers' compensation insurance coverage covering the injured employee." *Spivey v. Wright's Roofing*, 225 N.C. App. 106, 118, 737 S.E.2d 745, 753 (2013).

As this Court has held, "[N.C.]G.S. § 97-19, by its own terms, cannot apply unless there is first a contract for the performance of work which is then sublet." *Cook v. Norvell-Mackorell Real Estate Co.*, 99 N.C. App. 307, 310, 392 S.E.2d 758, 760 (1990). In the present case, Plaintiff provided no evidence of the contract between the owner of the Breakwater jobsite and the principal contractor, the subcontract between the principal contractor and Piner Construction, or any subcontract between Piner Construction and Noling.

However, even if Plaintiff is correct that Piner Construction had subcontracted the framing job to Noling – as noted above, a contention with little support in the record – Plaintiff has not shown that he was an employee of Noling. No evidence was presented at the hearing that tended to establish an employer-employee relationship between Noling and Plaintiff. To the contrary, the evidence showed that Plaintiff himself solicited and received the framing job from Piner under the Bentley Construction name and, thereafter, contacted Noling to work on the Breakwater jobsite with him. While Noling testified he was the "lead man" on the project, no evidence tended to show that Noling was Plaintiff's employer. As we have held, applying the *Hayes* factors, Defendant was an independent contractor of Piner Construction while working at the Breakwater jobsite.

Even if we were to assume that Piner Construction subcontracted the framing project to Noling, and were to further assume some type of relationship between Plaintiff and Noling, Plaintiff would at most be an independent contractor of Noling, not one of his employees. North Carolina's statutory employer statute only applies to injured subcontractors and their employees, not independent contractors of a subcontractor, placing Plaintiff outside the protections afforded by N.C.G.S. § 97-19.

See Greene v. Spivey, 236 N.C. 435, 444, 73 S.E.2d 488, 494 (1952) (holding N.C.G.S. § 97-19 "is not applicable to an independent contractor").

Plaintiff directs this Court to *Davis v. Taylor-Wilkes Helicopter Servs.*, 145 N.C. App. 1, 549 S.E.2d 580 (2001) in support of his contention that Piner Construction was his statutory employer pursuant to N.C.G.S. § 97-19. In *Davis*, the plaintiff, Carlton Davis ("Davis") worked as an independent contractor for the defendant, Taylor-Wilkes Helicopter Service, Inc. ("Taylor-Wilkes"). 145 N.C. App. at 2-3, 549 S.E.2d at 581. Davis was injured in the course of his work for Taylor-Wilkes when a "highboy sprayer" he was operating tipped over. *Id.* at 3; 549 S.E.2d at 581. Davis pursued a claim for workers' compensation, and this Court found Taylor-Wilkes to be Davis' statutory employer. After examining the language of N.C.G.S. § 97-19, this Court concluded that, because there was "no evidence that Taylor-Wilkes obtained the necessary certificate" certifying Davis was covered by workers' compensation insurance, "under N.C. Gen. Stat. § 97-19, Taylor-Wilkes remained liable for [Davis'] compensable injuries while he was working under a subcontract from Taylor-Wilkes." *Id.* at 10, 549 S.E.2d at 585.

In the present case, and unlike in *Davis*, Plaintiff does not argue he was a subcontractor of Piner Construction, but instead argues Noling was a subcontractor of Piner Construction, and that Plaintiff was an employee of Noling. As discussed above, Plaintiff did not produce evidence to show either that Noling was Piner Construction's subcontractor, or that Plaintiff was an employee of Noling. The evidence instead tended to suggest that Plaintiff, Noling, and Tucker were each independent contractors of Piner Construction. We therefore find Davis inapposite to the present case, and hold that Piner Construction was not Plaintiff's statutory employer pursuant to N.C.G.S. § 97-19.

III. Conclusion

Plaintiff did not preserve his argument regarding whether N.C.G.S. § 97-84 permits a deputy commissioner to issue an opinion and award in a case in which the deputy commissioner did not hear the evidence due to his failure to raise it before the Commission. The Commission did not err in holding Plaintiff to be an independent contractor, nor did it err in finding that Piner Construction was not Plaintiff's statutory employer pursuant to N.C.G.S. § 97-19. Accordingly, we affirm the judgment of the Industrial Commission.

AFFIRMED.

Judges CALABRIA and STROUD concur.

ANGELA BROWN, Next of Kin of DONALD L. BROWN, Deceased Employee, Plaintiff
v.
N.C. DEPARTMENT OF PUBLIC SAFETY, Employer, SELF-INSURED (CORVEL CORPORATION, Third-Party Administrator), Defendant

No. COA16-740

Filed 18 July 2017

Workers' Compensation—next-of-kin death benefits—time-barred

The Industrial Commission did not err in a workers' compensation case involving a corrections officer by dismissing plaintiff daughter's claim for next-of-kin death benefits as time-barred where her father was hurt. The relevant statute of limitations refers to an injury that was the cause of death, not a separate injury.

Appeal by Plaintiff from opinion and award of the North Carolina Industrial Commission entered 22 April 2016. Heard in the Court of Appeals 20 February 2017.

Campbell & Associates, by Bradley H. Smith, for Plaintiff-Appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Ryan C. Zellar, for Defendant-Appellee.

McGEE, Chief Judge.

Angela Brown ("Plaintiff") appeals from opinion and award of the North Carolina Industrial Commission ("the Commission") dismissing Plaintiff's claim for next-of-kin death benefits under the North Carolina Workers' Compensation Act. We affirm.

I. *Background*

Plaintiff's father, Donald L. Brown (hereinafter, "Brown" or "Decedent"), was employed as a correctional officer for the North Carolina Department of Correction ("Defendant"), at Foothills Correctional Institution in Morganton, when he was injured during a work-related training exercise on 25 August 2005 ("the accident"). The accident occurred while Brown was participating in a training exercise during which Brown alleged he injured himself in a fall. Defendant filed a Form 19 "Employer's Report of Employee's Injury" that stated Defendant first became aware of the accident on 19 November 2005. Brown alleged he injured his lower back, left hip, and leg in the accident, but that Brown had not felt injured until the following day, and had not

received any medical treatment for the alleged injuries.[1] Brown filed a Form 18 "Notice of Accident to Employer" dated 13 December 2005, but this form was file stamped by the Commission on 27 December 2005. In this Form 18, Brown gave notice, "as required by law, that [he] sustained an injury[,]" and "[d]escribe[d] the injury . . ., including the specific body part involved (e.g., right hand, left hand)" as follows: "[l]ower [b]ack."

Defendant submitted a Form 61 "Denial of Workers' Compensation Claim," dated 4 January 2006, stating it was "without sufficient information to admit [Brown's] right to compensation." However, Defendant subsequently filed a Form 60 "Employer's Admission of Employee's Right to Compensation," dated 23 March 2006, in which Defendant "admit[ted Brown's] right to compensation for an injury by accident on 8/25/2005[.]" This Form 60 indicated that the "description of the injury . . . is: low back strain[,]" and calculated a weekly compensation rate of $378.11. The Form 60 did not include any alleged injuries to Brown's hip or leg. Defendant compensated Brown for his medical treatment related to his back injury while Brown continued to work full-time in 2005 and 2006. Brown underwent surgery for his compensable back injury in December 2007.

Brown filed a second Form 18 on 15 May 2007, again alleging he injured his back on 25 August 2005 when he "was participating in a training exercise[.]" Once again, in this second Form 18, Brown made *no* claim that he had sustained injuries to his left hip or leg as a result of the accident. Defendant "initiated payment of temporary total disability . . . benefits to [Brown] in June 2008 in relation to his compensable back injury." These payments continued until Brown's death. Brown was "assessed at maximum medical improvement" on 10 February 2009, and was "assigned a 15% permanent partial impairment rating to [his] back, and [was] written out of work on a permanent basis" due to his ongoing "chronic back pain."

Brown submitted a third Form 18, "Amended Notice of Accident to Employer," dated 7 October 2010, alleging for the first time that, as a result of the accident, he sustained injuries "[i]ncluding, but not limited to, [his] back *and left hip and leg*."[2] (emphasis added). In addition

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1. The record copy of this Form 19 is not signed by any representative of Defendant, does not include a date in the section labeled "Date Completed," nor does it include any file stamp. Assuming it was sent to the Commission as required, there is no record indication of when that occurred.

2. We note that some of the documentation is file stamped, whereas other documentation, such as this amended Form 18, is not. Because Defendant does not argue otherwise, we presume all record documentation was correctly filed on or near the dates, if any, included on that documentation.

to the "Amended Notice of Accident," Brown apparently filed a Form 33 "Request that Claim be Assigned for Hearing," also dated 7 October 2010, in which he alleged that he had "sustained *a compensable injury to his left hip* [during the 25 August 2005 exercise] which [was] being denied by [] Defendant[]." (emphasis added). We note that there is no record evidence that Brown ever claimed he had sustained a compensable injury to his left hip prior to this amended Form 18 that was apparently filed concurrently with his Form 33 requesting a hearing related to his alleged compensable hip injury. A hearing on the matter was set for 5 May 2011.

Two days before the hearing date, Brown filed a request that the matter be "postponed indefinitely as there are currently no issues in dispute between the parties" in order to allow the parties "to try to mediate [Brown's] claim[.]" Pursuant to Brown's request, a deputy commissioner filed an order on 9 May 2011 removing the matter from the "May 5, 2011 hearing calendar and the active hearing docket as there [were] no issues currently in dispute." The matter was referred to mediation. The Commission's opinion and award stated: "The parties reached an impasse in settlement discussions at mediation. However, [Brown] did not file a new Form 33 request for hearing on the denied claim of left hip injury at any point during his lifetime."

The Commission found that Brown "received significant medical treatment for his left hip from 2007 until his death[.]" This treatment included a total left hip replacement in 2008, "at which time [Brown] denied to the medical provider any specific injury to [his] hip." Brown underwent multiple additional surgical procedures related to his left hip replacement that were complicated by persistent infections. However, "Defendant did not authorize, direct, or pay for any left hip medical treatment[.]"

Temporary total disability benefits related to Brown's *back* injury, totaling $105,233.12, continued until Brown's death on 1 January 2014. Total medical benefits paid for Brown's compensable back injury amounted to $40,198.87. Brown's death certificate listed alcoholic cirrhosis as the immediate cause of death, and noted

> underlying causes of death as hepatic encephalopathy [– altered mental state resulting from alcoholic cirrhosis of the liver R62 –] for a period of weeks prior to death and chronic left hip and psoas muscle abscess refractory to antibiotics [– infection resistant to antibiotics resulting in abscess of hip and associated muscle, likely resultant of Brown's 2008 left hip replacement –] for approximately six years prior to the date of death.

Plaintiff, as Brown's next of kin, submitted a Form 33 "Request that Claim be Assigned for Hearing" dated 21 August 2014, in which she sought death benefits pursuant to N.C. Gen. Stat. § 97-38. In Plaintiff's Form 33, she claimed that the parts of Decedent's body that had been injured in the 25 August 2005 accident were his "[b]ack and hip." Defendant mailed a response to Plaintiff's Form 33, dated 9 December 2014, in which it stated: "Decedent sustained a compensable low back injury on August 25, 2005 during a training exercise. Defendant accepted [P]laintiff's claim as compensable and has paid all benefits to which [D]ecedent [was] entitled for his compensable [lower back] injury. Defendant denies that the August 25, 2005 injury proximately caused [D]ecedent's death." Defendant again identified the only compensable injury suffered by Decedent as "low back strain." The matter was set for a hearing before a deputy commissioner on 21 April 2015, but Plaintiff and Defendant agreed to proceed without a hearing, and the record in this matter was closed on 14 September 2015 after the deputy commissioner received depositions, briefs, and other materials. The deputy commissioner entered an opinion and award on 21 October 2015, in which he concluded, *inter alia*, that Plaintiff was entitled to payment of death benefits pursuant to N.C. Gen. Stat. § 97-38, and ordered Defendant to pay Plaintiff said benefits.

Defendant appealed the deputy commissioner's order to the Commission. Following a hearing on 8 March 2016, the Commission entered an opinion and award dismissing with prejudice Plaintiff's claims for (1) medical compensation related to Decedent's alleged hip injury, and (2) death benefits pursuant to N.C.G.S. § 97-38. The Commission concluded, *inter alia*, that (1) Decedent's cause of death was "unrelated to his compensable back injury[;]" and (2) Plaintiff's claim for death benefits based on Decedent's denied hip injury was time-barred under N.C.G.S. § 97-38. Plaintiff appeals.

II. *Argument*

Plaintiff's sole argument on appeal is that the Commission erred by dismissing her claim for death benefits based on its conclusion that the claim was time-barred pursuant to N.C.G.S. § 97-38. We disagree.

A. Standard of Review

"The standard of review for an opinion and award of the North Carolina Industrial Commission is (1) whether any competent evidence in the record supports the Commission's findings of fact, and (2) whether such findings of fact support the Commission's conclusions of law." *Cox v. City of Winston-Salem*, 171 N.C. App. 112, 114, 613 S.E.2d

746, 747 (2005) (citation and internal quotation marks omitted). Plaintiff does not challenge the Commission's findings of fact; therefore, they are binding on appeal. *Hill v. Fed. Express Corp.*, 234 N.C. App. 488, 490, 760 S.E.2d 70, 73 (2014) (citation and internal quotation marks omitted). "The Industrial Commission's conclusions of law are reviewable *de novo* by this Court." *Moore v. City of Raleigh*, 135 N.C. App. 332, 334, 520 S.E.2d 133, 136 (1999) (citation omitted). Plaintiff's appeal also raises questions of statutory interpretation, which this Court considers *de novo*. *See In re Foreclosure of Vogler Realty, Inc.*, 365 N.C. 389, 392, 722 S.E.2d 459, 462 (2012).

B. Analysis

Plaintiff's claim for death benefits is based upon N.C.G.S. § 97-38, which states in relevant part:

> If death [of an employee] results proximately from a compensable injury . . . and within six years thereafter, or within two years of the final determination of disability, whichever is later, the employer shall pay or cause to be paid, subject to the provisions of other sections of this Article, weekly payments of compensation equal to sixty-six and two-thirds percent (66 2/3 %) of the average weekly wages of the deceased employee at the time of the accident, . . . and burial expenses not exceeding ten thousand dollars ($10,000), to the person or persons entitled thereto[.]

N.C. Gen. Stat. § 97-38 (2015). N.C.G.S. § 97-38 confers a right to receive death benefits upon "beneficiaries of an injured worker whose death results from a compensable injury[.]" *Pait v. SE Gen. Hosp.*, 219 N.C. App. 403, 413, 724 S.E.2d 618, 626 (2012). "[T]he [beneficiary's] right to compensation is 'an original right . . . enforceable only after (the employee's) death.' " *Booker v. Duke Med. Ctr.*, 297 N.C. 458, 466, 256 S.E.2d 189, 195 (1979) (citations omitted). Therefore, Brown's actions or inactions related to his potential compensation claims had no impact on Plaintiff's "original right" to recover pursuant to N.C.G.S. § 97-38.

> [A] death benefits claim [is] a distinct claim of the beneficiaries . . . . Specifically, our Supreme Court [has] stated:
>
> > [D]uring [the injured employee's] lifetime his [beneficiaries] were not parties in interest to the proceeding he brought for the enforcement of his claim. Their right to compensation did not arise until his death and their cause of action was not affected by anything he did[.]

> . . . The basis of their claim was an original right which was enforceable only after his death.
>
> Accordingly . . . a death benefits claim under the Workers' Compensation Act is a distinct claim to those beneficiaries upon the death of the injured [employee]. Notably, because the death benefits claim does not arise until the injured employee's death . . . the rights of the beneficiaries under the Act are not implicated until the injured employee's death.

Pait, 219 N.C. App. at 414, 724 S.E.2d at 626–27 (citations omitted).

In addition to the requirements of compensability and proximate causation, N.C.G.S. § 97-38 "imposes express time limitations on the accrual of death benefits claims." *Pait*, 219 N.C. App. at 413, 724 S.E.2d at 626. Specifically, N.C.G.S. § 97-38 requires payment of death benefits only "[i]f [the employee's] death results proximately from a compensable injury . . . and within six years thereafter, *or within two years of the final determination of disability, whichever is later*[.]" N.C.G.S. § 97-38 (2015) (emphasis added).

The accident occurred on 25 August 2005. Decedent died on 1 January 2014, and Plaintiff filed her Form 33 seeking death benefits pursuant to N.C.G.S. § 97-38 on 21 August 2014. Plaintiff acknowledges that Decedent did not die "within six years" of the accident and therefore her claim was not timely under that prong of the statute of limitations. However, Plaintiff argues that, because no final determination of disability was ever made, the second prong of the statute of limitations – the "final determination of disability" prong – renders her claim timely. *See* N.C.G.S. § 97-38 (providing that a claim is timely "[i]f death [of the employee] results proximately from a compensable injury . . . within two years of the final determination of disability").

This Court has held that, where there has been no final determination of disability with respect to a compensable injury, a claim for death benefits is not time-barred by the statute of limitations as set forth in N.C.G.S. § 97-38. *Shaw v. U.S. Airways, Inc.*, 217 N.C. App. 539, 543, 720 S.E.2d 688, 691 (2011). In *Shaw*, the Commission awarded death benefits to the plaintiff, the widow of a deceased employee. *Id.* at 540-41, 720 S.E.2d at 689-90. The employee had suffered a work-related back injury, and died eight years later. *Id.* at 540, 720 S.E.2d at 689. Prior to the employee's death, the employer admitted the compensability of the work-related back injury by filing a "Form 60, Employer's Admission of Employee's Right to Compensation Pursuant to N.C. Gen. Stat.

§ 97–18(b)." *Id.* Following the employee's death, the plaintiff filed a Form 33 requesting a hearing on her right to death benefits pursuant to N.C. Gen. Stat. § 97-38, and death benefits were granted. *Shaw*, 217 N.C. App. at 540–41, 720 S.E.2d at 689–90. In *Shaw*, the defendants appealed, arguing that the plaintiff's N.C.G.S. § 97-38 claim was barred by the statute of limitations. *Shaw*, 217 N.C. App. at 542, 720 S.E.2d at 690. Because it was undisputed that the compensable injury in *Shaw* occurred more than six years prior to the employee's death, this Court analyzed the "final determination of disability" prong of the statute of limitations to determine the timeliness of the plaintiff's claim:

> As noted by the Commission in the opinion and award entered 17 December 2010, defendants paid temporary total disability to [the employee] pursuant to a Form 60 and subsequent Form 62. Entry of these forms raises only a presumption of disability, not a final determination.
>
> > Under the Workers' Compensation Act, disability is defined by a diminished capacity to earn wages, not by physical infirmity. Thus, the employee has the burden "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."
>
> There is nothing in the record to indicate that [the employee] was paid anything other than temporary total benefits pursuant to Forms 60 and 62.
>
> Therefore, as there was no determination of [the employee]'s final determination of disability prior to the Commission's 17 December 2010 opinion and award determining that his death was the proximate result of his 12 July 2000 compensable injury, [the plaintiff's] 8 April 2009 claim for death benefits was not untimely and not barred by the statute of limitations under N.C. Gen. Stat. § 97–38.[3]

Shaw, 217 N.C. App. at 542–43, 720 S.E.2d at 690–91 (citations omitted).

Plaintiff contends, relying on *Shaw*, that because "there [had been] no final determination of disability [with respect to Decedent's

3. We note that the relevant inquiry is whether the employee's *death* occurred within two years of the final determination of disability. Because no final determination of disability was ever made, this Court in *Shaw* determined that the two-year limitations period of this prong had never started to run and, therefore, it could not serve to bar the plaintiff's claim.

compensable *back* injury] at the time of [Decedent's] death," Plaintiff's death benefits claim, based on Decedent's alleged *hip* injury, could be "filed more than six years from the date of accident *regardless of the injury that form[ed] the basis of the . . . claim*." (emphasis added). In other words, Plaintiff argues that because Decedent had a compensable *back* injury for which no final determination of disability was ever made, she was free to bring her N.C.G.S. § 97-38 claim based on Decedent's *hip* injury at any time – that, on the facts before us, *no* limitations period applied to her claim.

However, this Court in *Shaw* held that, because the employee's *compensable back injury had proximately caused his death* and that because there had been no "final determination of disability" *with respect to that compensable back injury*, the plaintiff's claim for death benefits was not untimely pursuant to N.C.G.S. § 97-38. *Id.* at 541, 720 S.E.2d at 690-91. Nothing in *Shaw* suggests that failure to make a final determination of disability for a compensable injury that was *not* a proximate cause of an employee's death tolls the N.C. Gen. Stat. § 97-38 statute of limitations.

In the present case, Brown filed a Form 18, "Notice of Accident," on 20 February 2006, claiming that on 25 August 2005 he sustained a work-related accident to his lower back. Defendant filed a Form 60 on 23 March 2006, admitting Brown's right to compensation for the "low back strain" resulting from his 25 August 2005 "injury by accident." Defendant never filed a Form 60 admitting compensability for any injury to Brown's left hip, nor did the Commission ever make a determination that the hip injury was a compensable work-related injury.

In its opinion and award, the Commission recognized the difference between the facts of *Shaw* and those in the present case, finding that "[P]laintiff [was] not entitled to use [D]ecedent's disability status resulting from his *compensable back injury* to pursue her claim of benefits for death proximately resulting from [D]ecedent's *denied left hip injury* using the two-year statute of limitations provision [in N.C. Gen. Stat. § 97-38]." (emphasis added). We reject Plaintiff's argument that, in the absence of a final determination of disability with respect to Decedent's compensable back injury, Plaintiff's claim for death benefits based on Decedent's hip injury, which was never determined to be compensable, was *per se* timely under N.C.G.S. § 97-38.

Under the Workers' Compensation Act, "compensability" and "disability" are distinct concepts, involving different elements of proof. *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 492-93 (2005). Thus,

an employee must prove that he has a compensable injury *before* there can be any "determination of disability." *Id.* at 44, 619 S.E.2d at 493 ("[D]efendants fully admitted the compensability of the [employee's] injury, leaving her only to prove her disability in order to receive continued compensation. [T]he law in North Carolina is well settled that an employer's admission of the 'compensability' of a workers' compensation claim does not give rise to a presumption of 'disability' in favor of the employee.").

We hold that the phrase "final determination of disability," as used in N.C.G.S. § 97-38, is limited to the final determination of disability for the compensable injury that is *specifically alleged to have proximately caused the employee's death.* N.C.G.S. § 97-38 ("[i]f death results *proximately from a compensable injury* . . . within two years of the final determination of disability, . . . the employer shall pay . . . weekly payments of compensation") (emphasis added). The final determination of disability for a compensable injury cannot be made unless *the compensability of such injury has already been established.* We note that N.C.G.S. § 97-38 refers to "*the* final determination of disability," not "*a* final determination of disability." This supports our interpretation that the statute contemplates a determination of disability *with respect to the specific injury which forms the basis of the claim for death benefits. See N.C. Dept. of Correction v. N.C. Medical Bd.*, 363 N.C. 189, 201, 675 S.E.2d 641, 649 (2009) ("Because the actual words of the legislature are the clearest manifestation of its intent, we give every word of the statute effect, presuming that the legislature carefully chose each word used.").

This Court has previously rejected interpretations of N.C.G.S. § 97-38 that "would lead to absurd results, contrary to the manifest purpose of our Legislature[.]" *Pait*, 219 N.C. App. at 415, 724 S.E.2d at 627. As the Commission in the present case concluded, "[t]o accept [Plaintiff's] argument would allow an individual to delay pursuing a claim of benefits for death proximately resulting from a denied injury on an indefinite basis and would subvert the overriding purpose of having a statute of limitations, which is to prevent the litigation of stale claims." *See, e.g.*, *Trexler v. Pollock*, 135 N.C. App. 601, 606-07, 522 S.E.2d 84, 88 (1999) (rejecting interpretation of statute that "would result in a virtually unlimited statute of limitations" for certain claims, and noting that "[s]tatutes of limitations exist for a reason – to afford security against stale claims.").

We recognize that the application of any statute of limitations may result in hardship to a plaintiff. As our Supreme Court has acknowledged,

> application of [N.C. Gen. Stat. §] 97-38 may sometimes have the effect of barring an otherwise valid and provable claim simply because the employee did not die within the requisite period of time. . . . The remedy for any inequities arising from the statute, however, lies not with the courts but with the legislature.

Booker v. Duke Medical Center, 297 N.C. 458, 483-84, 256 S.E.2d 189, 205 (1979); *see also Joyner v. J.P. Stevens & Co.*, 71 N.C. App. 625, 627, 322 S.E.2d 636, 637-38 (denying plaintiff's claim for benefits as untimely under the version of N.C.G.S. § 97-38 in effect at the time of employee's death, and noting that "[the] holding [was] a harsh but necessary result of the statutory scheme"). However, we do not believe the General Assembly intended the absurd result of excluding from *any* statute of limitations claims under N.C.G.S. § 97-38 based upon injuries *that had never been found to be compensable*, simply because some different injury – not a proximate cause of the employee's death – had been found compensable, but no final determination of disability for that injury had been made.

III. *Conclusion*

For the reasons stated above, we hold the Commission did not err in denying Plaintiff's claim for death benefits as time-barred pursuant to N.C.G.S. § 97-38.

AFFIRMED.

Judges DAVIS and TYSON concur.

FRIENDS OF CROOKED CREEK, L.L.C.; MARK BERTRAND; DONNA BERTRAND; SYLVIA T. TERRY; ROBERT F. ZAHN; AND MICHELLE R. ZAHN, PLAINTIFFS
v.
C.C. PARTNERS, INC. AND CROOKED CREEK GOLF LAND LLC, DEFENDANTS

No. COA17-32

Filed 18 July 2017

1. Declaratory Judgments—golf course property—closure of golf course—development of property into residential lots—restrictive covenants

The trial court did not err by granting summary judgment in favor of defendants in a declaratory judgment action seeking to declare golf course property as burdened by a Declaration and its restrictive covenants limiting it to golf-related uses. The hazard clause did not describe a specific required use or restriction on the retained property, or sufficiently describe any property to be bound to perpetual restrictions, and the law presumes the free and unrestricted use of land.

2. Declaratory Judgments—plat maps—community promotion materials—easement-by-plat—golf course property

The trial court did not err in a declaratory judgment action by concluding that plat maps and community promotion materials did not impose an easement-by-plat that required golf course property to be perpetually used only for golf. While the subdivision may have been contemplated and marketed as a golf course community to induce plaintiff lot owners to purchase lots, no case has recognized an implied easement or restrictive covenants being imposed on undeveloped land based upon statements in marketing materials.

Appeal by plaintiffs from order entered 5 August 2016 by Judge G. Wayne Abernathy in Wake County Superior Court. Heard in the Court of Appeals 15 May 2017.

Law Offices of F. Bryan Brice, Jr., by Matthew D. Quinn, for plaintiff-appellants.

Parker Poe Adams & Bernstein LLP, by Russell B. Killen, Jamie S. Schwedler and Michael J. Crook, for defendant-appellees.

TYSON, Judge.

Friends of Crooked Creek, L.L.C., Mark and Donna Bertrand, Sylvia T. Terry, and Robert F. and Michelle R. Zahn ("Plaintiffs") appeal from an order denying their motion for summary judgment and granting summary judgment in favor of Defendants. We affirm.

I. Background

In 1992, C.C. Partners, Inc. ("C.C. Partners") purchased a tract of real property situated in Fuquay-Varina, North Carolina and sub-divided portions of the property into single-family residential lots. C.C. Partners intended for the Crooked Creek subdivision to be developed as a golf course community, and retained a portion of the property to construct a golf course. C.C. Partners did not dedicate or convey the un-subdivided areas to the lot owners or the homeowner's association, or designate the areas as common area.

In 1992 and 1993, C.C. Partners recorded two plats of the subdivision, which showed the creation of residential lots. Although the construction of a golf course was contemplated by C.C. Partners on its retained property, neither of these plats depicts a golf course. The plats did not set forth any indication that the property retained by C.C. Partners was to be restricted to a golf course, or a perpetual amenity or common area for the benefit of the lot owners. The plats depict golf-themed street names, such as "Tee Box Court" and "Shady Greens Drive."

The 1992 plat contains Note 6, which states and reserves: "Lots fronting golf course shall allow limited access to property to retrieve golf balls and or complete maintenance as required to facilitate play by golfers . . . ." The plat recorded in 1993 contains Note 6 and a new Note 5, which states and reserves: "Golf course owner and developer reserve the right to encroach upon any lot for 10' on all sides if necessary for utility easement and irrigation system."

In 1993, C.C. Partners recorded a Declaration of Covenants, Conditions and Restrictions for Crooked Creek Subdivision ("the Declaration"). The Declaration makes several references to a proposed golf course, which are set forth and discussed *infra*.

In 1994, C.C. Partners recorded plats showing the creation of additional residential lots. None of these plats depict or label any area for a golf course, or contain any indication that the retained property was to be a perpetual amenity or common area to either benefit the lot owners or be maintained by C.C. Partners. The plats include Notes 5 and 6, as stated above, as well as new Note 11, which states and reserves: "Lots fronting golf course shall allow golf course encroachment up to

50 feet from rear or side lot lines to facilitate golf course construction and play." The subsequent plats also contain these Notes, although their designated numbers vary from plat to plat.

From 1992 to March 1995, C.C. Partners sold lots to builders, who sold the lots to homeowners. C.C. Partners began construction of a golf course on a portion of the original tract in 1993.

C.C. Partners and subsequent developers heavily marketed the subdivision as a "golf course community" with an "18-hole golf course." For example, a marketing brochure stated the "[i]nitiation fee for membership in the Crooked Creek Golf Club will be waived for the first 20 home buyers in Crooked Creek."

In December 1994, C.C. Partners entered into a contract to sell undeveloped portions of the Crooked Creek subdivision to MacGregor Development Company ("MacGregor"), a party unrelated to this lawsuit. The property to be conveyed consisted of twenty-four previously subdivided residential lots and five un-subdivided tracts of land.

In preparation for the closing, C.C. Partners had a survey completed to reflect the property to be sold to MacGregor. The owners of C.C. Partners testified by affidavit that the purpose of this survey plat was to provide a legal description of the property to be sold to MacGregor.

In February 1995, C.C. Partners recorded a plat entitled "Map of Crooked Creek Golf Course and Subdivision," which depicts a dash-lined sketch of an 18-hole golf course, tee boxes, fairways and greens, a driving range, the clubhouse, and other golf features. The plat also depicts five bold or hard-lined boundary acreage tracts, labeled "A," "B," "C," "D" and "F."

Tracts A, B, C, D and F were conveyed to MacGregor in March 1995, and MacGregor became the developer of further residential lots in Crooked Creek. C.C. Partners remained the owner and developer of the golf course. Construction of the golf course and clubhouse was completed after the conveyance to MacGregor in March 1995.

The deed from C.C. Partners to MacGregor references the 1995 plat, which depicts the dash-lined outline of the golf course and adjoining properties. The deed does not include any use restrictions on the property retained by C.C. Partners.

MacGregor began to subdivide tracts A, B, C, D and F to create new residential lots and sold the lots to buyers. MacGregor was solely responsible for the marketing and sale of the lots in Crooked Creek.

However, according to the deposition of C.C. Partners' plurality shareholder, C.C. Partners and MacGregor were "trying to work together . . . to sell golf and sell lots" in the years that followed the transfer of the residential lots to MacGregor.

For example, an area inside the golf clubhouse featured advertisements and a sales center for homes for sale within Crooked Creek. Advertisements for homes for sale referenced the golf course, and promoted "golf course homesites." Around 2005, C.C. Partners issued a flyer that offered a $1,000.00 discount on golf club initiation fees "to Crooked Creek Homeowners."

Crooked Creek Residential Properties, LLC recorded several plat maps subsequent to C.C. Partners' 1995 conveyance of tracts A, B, C, D and F. Those maps depict subdivision of the tracts purchased by MacGregor, and show land abutting residential lots labeled "Portion of Crooked Creek Golf Course."

On 31 December 2002, C.C. Partners transferred approximately one-half of the golf course property to Crooked Creek Golf Land, LLC ("CCGL"). No taxable consideration was stated and no revenue stamps were paid for the transfer of the property. The transaction was solely designed to facilitate a conservation easement. Statements averred C.C. Partners and CCGL are "one and the same."

Crooked Creek Golf Club experienced financial hardships during the recession beginning in 2008, and did not fully recover. C.C. Partners thereafter publically announced its intention to close the golf course and subdivide the golf course property into residential lots. The Crooked Creek Golf Club closed permanently on 5 July 2015, sold most of its assets, and has not maintained the property as a golf course since that time. C.C. Partners and CCGL have entered into a contract to sell twenty-one acres of the property to the Wake County Public School System.

Plaintiff, Friends of Crooked Creek, LLC ("FOCC"), is a limited liability company formed in 2014, whose membership consists entirely of Crooked Creek lot owners. FOCC's stated goal is to preserve the beauty, value, and livability of Crooked Creek. None of FOCC's seventy-eight members' deeds reference the 1995 plat, which shows the dotted outline of a golf course.

Plaintiffs filed suit on 15 June 2015, and sought a declaratory judgment to declare the golf course property is subject to the Declaration, which restricts the property to golf related uses. Plaintiffs also sought injunctive relief to prevent the closure of the golf course and

development of the golf course property into residential lots, which the trial court denied on 2 July 2015.

Defendants filed a motion for summary judgment on 22 February 2016, and Plaintiffs filed a motion for summary judgment on 15 March 2016. By Order filed 5 August 2016, the trial court denied Plaintiffs' motion for summary judgment and granted summary judgment in favor of Defendants on all issues. Plaintiffs appeal.

II. Jurisdiction

Jurisdiction lies in this Court from final judgment of the superior court pursuant to N.C. Gen. Stat. § 7A-27(b) (2015).

III. Whether the Property is Burdened by a Golf Only Use

Plaintiffs argue the trial court erred by granting summary judgment in favor of Defendants and denying their motion for summary judgment where: (1) C.C. Partners burdened the golf course property with a Declaration that promised the golf course would be used only for golf related purposes; and, (2) C.C. Partners' plat maps and community promotions imposed an easement-by-plat that the golf course property would be used only for golf related purposes in perpetuity.

A. Standard of Review

> Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party. If the movant demonstrates the absence of a genuine issue of material fact, the burden shifts to the nonmovant to present specific facts which establish the presence of a genuine factual dispute for trial. Nevertheless, if there is any question as to the weight of evidence summary judgment should be denied.

In re Will of Jones, 362 N.C. 569, 573-74, 669 S.E.2d 572, 576-77 (2008) (internal citations, quotation marks, and brackets omitted).

B. The Declaration

[1] Plaintiffs argue the property developed as a golf course is burdened by the Declaration and its restrictive covenants, which promised the

Crooked Creek lot owners that the property would be developed as a golf course and used only for golf. We disagree.

"In construing restrictive covenants, the fundamental rule is that the intention of the parties governs, and that their intention must be gathered from study and consideration of all the covenants contained in the instrument or instruments creating the restrictions." *Long v. Branham*, 271 N.C. 264, 268, 156 S.E.2d 235, 238 (1967).

> Covenants and agreements restricting the free use of property are *strictly construed against limitations upon such use*. Such restrictions will not be aided or extended by implication or enlarged by construction to affect lands not specifically described, *or to grant rights to persons in whose favor it is not clearly shown such restrictions are to apply. Doubt will be resolved in favor of the unrestricted use of property, so that where the language of a restrictive covenant is capable of two constructions, the one that limits, rather than the one which extends it, should be adopted, and that construction should be embraced which least restricts the free use of the land.*
>
> Such construction in favor of the unrestricted use, however, must be reasonable. The strict rule of construction as to restrictions should not be applied in such a way as to defeat the plain and obvious purposes of a restriction.

Id. (citation and quotation marks omitted) (emphasis supplied).

"Restrictive covenants cannot be established except by a[n] instrument of record containing adequate words so unequivocally evincing the party's intention to limit the free use of the land that its ascertainment is not dependent on inference, implication or doubtful construction." *Marrone v. Long*, 7 N.C. App. 451, 454, 173 S.E.2d 21, 23 (1970) (citing *Turner v. Glenn*, 220 N.C. 620, 18 S.E.2d 197 (1942)). " 'The courts are not inclined to put restrictions in deeds where the parties left them out.' " *Id.* (quoting *Hege v. Sellers*, 241 N.C. 240, 249, 84 S.E.2d 892, 899 (1954)).

The Declaration, which was recorded by C.C. Partners in 1993, references a golf course. The "golf course" is defined under the Declaration as "the Crooked Creek golf course (or to such other name given to same), including all related and appurtenant facilities thereto . . . ., which Declarant *contemplates* developing out of a portion of the Property or out of other real property adjoining or located near the Property." (emphasis supplied).

Plaintiffs argue the Declaration imposed a covenant that the subdivision would contain a golf course. Plaintiffs assert this enforceable, express covenant is set forth in Article XII, Section 15 of the Declaration, which states:

> Declarant hereby informs all Owners of the Lots subject to this Declaration . . . that the lots subject to this Declaration *are part of a subdivision plan approved by Wake County, North Carolina, which approved subdivision plan contains a golf course and related facilities (previously defined hereinabove as the "Golf Course")*. Declarant hereby informs all Owners of Lots in the Subdivision that certain provisions of this Declaration have been written for the purpose of enhancing the use and value of the Golf Course and to protect the rights of the owners of the Golf Course and those Persons lawfully using the Golf Course.
>
> Declarant hereby further informs all such Owners . . . that there exists certain hazards or risks associated with the ownership and use of property located adjacent to or near a Golf Course, . . . and Declarant hereby reserves for the owners of the Golf Course . . . a perpetual, non-exclusive easement to enter onto Lots in the Subdivision for the purpose of retrieving golf balls . . . . (emphasis supplied).

Section 15 is clearly a hazard and risks disclosure clause to lot owners, a reservation for golfers to enter on to lots to retrieve balls, and is not a use restriction, covenant or easement conveyed to lot owners. The hazard clause incorporates the definition of "golf course" under the Declaration, which merely refers to a "contemplated" golf course.

We decline to interpret this clause to impose a perpetual burden on the property, where a burden was not plainly contemplated. *See Marrone*, 7 N.C. App. at 454, 173 S.E.2d at 23. "[N]othing can be read into a restrictive covenant enlarging its meaning beyond what its language plainly and unmistakably imports." *Julian v. Lawton*, 240 N.C. 436, 440, 82 S.E.2d 210, 212 (1954) (citation omitted).

Furthermore, "[r]estrictions will not be aided or extended by implication or enlarged by construction to affect lands *not specifically described*, or to grant rights to persons in whose favor it is not clearly shown such restrictions are to apply." *Long*, 271 N.C. at 268, 156 S.E.2d at 239. The hazard clause does not describe a specific, required use or restriction on the retained property, or sufficiently describe any property to be bound to perpetual restrictions.

Plaintiff's proffered interpretation of the hazard clause also runs contrary to other unambiguous provisions of the Declaration. The Declaration further provides:

> The Golf Course property also shall be exempt from the assessments and liens for same created herein. Provided, however, *if at any time in the future any part or all of the Golf Course property shall be subdivided into Lots intended for single-family residential use or used for multi-family residential purposes*, then the exemption from assessments and liens for such part or all of the Golf Course property shall terminate and the same shall become subject to assessments and liens as provided herein for Lots and multi-family residential property. (emphasis supplied).

This clause plainly states the retained property may not always be used as a golf course, and the "Golf Course property" could later be developed into lots or other uses. The Declaration also includes an express right of access to common area property for lot owners, but does not designate any of C.C. Partners' retained property as common area property. The Declaration does not provide or convey lot owners any right of access or use to the retained property.

Absent a specific restriction within the Declaration, the law presumes the free and unrestricted use of land. *See Long*, 271 N.C. at 268, 156 S.E.2d at 238. The trial court properly observed and stated: "An intent to build a golf course is not necessarily the same [as] the intent to burden [the] land in perpetuity for golf use only." When interpreted as a whole, the Declaration clearly shows the intent of C.C. Partners was to reserve the right to develop a golf course, which was, in fact, developed and operated for over twenty years, rather than to perpetually restrict the use of the property. Plaintiffs arguments are overruled.

C. Implied Easement

[2] Plaintiffs also argue C.C. Partners' plat maps and community promotion materials imposed an easement-by-plat, requiring the golf course property to be perpetually used only for golf. We disagree.

> It is a settled principle in this State that when the owner of land, located within or without a city or town, has it subdivided and platted into lots, streets, alleys, and parks, and sells and conveys the lots or any of them with reference to the plat, nothing else appearing, he thereby dedicates

> the streets, alleys, and parks, and all of them, to the use of the purchasers, and those claiming under them, and of the public.

Gaither v. Albemarle Hosp., Inc., 235 N.C. 431, 443, 70 S.E.2d 680, 690 (1952).

> The general rule is based on principles of equitable estoppel, because purchasers who buy lots with reference to a plat are induced to rely on the implied representation that the "streets and alleys, courts and parks" shown thereon will be kept open for their benefit. Consequently, the grantor of the lots is "equitably estopped, as well in reference to the public as to his grantees, from denying the existence of the easement thus created."

Harry v. Crescent Resources, Inc., 136 N.C. App. 71, 77, 523 S.E.2d 118, 122 (1999) (quoting *Gaither*, 235 N.C. at 444, 70 S.E.2d at 690).

For an easement implied-by-plat to be recognized, the plat must show the developer clearly intended to restrict the use of the land at the time of recording for the benefit of all lot owners. *See id.* (holding that because the free use of property is favored in this State, the depiction of remnant parcels on the plat was insufficient to show a clear intent by the developer to grant an easement setting them aside as open space).

Here, the 1995 survey plat relied upon by Plaintiffs does not show an intent to restrict the uses of the golf course property. The survey plat reflects five un-subdivided tracts of land labeled as "A, B, C, D and "F," some previously subdivided lots, and the dotted line location of the golf course greens and fairways. Metes and bounds descriptions are shown *only* for the five un-subdivided tracts. The 1995 survey plat did not create any residential lots and only carved out the five tracts, A, B, C, D and F, from the original tract. All residential lots shown on the survey plat were previously subdivided and were shown on the 1995 survey plat for illustrative purposes.

This fact renders the rule in *Gaither* inapplicable here. *See Gaither*, 235 N.C. at 443, 70 S.E.2d at 690 (An implied easement may be recognized in favor of the lot purchaser "when the owner of land . . . has it subdivided and platted into lots, streets, alleys, and parks, and sells and conveys the lots or any of them with reference to the plat.").

The implied-by-plat rule in *Gaither* is also inapplicable at bar, because C.C. Partners did not sell any residential lot to any Plaintiff by reference to the survey plat. Plaintiffs purchased a total of seventy-eight

lots in Crooked Creek. *None* of these deeds reference the 1995 survey plat Plaintiffs claim they relied upon.

In *Cogburn v. Holness*, 34 N.C. App. 253, 237 S.E.2d 905 (1977), potential purchasers of a former golf course argued the land was burdened by an easement implied-by-plat, which limited the use of the property to golf activities. The plats referred to in the plaintiffs' deeds did "not show nor even contain a reference to a golf course," even though plats earlier in the chain of title did. *Id.* at 259, 237 S.E.2d at 908. This Court held the deeds failed to establish a dedication of land for a golf course or a restriction on development. *Id.* at 259-60, 237 S.E.2d at 908-09.

The same is true in this case. None of Plaintiffs' deeds reference plats recorded by C.C. Partners, which depict a golf course. The plats, which depict a dotted outline of a golf course do not bind the land for golf use for the benefit of Plaintiffs or create any easement or common use right to the property.

Plaintiffs rely primarily on this Court's decision in *Shear v. Stevens Bldg. Co., Inc.*, 107 N.C. App. 154, 418 S.E.2d 841 (1992). In *Shear*, residential lots were sold by the developer in the subdivision known as Cardinal Hills in Raleigh. *Id.* at 157, 418 S.E.2d at 845. The plat map for Cardinal Hills, filed in 1956 and revised in 1957, depicted approximately three hundred subdivided lots. *Id.* The plat map also depicted a lake known as White Oak Lake, and undeveloped areas surrounding the lake, which included a future playground. *Id.* at 160-61, 418 S.E.2d at 845. Neither the deeds nor the restrictive covenants referenced any easement relating to use of the lake. *Id.*

The plaintiffs in *Shear* presented evidence tending to show that lot purchasers were told the use of White Oak Lake was for residents of Cardinal Hills; that residents of the subdivision commonly used the lake; residents were told that the undeveloped land around the lake was for the use of the community; and that residents were encouraged to maintain the portion of the undeveloped land adjoining their properties. *Id.* at 157-58, 418 S.E.2d at 843. The developer advertised "lakefront" lots for sale in Cardinal Hills, and described the lots as overlooking "one of Wake County's most beautiful lakes." *Id.* at 158, 418 S.E.2d at 843-44.

In 1988, the developers learned the earthen dam, which created White Oak Lake, was in need of repairs. *Id.* at 159, 418 S.E.2d at 843. Instead of repairing the dam, the developers partially drained and lowered the lake, which created additional undeveloped lands surrounding the lake. *Id.* The developers then filed a plat map in 1988, which divided

the undeveloped land around the lake and the additional land obtained by draining the lake, into twenty-four lots. *Id.*

This Court held a lot owner's easement to the lake existed, solely because all deeds to lots sold in Cardinal Hills referenced the plat map, which showed the lake. *Id.* at 161, 418 S.E.2d at 846. The Court further noted that "oral representations and actions" by the developers "concerning the lake and the surrounding undeveloped property necessarily include the undeveloped areas around the lake in the scope of the easement." *Id.* at 163, 418 S.E.2d at 846. "These representations and actions, along with the use of the plat map and its depiction of the lake and property, decidedly show an intent to create an easement to the lake and surrounding undeveloped property." *Id.*

The facts of this case are distinguishable from those before this Court in Shear. Most notably, the deeds to the lots in *Shear* referenced a plat map, which showed the lake. Here, none of Plaintiffs' deeds referenced the 1995 survey map, which carved out the five tracts to be sold to MacGregor. Furthermore, the restrictive covenants in *Shear* were silent as to the potential for future development of the lake, unlike the future development clause in this case. For these reasons, *Shear* does not support Plaintiffs' claim.

While Crooked Creek subdivision may have been contemplated and marketed as a golf course community to induce Plaintiffs to purchase lots in the subdivision, no case has recognized an implied easement or restrictive covenants being imposed on undeveloped land, based upon statements in marketing materials. Courts have recognized marketing materials as further demonstrating the expressed intent of the developer, but only where a recorded instrument exists to demonstrate the intent to encumber and restrict the land. *See id.*; *see also Cogburn*, 34 N.C. App. at 259-60, 237 S.E.2d at 908-09. That is not the circumstances present in this case.

IV. Conclusion

"Restrictive servitudes in derogation of the free and unfettered use of land are to be strictly construed so as not to broaden the limitation on the use." *Reed v. Elmore*, 246 N.C. 221, 224, 98 S.E.2d 360, 363 (1957). Plaintiffs have failed to show C.C. Partners intended to restrict the golf course property to a perpetual golf-only use where: (1) the Declaration does not contain any express language restricting the uses of the property; (2) the Declaration specifically allows for the future development of the "Golf Course property" into residential lots or other uses; (3) the 1995 survey map relied upon by Plaintiffs is not referenced in any of

Plaintiffs' deeds; and, (4) the 1995 survey map does not establish any residential lots and was prepared for the purpose of conveying the five large undeveloped tracts, A, B, C, D, and F.

The trial court correctly denied Plaintiffs' motion for summary judgment and granted summary judgment in favor of Defendants. The trial court's order is affirmed. *It is so ordered.*

AFFIRMED.

Chief Judge McGEE and Judge INMAN concur.

IN THE MATTER OF C.S.L.B., C.P.R.B., S.C.R.B.

No. COA16-1283

Filed 18 July 2017

1. Child Abuse, Dependency, and Neglect—failure to make findings—reunification as a permanent plan not eliminated

The trial court did not err in a child neglect and dependency case by failing to make the findings required by N.C.G.S. § 7B-906.2(b) where the court did not eliminate reunification as a permanent plan for the children, and thus, was not required to make the findings.

2. Child Abuse, Dependency, and Neglect—closing juvenile case to further review hearings—relieving DSS and guardian ad litem of responsibilities

The trial court erred in a child neglect and dependency case by closing the juvenile case to further review hearings and by relieving the Department of Social Services and the guardian ad litem of further responsibilities where the trial court designated relatives as guardians of the children, found the children had resided with their guardians for at least one year, and concluded the children's placement with their relatives was stable and in their best interests. However, the order was silent as to whether all parties were aware that the matter could be brought into court for review by the filing of a motion or on the court's own motion.

Appeal by respondent-mother from order entered 20 September 2016 by Judge Joseph Moody Buckner in Orange County District Court. Heard in the Court of Appeals 22 June 2017.

Holcomb and Stephenson, LLP, by Carol J. Holcomb, for petitioner-appellee Orange County Department of Social Services.

Robert W. Ewing for respondent-appellant mother.

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

BERGER, Judge.

Respondent-mother appeals from a permanency planning order that granted guardianship of her child C.S.L.B. ("Cathy") to Cathy's maternal grandmother, T.B. ("Teresa"), and guardianship of her children C.P.R.B. ("Callie") and S.C.R.B. ("Sarah") to their maternal aunt, S.B. ("Sandra").[1] We affirm the awards of guardianship, but vacate the order in part and remand for adoption of an appropriate visitation plan, and further review and permanency planning hearings.

On March 4, 2015, the Orange County Department of Social Services ("OCDSS") filed petitions alleging Cathy, Callie, and Sarah were neglected and dependent juveniles based on allegations that Respondent-mother suffered from substance abuse and mental health issues. Respondent-mother entered into a safety plan with OCDSS that provided, in part, the children would remain in her home; their father would stay in the home to help care for them; and Teresa would go to the home each day to check on them. The children were found to be dependent juveniles pursuant to a consent order entered March 10, 2015; however, the order provided that it was in the children's best interest to remain in the parents' home.

On April 15, 2015, OCDSS obtained non-secure custody of the children. The trial court held a hearing the next day, and entered an order on May 1, 2015 continuing custody of the children with OCDSS, but ordering Cathy be placed with Teresa, and Callie and Sarah be placed with Sandra.

The trial court continued custody of the children with OCDSS and their placements with Teresa and Sandra in subsequent custody review orders. The court held a permanency planning hearing on November 19, 2015, and set the permanent plan for the children as reunification with a concurrent plan of guardianship. Reunification with guardianship as a secondary plan remained the permanent plan for the juveniles through

1. Pseudonyms are used throughout to protect the identity of the children pursuant to N.C.R. App. P. 3.1(b), and for ease of reading.

July 14, 2016, whereupon the court set the primary plan as guardianship with a relative and the secondary plan as reunification.

After an August 4, 2016 hearing, the trial court entered a permanency planning order on September 20, 2016 that awarded guardianship of Cathy to Teresa, and guardianship of Callie and Sarah to Sandra. The order granted Respondent-mother weekly unsupervised visitation with the children, closed the matter to further reviews, and relieved OCDSS and the children's guardian ad litem from further responsibility in the case. Respondent-mother filed timely notice of appeal from this order.

[1] Respondent-mother first argues the trial court erred in removing reunification as a permanent plan for the children without making the findings required by N.C. Gen. Stat. § 7B-906.2(b) (2016). Citing to this Court's opinion in *In re N.B.*, 240 N.C. App. 353, 771 S.E.2d 562 (2015), Respondent-mother contends that the secondary plan of reunification was eliminated when the trial court granted guardianship over the children, closed the juvenile case, and relieved OCDSS of further responsibilities. Although we agree with Respondent-mother that the trial court did not make the findings mandated by Section 7B-906.2(b) in this case, Respondent-mother is mistaken that the trial court eliminated reunification as a permanent plan for the children. Respondent-mother conflates removing reunification as a permanent plan for the children with ceasing reunification efforts. In *N.B.*, this Court held that a trial court "effectively ceases reunification efforts by (1) eliminating reunification as a goal of [the children's] permanent plan, (2) establishing a permanent plan of guardianship with [the proposed guardians], and (3) transferring custody of the children from [DSS] to their legal guardians." *Id.* at 362, 771 S.E.2d at 568 (citations omitted).

Here, even though the trial court established guardianships for Cathy, Callie, and Sarah, the trial court specifically found that "[t]he best plan of care for the juveniles to achieve a safe, permanent home is a primary permanent plan of guardianship with a relative with a secondary plan of reunification[.]" Because the court did not eliminate reunification as a permanent plan for the children, the court was not required to make the findings mandated by Section 7B-906.2(b), and it did not err in failing to do so.

[2] Next, Respondent-mother argues the trial court erred in closing the juvenile case to further review hearings. A trial court may waive further review and permanency planning hearings in a juvenile case

> if the court finds by clear, cogent, and convincing evidence each of the following:

> (1) The juvenile has resided in the placement for a period of at least one year.
>
> (2) The placement is stable and continuation of the placement is in the juvenile's best interests.
>
> (3) Neither the juvenile's best interests nor the rights of any party require that review hearings be held every six months.
>
> (4) All parties are aware that the matter may be brought before the court for review at any time by the filing of a motion for review or on the court's own motion.
>
> (5) The court order has designated the relative or other suitable person as the juvenile's permanent custodian or guardian of the person.

N.C. Gen. Stat. § 7B-906.1(n) (2016). Our "review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and whether the findings support the conclusions of law. If the trial court's findings of fact are supported by any competent evidence, they are conclusive on appeal." *In re P.O.*, 207 N.C. App. 35, 41, 698 S.E.2d 525, 530 (2010) (citations omitted).

Here, the trial court designated relatives as guardians of the children, found the children had resided with their guardians for at least one year, and concluded the children's placement with their relatives was stable and in their best interests. The trial court's order, however, is silent as to whether all parties were aware that the matter could be brought into court for review by the filing of a motion or on the court's own motion.

Moreover, by leaving reunification as a secondary permanent plan for the children, Respondent-mother continued to have the right to have OCDSS provide reasonable efforts toward reunifying the children with her, and the right to have the court evaluate those efforts. *See* N.C. Gen. Stat. § 7B-906.1(d)-(e) (2016) (requiring the trial court to make findings at review and permanency planning hearings regarding efforts to reunite parents with their children); *see also* N.C. Gen. Stat. § 7B-906.2(b) (2016) (providing that until reunification is removed as a permanent plan for a juvenile, "[t]he court shall order the county department of social services to make efforts toward finalizing the primary and secondary permanent plans and may specify efforts that are reasonable to timely achieve permanence for the juvenile"). Accordingly, the trial court erred in ceasing further review hearings and relieving OCDSS and the guardian ad litem of

further responsibilities in this case, and we must vacate this portion of its order.

Respondent-mother also argues the trial court erred in adopting the visitation plan set forth in the guardianship order, because the court improperly delegated its authority to the guardians. We agree.

Section 7B-905.1 of the North Carolina Juvenile Code provides:

> (a) An order that removes custody of a juvenile from a parent, guardian, or custodian or that continues the juvenile's placement outside the home shall provide for appropriate visitation as may be in the best interests of the juvenile consistent with the juvenile's health and safety. The court may specify in the order conditions under which visitation may be suspended.
>
> . . . .
>
> (c) If the juvenile is placed or continued in the custody or guardianship of a relative or other suitable person, any order providing for visitation shall specify the minimum frequency and length of the visits and whether the visits shall be supervised. The court may authorize additional visitation as agreed upon by the respondent and custodian or guardian.

N.C. Gen. Stat. § 7B-905.1 (2015). "This Court reviews the trial court's dispositional orders of visitation for an abuse of discretion." *In re C.M.*, 183 N.C. App. 207, 215, 644 S.E.2d 588, 595 (2007) (citations omitted). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) (citation omitted). However, the trial court may not delegate its judicial function of awarding visitation to the custodian of a child. *See In re J.D.R.*, 239 N.C. App. 63, 75, 768 S.E.2d 172, 180 (2015).

Here, the trial court's order awarding visitation provides in pertinent part:

> [Respondent-mother] shall have a minimum visitation schedule with [Cathy, Callie, and Sarah] as follows:
>
> . . . .
>
> Visits shall occur unsupervised for four hours a week upon leaving the Daybreak program provided

> [Respondent-mother] tests negative and there is *no concern* she is using. She should not leave the children alone with anyone else during visitation, unless it is [with a family member]. Visits can become longer and more frequent with every six months of clean time outside the program. Visits should return [to] supervised or be suspended if [Respondent-mother] tests positive for [illegal] substances, if there is *concern* she is using, or if there is *concern* for discord between [Respondent-mother] and [the children's father] during visits.

(Emphasis added). Although this visitation provision complies with the requirements of Section 7B-905.1, it improperly delegates the court's judicial function to the guardians by allowing them to unilaterally modify Respondent-mother's visitation. Accordingly, we must vacate the trial court's visitation award because it leaves Respondent-mother's visitation to the discretion of the guardians based on their "concerns." *See Id.* at 75-76, 768 S.E.2d at 179-80 (custodian/guardian cannot determine visitation plan).

Respondent-mother does not otherwise challenge the order appointing guardians for Cathy, Callie, and Sarah, and, except as discussed above, the trial court's order is affirmed.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Judges ELMORE and TYSON concur.

IN RE D.E.M.

[254 N.C. App. 401 (2017)]

IN THE MATTER OF D.E.M.

No. COA16-1319

Filed 18 July 2017

1. Termination of Parental Rights—grounds for termination—willful abandonment

The trial court did not err in a termination of parental rights case by adjudicating that grounds existed to terminate respondent mother's parental rights under N.C.G.S. § 7B-1111(a)(7) for willful abandonment where the mother made no effort to contact the child and paid nothing toward his support during the pertinent six months. Further, there was no evidence that the mother sought to stay the order while her appeal was pending pursuant to N.C.G.S. § 7B-1003(a), or otherwise requested visitation with the child from the trial court or petitioner paternal grandparents.

2. Termination of Parental Rights—best interests of child—termination at dispositional stage

The trial court did not abuse its discretion in a termination of parental rights case by concluding that it was in a minor child's best interests to terminate respondent mother's parental rights at the dispositional stage of the proceeding under N.C.G.S. § 7B-1110(a) even though the mother alleged it would make the child a legal orphan. The child's paternal grandparents and legal custodians raised the child since he was eighteen months old and wished to adopt him, and termination of the mother's parental rights at this stage would facilitate this process.

Judge STROUD dissenting.

Appeal by Respondent-Mother from order and amended order entered 29 September 2016 and 10 October 2016 by Judge David V. Byrd in District Court, Wilkes County. Heard in the Court of Appeals 29 June 2017.

Robert W. Ewing for Respondent-Appellant Mother.

Vannoy, Colvard, Triplett & Vannoy, P.L.L.C., by Daniel S. Johnson, for Petitioners-Appellees.

McGEE, Chief Judge.

I. *Background*

Respondent-Mother ("Mother") appeals from order and amended order terminating her parental rights as to the minor child, D.E.M., born in November 2011. We note the orders also terminated the parental rights of D.E.M.'s father ("Father"), who has not pursued an appeal. We affirm.

Petitioners are D.E.M.'s paternal grandparents. They were awarded primary legal and physical custody of D.E.M. in a civil custody order entered 14 November 2013. *See In re D.E.M.*, __ N.C. App. __, 782 S.E.2d 926, 2016 (unpublished). Although the custody order granted Mother and Father visitation with D.E.M., neither parent exercised their right to visitation after December 2013.

Petitioners filed a petition to terminate the parental rights of Mother and Father on 29 May 2014. *Id.* at ___, 782 S.E.2d at 926. After a hearing, the trial court concluded that Mother and Father had willfully abandoned D.E.M., *see* N.C. Gen. Stat. § 7B-1111(a)(7) (2015), and terminated their parental rights by order entered 4 March 2015. *D.E.M.*, ___ N.C. App. at ___, 782 S.E.2d at 926.

Mother appealed. In an opinion filed 1 March 2016, this Court vacated the termination order on the ground that Petitioners lacked standing to bring an action for termination of parental rights under N.C. Gen. Stat. § 7B-1103(a) (2015). *D.E.M.*, ___ N.C. App. at ___, 782 S.E.2d at 926.

Petitioners filed a new petition to terminate Mother's and Father's parental rights to D.E.M. on 8 March 2016. With regard to standing, the petition alleged that D.E.M. "has been in the sole custody of the Petitioners pursuant to an Order entered on November 14, 2013 in Wilkes County File No. 13 CVD 625."[1] Petitioners asserted three statutory grounds for termination of Mother's and Father's parental rights: (1) willful failure to pay for D.E.M.'s care, support, and education under N.C. Gen. Stat. § 7B-1111(a)(4); (2) dependency under N.C. Gen. Stat. § 7B-1111(a)(6); and (3) willful abandonment under N.C. Gen. Stat. § 7B-1111(a)(7).

The trial court held a hearing regarding the petition on 13 September 2016, receiving testimony from Petitioners and Mother and a written report from D.E.M.'s Guardian ad Litem ("GAL"). In its order terminating

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1. Although the petition mistakenly asserted standing under "N.C.G.S. § 7B-1103(a)(6)," we note that the statute confers standing upon "[a]ny person with whom the juvenile has resided for a continuous period of two years or more next preceding the filing of the petition or motion." N.C. Gen. Stat. § 7B-1103 (2015). The termination order cites to the correct statutory provision establishing Petitioners' standing.

the parental rights of Mother and Father,[2] the court adjudicated grounds for termination based on Mother's and Father's non-payment of support under N.C. Gen. Stat. § 7B-1111(a)(4) and willful abandonment of D.E.M. under N.C. Gen. Stat. § 7B-1111(a)(7). After considering the dispositional factors in N.C. Gen. Stat. § 7B-1110(a) and the recommendation of the GAL, the court further determined it was in D.E.M.'s best interest to terminate Mother's and Father's parental rights. Mother appeals. Father is not a party to this appeal.

II. *Standard of Review*

The standard of review from an order terminating parental rights is well-established:

> Termination of parental rights proceedings are conducted in two stages: adjudication and disposition. "In the adjudication stage, the trial court must determine whether there exists one or more grounds for termination of parental rights under N.C. Gen. Stat. § 7B–1111(a)." This Court reviews a trial court's conclusion that grounds exist to terminate parental rights to determine whether clear, cogent, and convincing evidence exists to support the court's findings of fact, and whether the findings of fact support the court's conclusions of law. "If the trial court's findings of fact are supported by ample, competent evidence, they are binding on appeal, even though there may be evidence to the contrary." However, "[t]he trial court's conclusions of law are fully reviewable *de novo* by the appellate court." "It is 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."

In re C.J.H., 240 N.C. App. 489, 497–98, 772 S.E.2d 82, 88–89 (2015) (citations omitted).

> The trial court examined respondent's history of sporadic contact with the juvenile in evaluating whether his 2014 requests for visitation were made in good faith. Although the trial court must examine the relevant six-month period

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2. The record on appeal contains both the "Order Terminating Parental Rights" entered on 29 September 2016 and the "Amended Order Terminating Parental Rights" entered on 10 October 2016. Although Mother's notice of appeal is timely as to both orders, we deem the amended order to supersede the original. Accordingly, we confine our review to the "Amended Order Terminating Parental Rights" entered on 10 October 2016.

> in determining whether respondent abandoned the juvenile, the trial court may consider respondent's conduct outside this window in evaluating respondent's credibility and intentions. *See . . . Gerhauser v. Van Bourgondien*, 238 N.C. App. 275, 291, 767 S.E.2d 378, 389 (2014) (considering a party's conduct after determinative date established . . . in order to assess "the party's credibility and intentions"). In light of the trial court's findings on respondent's history of sporadic contact with the juvenile, we hold that clear, cogent, and convincing evidence supports the trial court's sub-conclusions . . . that respondent failed to make a good faith effort to visit [the child].

Id. at 503, 772 S.E.2d at 91 (citations omitted).

> If the trial court determines that at least one ground for termination exists, it then proceeds to the disposition stage where it must determine whether terminating the rights of the parent is in the best interest of the child, in accordance with N.C. Gen. Stat. § 7B–1110(a). The trial court's determination of the child's best interests is reviewed only for an abuse of discretion. Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.

In re S.Z.H., __ N.C. App. __, __, 785 S.E.2d 341, 345 (2016) (citation omitted). Uncontested findings of fact are deemed to be supported by the evidence and are binding on appeal. *In re H.S.F.*, 182 N.C. App. 739, 742, 645 S.E.2d 383, 384 (2007).

III. *Adjudication*

[1] Mother argues the trial court erred in adjudicating the existence of grounds to terminate her parental rights under N.C. Gen. Stat. § 7B-1111(a)(7). We disagree.

Mother challenges the trial court's conclusion that she willfully abandoned D.E.M. pursuant to N.C. Gen. Stat. § 7B-1111(a)(7). Under this provision, the trial court may terminate parental rights if "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion [to terminate.]" N.C. Gen. Stat. § 7B-1111(a)(7) (2015). Petitioners filed their petition to terminate Mother's and Father's parental rights on 8 March 2016. Therefore, in reviewing the court's adjudication, we must primarily

consider Mother's conduct during the period from 8 September 2015 to 8 March 2016. "Although the trial court must examine the relevant six-month period in determining whether respondent abandoned the juvenile, the trial court may consider respondent's conduct outside this window in evaluating respondent's credibility and intentions." *C.J.H.*, 240 N.C. App. at 503, 772 S.E.2d at 91.

" 'Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child.' " *In re Young*, 346 N.C. 244, 251, 485 S.E.2d 612, 617 (1997) (citation omitted). " 'Whether a biological parent has a willful intent to abandon his child is a question of fact to be determined from the evidence.' " *In re S.Z.H.*, __ N.C. App. at __, 785 S.E.2d at 347 (citation omitted). However,

> [a] judicial determination that a parent willfully abandoned her child, particularly when we are considering a relatively short six month period, needs to show more than a failure of the parent to live up to her obligations as a parent in an appropriate fashion; *the findings must clearly show that the parent's actions are wholly inconsistent with a desire to maintain custody of the child.*

Id. (citation omitted).

In support of its adjudication under N.C. Gen. Stat. § 7B-1111(a)(7), the trial court made the following uncontested findings of fact:

> 4. In May 2013, [Mother and Father] were involved in a domestic violence incident. . . . [They] voluntarily placed the [D.E.M.] in the physical custody of [] Petitioners. [D.E.M.] has been in the exclusive custody of [] Petitioners since May 2013.
>
> 5. [Mother] sent a text to [] Petitioners on May 31, 2013 that indicated that she was going to harm herself. As a result of [Mother's] text, substance abuse on the part of both [Mother and Father], and the unstable relationship between [Mother and Father], [] Petitioners filed a custody action and obtained a temporary custody order for [D.E.M.].
>
> 6. Following a hearing on November 14, 2013, the Court granted [] Petitioners full legal and physical custody of [D.E.M.].

7. Prior to entry of the November 2013 Order, the Court had granted [Mother and Father] supervised visitation. Neither parent exercised any supervised visitation with [D.E.M.] from June 2013 through November 2013. . . . .

8. The November 2013 Order also granted [Mother and Father] visitation with [D.E.M.]. The visits were to be supervised by [] Petitioners for an initial sixty-day period. Thereafter the visits were to transition to unsupervised visitation.

9. [Mother] had one visit with [D.E.M.] on December 22, 2013. [She] did not feel comfortable with [] Petitioners' supervision and she did not pursue any further visits. *Neither [Mother nor Father] exercised any visitation whatsoever with [D.E.M.] after December 2013*, even though the visitation schedule was to transition to unsupervised visits within a reasonable period of time.

10. *Neither [Mother nor Father] has ever paid child support for the benefit of [D.E.M.] or offered any type of support for his case.* [Mother and Father] did send Christmas gifts to [D.E.M.] in 2014. Both [Mother and Father] have been gainfully employed and have had the ability to provide support for the benefit of [D.E.M.].

11. A prior termination of parental rights proceeding was filed against [Mother and Father] in 2014. The decision in the prior proceeding was vacated by the North Carolina Court of Appeals on March 1, 2016 . . . . *During the entire time that the prior action was pending, [Mother and Father] did not pursue any attempts to contact [D.E.M.].*

12. [] Mother saw [D.E.M.] and Petitioner [grandfather] at a grocery store in May 2015 and spoke to the child. It did not appear that [D.E.M.] knew her.

13. The Court previously found [Mother's] excuses for not attempting to visit with [D.E.M.] unpersuasive. [Her] reasons for not attempting to visit with [D.E.M.] are even less persuasive now given the passage of time.

The trial court also "found:"

15. [Mother's and Father's] conduct with respect to the minor child evinces a settled purpose to forego their

> parental duties. They have failed and refused to perform the natural and legal obligations of parental care and support and as such they have abandoned the minor child since he has been in Petitioners' care, custody and control.

Mother argues that Finding 15 is actually a conclusion of law, and also argues that even if it is considered to be a finding of fact, it is not supported by the record evidence. The trial court concluded that Petitioners had shown "by clear, cogent, and convincing evidence" that Mother and Father "have willfully abandoned" D.E.M. under N.C. Gen. Stat. § 7B-1111(a)(7).

Mother argues she cannot be deemed to have willfully abandoned D.E.M. during the six-month period from 8 September 2015 to 8 March 2016 because, until this Court vacated the order in its opinion filed in *In re D.E.M.* on 1 March 2016,[3] she was bound by the trial court's prior order terminating her parental rights. Mother notes that "the trial court did not grant [her] visitation during the pendency of the initial appeal in this case" or stay the termination order pending her appeal, as authorized by N.C. Gen. Stat. § 7B-1003. Mother contends that "[w]ithout an order from the trial court granting visitation pursuant to [N.C. Gen. Stat.] § 7B-1003 or an entry of a stay by the Courts, [her] failure to contact D.E.M. was not willful."

We find Mother's argument without merit. The evidence and the trial court's findings show that Mother made no effort to contact D.E.M. and paid nothing toward his support during the six months at issue in N.C.G.S. § 7B-1111(a)(7). While it is correct that the prior order terminating her parental rights remained in effect during this period, there is no evidence that Mother sought to stay the order while her appeal was pending pursuant to N.C.G.S. § 7B-1003(a), or otherwise requested visitation with D.E.M. from the trial court or Petitioners. *See* N.C. Gen. Stat. § 7B-1003(b) (2015). To the contrary, the evidence shows Mother made no attempt to have any form of contact with D.E.M. While Mother now suggests she "was *prohibited* from contacting and visiting D.E.M.," no such prohibition was imposed. (Emphasis added). Although Mother's options were limited after she was divested of her parental rights, she was not absolved of the requirement that she take whatever measures possible to show an interest in D.E.M. Regarding an incarcerated father, this Court had held: "Although his options for showing affection are greatly limited, the respondent will not be excused from showing

3. Our mandate to the trial court in *In re D.E.M.* issued 21 March 2016. *See* N.C. R. App. P. 32(b).

interest in the child's welfare by whatever means available. The sacrifices which parenthood often requires are not forfeited when the parent is in custody." *Whittington v. Hendren (In re Hendren)*, 156 N.C. App. 364, 368, 576 S.E.2d 372, 376 (2003). Similarly, in the present case, Mother had limited options to interact with D.E.M., yet she still failed to show that she even attempted to exercise any of the options available to her. Mother was not under any type of order restraining her from attempting to contact Petitioners about D.E.M., or sending gifts or letters to D.E.M. through Petitioners. Just as in *Hendren*, Mother's failure to even attempt to show affection for her child through her limited options was evidence that the child had been abandoned. *Hendren*, 156 N.C. App. at 369, 576 S.E.2d at 376-77.

In addition, "[a]lthough the trial court must examine the relevant six-month period in determining whether respondent abandoned the juvenile, the trial court *may consider respondent's conduct outside this window in evaluating respondent's credibility and intentions*." *In re C.J.H.*, 240 N.C. App. at 503, 772 S.E.2d at 91 (citation omitted) (emphasis added). Mother has demonstrated almost no interest in D.E.M. since losing custody of him. This Court detailed Mother's lack of interest in its prior opinion in this matter:

> On 11 December 2013, following a hearing on the merits on 14 November 2013, the district court issued an order awarding petitioners primary legal and physical custody of [D.E.M.] As part of the court's custody order, [Mother] was granted the following visitation rights: "For the first sixty (60) days from the date of this hearing, [Mother] may have supervised visitation at [Petitioners'] home every other Sunday afternoon from 1:30 PM until 4:30 PM. If these visits go well and provided that there are no problems then for thirty (30) days after that [Mother] shall have unsupervised visitation with the minor child every other Sunday from 1:30 PM until 6:30 PM. Following that initial unsupervised period, and if those visits go well and provided that there are no problems, [Mother] shall have unsupervised overnight visitation every third weekend of the month from Friday at 6:00 PM until Sunday at 6:00 PM."
>
> On 29 May 2014, [P]etitioners filed a petition seeking the termination of [Mother]'s parental rights. Petitioners noted that at all times since [D.E.M.] was placed in their custody, [Mother] . . . knew the street address and phone number of their residence, yet [Mother] "only had contact

> with the child one time since November 14, 2013 and less than a handful of times in total since May, 2013." In addition, at the time the petition was filed, [P]etitioners had not heard from [Mother] since 22 December 2013, which was the only time she visited [D.E.M.] since [P]etitioners were awarded primary custody of him. [Mother has never] paid any support for [D.E.M.] or offered any assistance for his care.

D.E.M., ___ N.C. App. ___, 782 S.E.2d 926. At the 13 September 2016 termination hearing, Petitioner-Grandmother testified:

> [T]hrough this whole period, from the time that we first went to court, [Mother and Father] have had visitations. When we first started going to court we communicated through [Petitioner's attorney] to have visitation. At one point, [Mother] wanted to have visitation at playgrounds. We agreed. We have agreed to everything that she requested. But she would never contact us to set up these visits. We never went to any playground. Like I said, she did not show up to Our House [a child abuse and neglect prevention organization], in town. She has come to the one visit [on 22 December 2013].

Petitioner-Grandmother testified that Mother has never contacted her requesting to set up visitation with D.E.M. since that single 22 December 2013 visit, and that Mother has never tried to contact her since a Facebook message Mother sent to Petitioner-Grandmother in February 2014. Petitioner-Grandmother testified that other than a few gifts Mother brought on her 22 December 2013 visit, she has not "sent any type of gifts, cards, correspondence, anything whatsoever," to D.E.M. Mother testified that though she has been continually employed since at least September 2013, she has never sent any money to help support D.E.M.

The trial court's findings show that Mother unilaterally ceased her court-ordered visitation with D.E.M. in December of 2013 *and made no further effort to preserve her relationship with D.E.M.* Viewed against this history, the evidence of Mother's ongoing failure to visit, contact, or provide for D.E.M. from 8 September 2015 to 8 March 2016 allows a reasonable inference that she acted willfully. *C.J.H.*, __ N.C. App. at __, 772 S.E.2d at 91; *see also Searle*, 82 N.C. App. at 276, 346 S.E.2d at 514 ("Whether a biological parent has a willful intent to abandon his child is a question of fact to be determined from the evidence."); *In re Hughes*, 74 N.C. App. 751, 759, 330 S.E.2d 213, 218 (1985) (Where "different inference[s] may be drawn from the evidence, [the trial court] alone

determines which inferences to draw and which to reject."). Having made no gesture to assist Petitioners with the support of D.E.M., or to provide D.E.M. with her "presence, love and care . . . by whatever means available," we hold that the trial court did not err in concluding that Mother abandoned D.E.M. within the meaning of N.C.G.S. § 7B-1111(a)(7). *In re R.R.*, 180 N.C. App. 628, 634, 638 S.E.2d 502, 506 (2006).

In light of our holding that grounds for termination exist under N.C. Gen. Stat. § 7B-1111(a)(7), we need not review the remaining ground found by the trial court under N.C.G.S. § 7B-1111(a)(4). *C.J.H.*, 240 N.C. App. at 504, 772 S.E.2d at 92 ("Because we hold that the findings of fact support one ground for termination, we need not review the other challenged grounds. *See Humphrey*, 156 N.C. App. at 540, 577 S.E.2d at 426–27.").

IV. *Disposition*

[2] Mother next claims the trial court abused its discretion in concluding that it was in D.E.M.'s best interests to terminate her parental rights at the dispositional stage of the proceeding. *See* N.C. Gen. Stat. § 7B-1110(a) (2015). She argues the court made an erroneous assessment of D.E.M.'s best interests under N.C.G.S. § 7B-1110(a), based on its misunderstanding of North Carolina's adoption laws. We disagree.

"Once a trial court has concluded during the adjudication phase that grounds exist for termination of parental rights, it must decide in the disposition phase whether termination is in the best interests of the child." *In re D.R.F.*, 204 N.C. App. 138, 141, 693 S.E.2d 235, 238 (2010). The trial court's ruling on best interests will only be overturned pursuant to a showing that it abused its discretion. *S.Z.H.*, __ N.C. App. at __, 785 S.E.2d at 345. The trial court must consider and make findings about the following criteria, insofar as they are relevant:

> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
>
> (4) The bond between the juvenile and the parent.
>
> (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
>
> (6) Any relevant consideration.

N.C.G.S. § 7B-1110(a).

In assessing the likelihood of D.E.M.'s adoption under N.C.G.S. § 7B-1110(a)(2), the trial court found that "Petitioners have expressed their intentions to adopt [D.E.M.]." While Mother does not dispute the evidentiary support for this finding, she suggests that it "reflects [the court's] misapprehension of law" with regard to Petitioners' *ability* to adopt D.E.M. Specifically, she asserts that Petitioners lack standing to petition for D.E.M.'s adoption under N.C. Gen. Stat. § 48-2-301(a), which provides as follows:

> A prospective adoptive parent may file a petition for adoption pursuant to Article 3 of this Chapter only if a minor has been placed with the prospective adoptive parent pursuant to Part 2 of Article 3 of this Chapter unless the requirement of placement is waived by the court for cause.

N.C. Gen. Stat. § 48-2-301(a) (2015). Mother asserts that the 14 November 2013 custody order entered in 13 CVD 625 does not constitute an adoptive placement for purposes of Chapter 48 of our General Statutes. *See* N.C. Gen. Stat. § 48-1-101(13) (2015) (defining "[p]lacement"); *see also* N.C. Gen. Stat. § 48-3-201(a) (2015) (defining who may place a minor for adoption). Therefore, she contends that "termination of [her] parental rights would make D.E.M. a legal orphan which is not in his best interest."

We find Mother's argument unpersuasive. N.C. Gen. Stat. § 48-2-301(a) expressly authorizes a waiver of the requirement of an adoptive placement "for cause." N.C.G.S. § 48-2-301(a). The North Carolina Supreme Court has recognized a trial court's authority to waive the N.C.G.S. § 48-2-301(a) requirement. *In re Adoption of Byrd*, 354 N.C. 188, 191-92, 552 S.E.2d 142, 145 (2001) (where the trial court waived the prospective parent placement requirement for petitioners who filed to adopt a child the following day after the child's birth). Thus, it cannot be said Petitioners lack the ability to obtain standing to adopt D.E.M. Moreover, in the present case, Petitioners are D.E.M.'s grandparents and legal custodians; they have raised D.E.M. since he was eighteen months old; and they wish to adopt him. By all accounts, D.E.M. is thriving in Petitioners' home. D.E.M.'s GAL recommended the termination of Mother's and Father's parental rights in order to facilitate D.E.M.'s adoption by Petitioners. Under these circumstances, the court did not err in deeming it likely that Petitioners will adopt D.E.M. Nor did the court abuse its discretion in concluding that D.E.M.'s best interests would be served by terminating Mother's parental rights under N.C. Gen. Stat. § 7B-1110(a). Accordingly, we affirm the termination order.

AFFIRMED.

Judge ARROWOOD concurs.

Judge STROUD dissents by separate opinion.

STROUD, Judge, dissenting.

I respectfully dissent from the majority's opinion for two reasons. First, during the six month time period relevant to termination based upon willful abandonment under N.C. Gen. Stat. § 7B-1111(a)(7) (2015), Mother had no parental rights and no visitation rights under the previous Chapter 50 custody order. Second, the trial court erred by terminating Mother's parental rights based upon non-payment of child support under N.C. Gen. Stat. § 7B-1111(a)(4) (2015) because there was never any child support order entered requiring Mother to pay child support to Petitioners.

I. Abandonment

This case presents an unusual situation and appears to be a case of first impression. As the majority states, under N.C. Gen. Stat. § 7B-1111(a)(7), the trial court may terminate parental rights where "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion[.]" In this case, this Court filed a previous opinion on 1 March 2016 that vacated an earlier termination order due to lack of standing. *In re D.E.M.*, __ N.C. App. __, 782 S.E.2d 926, 2016 WL 791272, 2016 N.C. App. LEXIS 229 (2016) (unpublished). The new petition to terminate Mother's and Father's parental rights in the present case was then filed on 8 March 2016. Thus, during the entire six months next preceding the filing of the petition for termination, Mother's parental rights had been terminated and she had no right to visit with the child. The filing of the new petition, even before the prior termination order was officially vacated, set the beginning and ending dates of the new six-month period preceding the date of filing and also ended any practical possibility that Mother may take some legal action in the gap between the first termination order and the filing of a new petition to assert her visitation rights, because there was no gap. This was a clever procedural maneuver by Petitioners' counsel, at a time when Mother had no legal representation. After the new petition was filed and counsel was appointed for her, it was too late.

Although Mother had been awarded some limited visitation rights in the prior Chapter 50 custody proceeding, the prior termination order

ended those rights. At the hearing in September 2016, Mother described her attempts to exercise her visitation before her rights were terminated and claimed that Petitioners always had some sort of excuse for her not to visit. For example, they did not want her to bring her other child to her visitation with D.E.M., although the custody order did not include this limitation and her other child is D.E.M.'s half-brother. Petitioner Grandmother acknowledged that she had imposed this limitation although the order did not require it. Mother testified that since May of 2015, she had been unable to contact respondents. She never had a home phone number for Petitioners. Petitioner Grandmother acknowledged that she had changed her cell phone number about a year before the hearing, although she said that Petitioner Grandfather's number had not changed. But Mother testified that when she called Petitioner Grandfather's number in November 2015, a woman answered and told her it was not the correct number. She had been blocked from contacting Petitioner Grandmother on Facebook. Petitioners did not claim to have made any efforts to encourage Mother to have a relationship with D.E.M. or even to let her know how the child was doing. Mother felt that she was not welcome at Petitioners' home, and since they lived down a mile-long dirt road, she feared they would charge her with harassment if she tried to approach the house. She also testified: "I've been threatened that I wasn't welcome up there. They have guns."

On cross-examination, Petitioners' counsel stressed the fact that Mother had visitation rights under the custody order and that she had not filed an action for contempt to enforce those rights. Mother acknowledged this was true, as she had been unable to afford to pay an attorney. In closing, Petitioners' counsel stressed that Mother had not sought to see the child and acknowledged that during the relevant six months, her rights had been terminated. But he argued that the prior termination order should not change the court's analysis:

> The Court of Appeals vacated the earlier decision. What does all that mean for [Mother]? That's more time. It's more time for her to try to come back to court and try to say I've got a custody order. I've got an order that says I get to see my son on certain specified dates. And I want to do that. . . .
>
> And the most telling thing in this case is she didn't do anything.

The trial court also noted that Mother had visitation rights under the custody order. But Petitioners' argument and the trial court's reliance

on the custody order for the relevant six month period was legally incorrect. Mother did not have a custody order or any visitation rights after 4 March 2015, when her parental rights were terminated by the trial court's first order, and since the new termination proceeding was filed on 8 March 2016 before the mandate issued on this Court's opinion in *In re D.E.M.*, __ N.C. App. __, 782 S.E.2d 926, 2016 WL 791272, 2016 N.C. App. LEXIS 229, she never could have had any opportunity legally to assert her rights during the relevant time, even if she had been able to afford an attorney.

I agree with the majority that it is appropriate for the trial court to consider a parent's conduct outside the relevant six months next preceding the filing of the petition "in evaluating respondent's credibility and intentions." *In re C.J.H.*, 240 N.C. App. 489, 503, 772 S.E.2d 82, 91 (2015). But in *In re C.J.H.*, the father was under no legal or physical restraint or disability which could prevent him from seeing the child; the court was evaluating his "sporadic" efforts to have contact with the child over a period of several years, where he had made a few attempts during the relevant six month period. *Id.* at 500-03, 772 S.E.2d at 90-91. The law does not support relying *solely* upon a time period prior to the six months preceding the filing of the petition for a finding of abandonment. Efforts to see a child outside of the relevant six-month period were considered only to evaluate the "credibility and intentions" of the parent *during* the six month period. Events outside the relevant six month period cannot be the sole basis for the termination, where the parent was legally not a parent and had no rights to assert during the relevant time. I would therefore reverse the trial court's determination that Mother willfully abandoned the child under N.C. Gen. Stat. § 7B-1111(a)(7).

II. Failure to pay child support

The other ground the trial court relied upon to terminate Mother's right was failure to pay any child support under N.C. Gen. Stat. § 7B-1111(a)(4). Although a child support order is not necessary for the trial court to terminate a parent's rights under N.C. Gen. Stat. § 7B-1111(a)(3) (2015), when a child "has been placed in the custody of a county department of social services, a licensed child-placing agency, a child-caring institution, or a foster home," a child support order is necessary in this situation, where the child was in the legal custody of Petitioners, his grandparents. The trial court relied here upon N.C. Gen. Stat. § 7B-1111(a)(4), which allows termination of parental rights when:

> *One parent* has been awarded custody of the juvenile by judicial decree or has custody by agreement of the

> parents, and the *other parent* whose parental rights are sought to be terminated has for a period of one year or more next preceding the filing of the petition or motion willfully failed without justification to pay for the care, support, and education of the juvenile, as required by said decree or custody agreement.

(Emphasis added)

First, it is not clear that subsection (4) would apply here since neither parent was awarded custody of the child; the grandparents were awarded custody. But even if this subsection does apply to a case in which a non-parent has custody, it is undisputed that no child support order was ever entered. Petitioners testified that they had included a claim for child support in the custody complaint but acknowledged that no order was ever entered on child support.[1] The trial court erred in terminating Mother's parental rights on this basis.

These were the only two bases for termination of parental rights the trial court found, and considering the evidence before the court, that is not surprising. The other unusual thing about this case is that the record does not reveal that Mother -- or Father, although he did not appeal -- is unfit as a parent in any way. Mother and Father, though never married, had been living together since January 2015 and continued to do so at the time of the hearing in September 2016. Mother's child from a prior relationship and their youngest child, D.E.M.'s full brother, live with them. She testified regarding the medical care she provided for both children and her older child's education. Although Mother had some periods of instability in relation to her residence several years ago, at the time of the termination hearing, she and Father shared a home and there was no evidence to indicate it is not suitable for children. Both parents were employed. Mother had a driver's license, insurance, and transportation. The only evidence of domestic violence between the parents was the incident in May 2013 which led to Petitioners' assumption of custody of D.E.M. Mother testified that they now "get along better than we've ever gotten along." Petitioner Grandmother had suspicions of drug use by Mother and Father back in 2013; Mother had submitted to three drug tests under an order in the custody case and passed all three. There was no evidence of any suspicion of drug use since 2013. All of this evidence was uncontroverted.

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1. If Petitioners had pursued entry of an order for child support in the Chapter 50 case, it would have imposed an obligation on Father – their son – as well as Mother. The evidence showed that Petitioners also allowed Father to see D.E.M., although he did so infrequently.

I agree that there were other methods Mother could have, and should have, used to enforce her rights to D.E.M. since 2014. Those methods all require representation by counsel, which Mother could not afford. She could have used other methods to contact Petitioners to seek to exercise her visitation -- when the custody order was still in effect, at least. The trial court evaluated her "excuses" as unpersuasive, and that is the role of the trial court. But because Mother had no legal rights during the relevant six-month period, as a matter of law, her rights cannot be terminated based upon her failure to assert them during that time.

Since I would therefore reverse the trial court's order adjudicating the existence of grounds to terminate Mother's parental rights, I dissent.

IN THE MATTER OF STEPHEN WOLFE

No. COA16-1217

Filed 18 July 2017

Mental Illness—voluntary admission to inpatient psychiatric facility—inpatient treatment—written and signed application by guardian required

The trial court lacked jurisdiction to concur in respondent adult incompetent's voluntary admission to a twenty-four hour inpatient psychiatric facility and to order that he remain admitted for further inpatient treatment. The hearing was not indicated by a written and signed application for voluntary admission by a guardian as required by N.C.G.S. § 122C-232(b).

Appeal by respondent from order entered 9 June 2016 by Judge Andrea Dray in Buncombe County District Court. Heard in the Court of Appeals 3 May 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Andrew L. Hayes, for petitioner-appellee.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Zimmer, for respondent-appellant.

ELMORE, Judge.

IN RE WOLFE

[254 N.C. App. 416 (2017)]

Respondent Stephen Wolfe, an adult incompetent, appeals from an order concurring in his voluntary admission to a twenty-four hour (inpatient) psychiatric facility and ordering he remain admitted for further inpatient treatment. Wolfe contends the trial court lacked subject-matter jurisdiction to enter its order because it never received his written and signed application for voluntary admission to the facility as statutorily required to initiate the postadmission review hearing from which its order arose. Because we hold the lack of a written and signed application for voluntary admission fails to vest a district court's subject-matter jurisdiction to concur in a patient's voluntary admission and order continued admission for further treatment, we vacate the court's order.

I. Background

On 25 May 2016, Wolfe presented to the emergency department at Mission Hospital in Buncombe County "suffering from self-reported dehydration, and apparent psychiatric decompensation due to treatment noncompliance." Three days later Wolfe was admitted to Mission Hospital's inpatient psychiatric unit (Copestone) and evaluated that same day by a staff psychiatrist, Dr. Suzanne Collier.

On 31 May, Dr. Collier filed with the Buncombe County District Court an evaluation for admission, in which she noted that Wolfe had a history of bipolar disorder and psychiatric hospitalizations; that he had recently stopped taking his psychiatric medication and was exhibiting signs of paranoia, delusions, and sleeplessness; and opined that Wolfe was mentally ill, needed further evaluation, and should be admitted to Copestone for inpatient psychiatric treatment. Upon receipt of Dr. Collier's evaluation, the district court scheduled an "Involuntary Commitment or Voluntary Admission hearing" to review Wolfe's admission and determine if further inpatient psychiatric treatment was necessary. The district court never received a written and signed application for Wolfe's voluntary admission to Mission Hospital or to its psychiatric unit at Copestone.

On 3 June, Wolfe was appointed counsel. After interviewing Wolfe, his appointed counsel filed a notice with the district court requesting a hearing because Wolfe "does not agree with [Dr. Collier's] recommendations."

At the 9 June hearing on Wolfe's admission, Dr. Collier testified that Wolfe "did not present [to the emergency room] for psychiatric reasons per his report" and stated when she first evaluated Wolfe on 28 May, "he told me he came in for some other medical problem, and that he didn't need to be at Copestone." Dr. Collier stated that Wolfe was admitted to

the hospital's psychiatric unit because he had stopped taking his bipolar disorder medications; was currently in a manic episode; and was decompensating, experiencing symptoms of agitation, paranoia, delusions, and sleeplessness. After about a week of observation, Dr. Collier explained that Wolfe "generally remained calm, but argumentative about the fact that he [did not] believe he need[ed] to be on medication." Wolfe initially refused to take the oral psychiatric medication prescribed at Copestone because he believed it was unnecessary and was "poisoning him." After a few forced antipsychotic injections to which Wolfe's guardian apparently consented, Wolfe started voluntarily taking his oral medication a few days before the hearing. Dr. Collier opined that Wolfe needed further inpatient treatment to stabilize him on his current medication and expressed concern that if he were released, Wolfe might stop taking his medication, decompensate, and become manic. She opined further that it would currently be medically inappropriate to discharge Wolfe to an independent living situation and requested that the court authorize his continued inpatient psychiatric treatment at Copestone for thirty more days.

Wolfe testified that he presented to Mission Hospital's emergency department complaining of severe dehydration and malnourishment because he was unable to pay for groceries, since his payee, who receives government benefits on his behalf, failed to provide him funds timely for basic living expenses. Wolfe conceded that he did not believe he has bipolar disorder and stated he initially refused medication at Copestone because each of the seven or eight psychiatric medications he has been prescribed over the past several years have "poison[ed the] emotional state of being in [his] state of mind" and have "made [him] angry, irritable, and stupid." Wolfe testified that he was currently receiving outpatient treatment at Family Preservation Services and taking psychiatric medication as needed, as prescribed by a general psychiatrist there. Wolfe indicated he would continue taking the medicine prescribed at Copestone if discharged and was currently able to return to living independently. Wolfe requested that if the court found it necessary he receive further inpatient treatment, it send him to another facility for an independent assessment, since Copestone "seem[ed] to be intent on making [him] take [bipolar] medicine and stay there." Wolfe's guardian was not present at the hearing.

After the hearing, the court entered an order on 9 June 2016 concurring in Wolfe's voluntary admission and authorizing his continued inpatient admission at Copestone for no more than thirty days. In its order, the court found by clear, cogent, and convincing evidence that Wolfe was mentally ill, in need of further treatment at Copestone, and

that lesser measures would be insufficient. Wolfe was discharged from Copestone on 22 June 2016. Wolfe appeals.

II. Analysis

On appeal, Wolfe contends the trial court lacked jurisdiction to concur in his voluntary admission and order he remain admitted for further inpatient psychiatric treatment because it never received a written and signed application for his voluntary admission to Copestone as required by N.C. Gen. Stat. § 122C-232 to initiate the hearing. Wolfe also challenges the sufficiency of evidence underlying the district court's finding that his admission was voluntary, arguing no evidence presented showed that his admission to Mission Hospital's inpatient psychiatric unit at Copestone was, in fact, voluntary. Because we hold that the lack of Wolfe's application for voluntary admission failed to vest the trial court with subject-matter jurisdiction to concur in his admission and authorize he remain admitted for additional inpatient treatment, we vacate the order and thus decline to address Wolfe's second argument.

We review *de novo* whether a trial court has jurisdiction over particular subject matter. *See, e.g.*, *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010). Subject-matter jurisdiction "involves the authority of a court to adjudicate the type of controversy presented by the action before it." *Haker-Volkening v. Haker*, 143 N.C. App. 688, 693, 547 S.E.2d 127, 130, *disc. rev. denied*, 354 N.C. 217, 554 S.E.2d 338 (2001). "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) (citing *High v. Pearce*, 220 N.C. App. 266, 271, 17 S.E.2d 108, 112 (1941)), and "in its absence a court has no power to act[and any resulting] 'judgment is void,' " *In re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d 787, 790 (2006) (quoting *Hart v. Thomasville Motors, Inc.*, 244 N.C. 84, 90, 92 S.E.2d 673, 678 (1956)). "When the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to . . . vacate any order entered without authority." *State v. Felmet*, 302 N.C. 173, 176, 273 S.E.2d 708, 711 (1981) (citations omitted).

" 'Where jurisdiction is statutory and the [l]egislature requires the [c]ourt to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the [c]ourt to certain limitations, an act of the [c]ourt beyond these limits is in excess of its jurisdiction.' " *In re T.R.P.*, 360 N.C. at 590, 636 S.E.2d at 790 (quoting *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)). Thus, for certain statutorily created causes of action, a trial court's subject-matter jurisdiction over the action does not fully vest unless the action is properly initiated. *In re T.R.P.*, 360 N.C. at 591–93, 636 S.E.2d at 790–92 (holding court lacked jurisdiction to enter a custody review order in an abuse, neglect, and dependency action because statutorily required initiating petition was defective); *see also Hodges v. Hodges*, 226 N.C. 570–71, 571, 39 S.E.2d 596, 597 (1946) (holding court lacked jurisdiction to enter order in alimony action because statutorily required initiating complaint was defective). This principle also applies to statutorily created involuntary commitment proceedings and a court's authority to enter an involuntary commitment order. *See In re Ingram*, 74 N.C. App. 579, 580–81, 328 S.E.2d 588, 589 (1985) (vacating commitment order for want of jurisdiction where initiating petition lacked statutorily required affidavit).

Article 5 of Chapter 122C of the North Carolina General Statutes governs the procedures for admitting or committing persons into inpatient psychiatric facilities. N.C. Gen. Stat. § 122C-211(a) (2015) provides that for a competent adult to seek voluntary admission to a facility, "a written application for evaluation or admission, signed by the individual seeking admission, is required." For incompetent adults seeking voluntary admission, the written application must be completed and signed by his or her guardian. *Id.* § 122C-231 ("The provisions of G.S. 122C-211 shall apply to admissions of an incompetent adult . . . except that the legally responsible person shall act for the individual, in applying for admission to a facility . . . ."); *id.* § 122C-3(20) (" 'Legally responsible person' means . . . when applied to an adult, who has been adjudicated incompetent, a guardian . . . ."). Accordingly, for Wolfe to have been voluntarily admitted to Copestone, his guardian was required to complete and sign a written application for Wolfe's admission.

N.C. Gen. Stat. § 112C-232 (2015) empowers a district court to review an incompetent adult's voluntary admission into an inpatient psychiatric facility and order he or she remain admitted for further inpatient treatment. The statute mandates that the district court must hold a hearing within ten days after an incompetent adult's voluntary admission to "determine whether the incompetent adult is mentally ill . . . and is in need of further treatment at the facility." *Id.* §§ 122C-232(a), (b). If the court determines by clear, cogent, and convincing evidence that the patient is mentally ill, in need of further treatment, and that lesser measures would be insufficient, the court may concur with the voluntary admission and authorize further treatment. *Id.* § 122C-232(b). If further inpatient treatment is authorized, "only the facility or the court may

release the incompetent adult" upon a determination that such treatment is no longer needed. *Id.* § 122C-233(b).[1]

Significantly here, N.C. Gen. Stat. § 112C-232(b) provides that "[i]n any case requiring [this] hearing . . . , no petition is necessary; *the written application for voluntary admission shall serve as the initiating document* for the hearing." (Emphasis added.) This limitation conditions subject-matter jurisdiction: a district court's N.C. Gen. Stat. § 122C-232 jurisdiction to concur in an incompetent adult's voluntary admission and order that he or she remain admitted for further inpatient treatment does not vest absent the statutorily required written application for voluntary admission signed by the incompetent adult's legal guardian.

Here, the district court entered an order purporting to concur in Wolfe's voluntary admission to Copestone and ordering he remain admitted for an additional thirty days of inpatient psychiatric treatment. Yet the appellate record contains no written application for Wolfe's voluntary admission signed by his guardian. Rather, as an amendment to appellate record reflects, Wolfe's "application was not filed in the court file for this case," and the Buncombe County District Court calendared the hearing upon receipt of Dr. Collier's evaluation for admission. Because a written and signed application for voluntary admission never initiated the hearing, the district court failed to comply with the requirements of N.C. Gen. Stat. § 122C-232(b). Because the district court never received this required application for voluntary admission, its subject-matter jurisdiction to concur in Wolfe's voluntary admission to Copestone and order he remain admitted for further inpatient psychiatric treatment never vested. The district court thus lacked authority to enter its voluntary admission order and it must be vacated. *See In re Ingram*, 74 N.C. App. at 580–81, 328 S.E.2d at 589 (vacating commitment order for want of jurisdiction where petition to initiate involuntary commitment proceedings lacked statutorily required affidavit); *cf. In re T.R.P.*, 360 N.C. at 591–93, 636 S.E.2d at 790–92 (affirming this Court's decision to vacate a custody review order because lower court's subject-matter jurisdiction never vested where initiating petition lacked statutorily required verification).

III. Conclusion

The lack of a required written application for Wolfe's voluntary admission signed by his guardian failed to vest the district court with

1. Additionally, if the facility refuses a legal guardian's request to discharge an incompetent adult, the guardian may apply to the court for a discharge hearing. *Id.*

subject-matter jurisdiction to concur in his voluntary admission to Copestone and order he remain admitted for further inpatient treatment. We therefore vacate its voluntary admission order.

VACATED.

Judges INMAN and BERGER concur.

RICHMOND COUNTY BOARD OF EDUCATION, PLAINTIFF

v.

JANET COWELL, NORTH CAROLINA STATE TREASURER, IN HER OFFICIAL CAPACITY; LINDA COMBS, NORTH CAROLINA STATE CONTROLLER, IN HIS OFFICIAL CAPACITY; ANDREW HEATH, NORTH CAROLINA STATE BUDGET DIRECTOR, IN HIS OFFICIAL CAPACITY; FRANK PERRY, SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, IN HIS OFFICIAL CAPACITY; AND ROY COOPER, ATTORNEY GENERAL OF NORTH CAROLINA, IN HIS OFFICIAL CAPACITY, DEFENDANTS

No. COA17-112

Filed 18 July 2017

Penalties, Fines, and Forfeitures—fees collected—improperly sent to jail program instead of schools—money already spent—judicial branch not authorized to order new money paid from treasury—failure to secure injunction

The trial court erred by its order and writ of mandamus commanding defendants (State Treasurer, State Controller, and various other officials) to pay money from the State treasury to satisfy a court judgment against the State for all fees collected and sent to a jail program to be "paid back" to the clerks of superior court in the respective counties, to then be sent to the county schools. Under longstanding precedent from our Supreme Court, the judicial branch cannot order the State to pay new money from the treasury to satisfy this judgment where the fees collected through the program were already spent to assist the counties in funding their local jails and plaintiff Board of Education never secured an injunction to stop the program while this case made its way through the courts.

Appeal by defendants from order entered 1 November 2016 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 7 June 2017.

George E. Crump, III, for plaintiff-appellee.

Attorney General Joshua H. Stein, by Assistant Attorney General Thomas M. Woodward and Special Deputy Attorney General Amar Majmundar, for defendants-appellants.

DIETZ, Judge.

The State Treasurer, State Controller, and various other officials appeal from the trial court's order and writ of mandamus commanding them to pay money from the State treasury to satisfy a court judgment against the State.

If this were any other case, we would summarily reverse. Under the Separation of Powers Clause in our State constitution, no court has the power to order the legislature to appropriate funds or to order the executive branch to pay out money that has not been appropriated.

But this case is more complicated because it, too, arises under our State constitution. The Richmond County Board of Education brought a claim against the State alleging that fees collected for certain criminal offenses, and used to fund county jail programs, should have been given to the schools instead. The school board relied on Article IX, Section 7 of our State constitution, which provides that "all fines collected in the several counties for any breach of the penal laws of the State, shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools."

After a series of appeals to this Court, the school board ultimately prevailed on its constitutional claim. This Court ordered that all fees collected and sent to the jail program must be "paid back" to the clerks of superior court in the respective counties, to then be sent to the county schools. *Richmond Cty. Bd. of Educ. v. Cowell*, __ N.C. App. __, __, 776 S.E.2d 244, 249 (2015).

That never happened—apparently because the Richmond County Board of Education never secured an injunction to stop the program while this case made its way through the courts, and now the money has been spent. Moreover, the General Assembly, to date, has not appropriated any new money to pay the Richmond County schools (or any other county schools) what they are owed.

After time passed and the Richmond County schools never got paid, the school board returned to the trial court and secured the order and

writ of mandamus on appeal here, which commands various state officials to immediately pay the judgment out of the State treasury or risk being thrown in jail.

As explained below, we reverse the trial court's order. Under longstanding precedent from our Supreme Court, the judicial branch cannot order the State to pay new money from the treasury to satisfy this judgment. To be sure, if the school board had sought and obtained an injunction to stop the county jail program from using the money, courts might have the power to order the existing money returned. But that is not what happened here. The fees collected through the program are gone—spent to assist the counties in funding their local jails.

Of course, this does not mean the Richmond County schools cannot get their money. As our Supreme Court explained in a similar case, having entered a money judgment against the State, the judiciary has "performed its function to the limit of its constitutional powers." *Smith v. State*, 289 N.C. 303, 321, 222 S.E.2d 412, 424 (1976). From here, satisfaction of that money judgment "will depend upon the manner in which the General Assembly discharges its constitutional duties." *Id.*

Facts and Procedural History

On 16 February 2012, the Richmond County Board of Education sued various State officials challenging the constitutionality of a now-repealed version of N.C. Gen. Stat. § 7A-304(a)(4b). The statute required the State to collect a $50 fee from defendants convicted of improper equipment offenses and to remit the $50 fee to the Statewide Misdemeanant Confinement Fund, which helps counties pay the cost of housing criminal offenders in county jails, rather than in State prisons. The school board argued that the statute violated Article IX, Section 7 of the North Carolina Constitution, which states that "the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State, shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools." N.C. Const. art. IX, § 7(a).

After a side trip to this Court on the issue of sovereign immunity, *Richmond Cty. Bd. of Educ. v. Cowell*, 225 N.C. App. 583, 739 S.E.2d 566, *rev. denied*, 367 N.C. 215, 747 S.E.2d 553 (2013), the trial court granted summary judgment in the school board's favor.

On appeal from the trial court's judgment, this Court affirmed, holding that "the remittance of the $50.00 surcharges collected in Richmond

County to the State Confinement Fund is unconstitutional" and "it is appropriate—as the trial court ordered—that this money be paid back to the clerk's office in Richmond County" to then be paid to the school system as the State constitution requires. *Richmond Cty. Bd. of Educ. v. Cowell*, __ N.C. App. __, __, 776 S.E.2d 244, 249 (2015). Neither side sought further review of this Court's decision in our Supreme Court. On remand, the trial court followed this Court's mandate and entered a judgment ordering the State to pay the Richmond County school system the $272,300.00 it is owed.

Time passed but the Richmond County schools never got the money. Apparently, the State was unable to "pay back" the funds collected from the $50 fees, as this Court had ruled, because the money already had been spent on the county jail program. Thus, without a new appropriation from the General Assembly, there were no funds available to satisfy the judgment.

The school board ultimately returned to the trial court and sought an order directing various State officials to appear and show cause why they had not complied with the trial court's judgment. The court initially denied the school board's request without prejudice, noting that "Plaintiff's Motion for Show Cause Order raises significant issues concerning appropriation of state funds, matters of collectability, and separation of powers." The trial court also observed that a legislative session was set to begin, at which point the General Assembly could appropriate funds to pay the judgment.

That didn't happen. The General Assembly concluded its legislative session without appropriating any funds to satisfy the judgment. On 1 September 2016, the Richmond County Board of Education returned to the trial court seeking an order to compel various State officials to pay $272,300.00 out of the State treasury to satisfy the trial court's judgment. The trial court granted the school board's motion and issued a writ of mandamus ordering the State Treasurer, State Controller, and State Attorney General to take the necessary steps to pay the judgment using funds from the State treasury. This appeal followed.

Analysis

Among the most important rights guaranteed in the North Carolina Constitution is the Separation of Powers, which ensures that "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. Const. art. I, § 6. The Framers of our constitution included this provision

in the Declaration of Rights to prevent the concentration of power in any one branch of our government. By reserving certain powers exclusively to one of the three branches, our government has an inherent set of checks and balances, which the Framers believed was essential to preserve liberty and prevent tyranny. *See State v. Berger*, 368 N.C. 633, 645, 781 S.E.2d 248, 256 (2016). This is not a controversial concept. As our Supreme Court once observed, "[a]s to the wisdom of this provision there is practically no divergence of opinion—it is the rock upon which rests the fabric of our government." *Person v. Board of State Tax Comm'rs*, 184 N.C. 499, 502, 115 S.E. 336, 339 (1922).

Although most Separation of Powers cases (in modern times, at least) involve clashes between the legislative and executive branches, in many ways the judicial branch poses the greatest risk to the doctrine. This is so because the courts have an inherent power "to do all things that are reasonably necessary for the proper administration of justice." *In re Alamance Cty. Court Facilities*, 329 N.C. 84, 94, 405 S.E.2d 125, 129 (1991). To accomplish this task, courts possess the power to issue injunctions and extraordinary writs, like the writ of mandamus issued in this case. If the public officials targeted by these injunctions and writs ignore them, those officials can be held in contempt and put in jail. Left unchecked, this power would permit judges to freely organize and execute State power as they see fit.

To restrain this far-reaching power, our Supreme Court repeatedly has acknowledged that "[e]ven in the name of its inherent power, the judiciary may not arrogate a duty reserved by the constitution exclusively to another body." *Id.* at 99, 405 S.E.2d at 132. In other words, the Separation of Powers doctrine prohibits the courts from using the judicial power to step into the shoes of the other branches of government. The courts can declare a statute unconstitutional, for example, but cannot draft a new one or order the legislature to do so. *Person*, 184 N.C. at 503, 115 S.E. at 339.

Unsurprisingly, fights over the reach of judicial power often arise in the context of the State treasury. After all, courts expect that when they enter valid money judgments against the State, the State will respect those judgments. But, when that fails, the Separation of Powers clause prevents the judicial branch from reaching into the public purse on its own. Appropriating money from the State treasury is a power vested exclusively in the legislative branch and "[n]o money shall be drawn from the State treasury but in consequence of appropriations made by law." N.C. Const. art. V, § 7; *see also Advisory Opinion In re Separation*

of Powers, 305 N.C. 767, 777, 295 S.E.2d 589, 595 (1982). Because the State constitution vests the authority to appropriate money solely in the legislative branch, the Separation of Powers Clause "prohibits the judiciary from taking public monies without statutory authorization." *Alamance Cty. Court Facilities*, 329 N.C. at 99, 405 S.E.2d at 132.[1]

Our Supreme Court described how these Separation of Powers principles apply in *Smith v. State*, 289 N.C. 303, 321, 222 S.E.2d 412, 424 (1976). In *Smith*, the Supreme Court held that when the State contracts with a private citizen, it cannot invoke sovereign immunity to defeat an action alleging that the State breached that contract. The Court likewise reaffirmed the power of the judicial branch to enter a money judgment against the State. But the Court also cautioned that the power of the judicial branch ends with the entry of that judgment:

> In the event that plaintiff is successful in establishing his claim against the State, he cannot, of course, obtain execution to enforce the judgment. The validity of his claim, however, will have been judicially ascertained. The judiciary will have performed its function to the limit of its constitutional powers. Satisfaction will depend upon the manner in which the General Assembly discharges its constitutional duties.

Id. (citations omitted).

Thus, when the courts enter a judgment against the State, and no funds already are available to satisfy that judgment, the judicial branch has no power to order State officials to draw money from the State treasury to satisfy it.

Of course, this case is no mere contract dispute. The State violated the North Carolina Constitution when it moved money otherwise destined for the Richmond County schools to a separate State fund to pay for county jail programs throughout the State. *Richmond Cty. Bd. of Educ. v. Cowell*, __ N.C. App. __, __, 776 S.E.2d 244, 249 (2015). As a result, this Court held that "it is appropriate—as the trial court ordered—that this money be paid back to the clerk's office in Richmond County." *Id.*

It was well within the judicial branch's power to order this money—taken from Richmond County in violation of the constitution—to be

1. The only exception to this rule is when the legislative branch refuses to fund the judicial branch to such an extreme extent that the judiciary cannot perform its own constitutional duties. *Alamance Cty. Court Facilities*, 329 N.C. at 99, 405 S.E.2d at 132.

returned. This, in turn, means that if the money collected from these fines still rested within the Statewide Misdemeanant Confinement Fund, awaiting the outcome of this protracted litigation, the courts could order State officials to return the money to Richmond County and the other affected counties.

But, as the parties concede, this cannot be done because the money is gone. The Richmond County Board of Education did not obtain a preliminary injunction to prevent the State from spending the money while it litigated the case (and the record on appeal contains no indication that the school board even sought an injunction). As a result, the only way the State can satisfy the judgment entered by the trial court is to pay *new* money from the State treasury—money not obtained from the improper equipment fees, but from the taxpayers and other sources of general State revenue. Under *Smith*, the judicial branch lacks the power to order State officials to pay this new money from the treasury. 289 N.C. at 321, 222 S.E.2d at 424.

The school board also contends that, even without a specific appropriation from the General Assembly, there are ways for State officials to find money to pay the judgment. For example, the school board points to the Contingency and Emergency Fund established in N.C. Gen. Stat. § 143C-4-4. By law, that fund may be used for "expenditures required . . . by a court." N.C. Gen. Stat. § 143C-4-4. The school board argues that the trial court's writ of mandamus can be interpreted not as an order to pay out funds that were not appropriated, but instead as an order that State officials take whatever steps are necessary to pay the judgment from any discretionary sources that are available.

We must reject this argument because a writ of mandamus may be used only to command public officials "to perform a purely ministerial duty imposed by law; it generally may not be invoked to review or control the acts of public officers respecting discretionary matters." *Alamance Cty. Court Facilities*, 329 N.C. at 104, 405 S.E.2d at 135. It is hard to imagine a more discretionary process than the one required to obtain emergency funds—a process that permits State agencies to request the funds, then permits the Governor to decide whether to approve that request, and then calls for the Council of State to review the agency's request and the Governor's recommendation, and to vote on whether to approve it. N.C. Gen. Stat. § 143C-4-4.[2]

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2. In addition, although portions of the trial court's order refer to all defendants in the suit, the writ of mandamus is directed only at the State Treasurer, State Controller, and State Attorney General, not at the other officials involved in this process.

Moreover, commanding members of the Council of State and other executive branch officials to approve payment from this type of discretionary emergency fund is no less offensive to the Separation of Powers Clause than commanding the legislature to appropriate the money. *See Alamance Cty. Court Facilities*, 329 N.C. at 100, 405 S.E.2d at 133. The Contingency and Emergency fund, as its name suggests, was created to fund "contingencies and emergencies" for which no separate appropriation exists but which must be addressed before the General Assembly convenes to appropriate new funds. Determining what constitutes an emergency worthy of this special fund is a task for which executive branch officials are uniquely suited. The judiciary "has no power, and is not capable if it had the power" of substituting its own judgment for that of the executive branch officials charged with making these discretionary decisions. *Id.* at 101, 405 S.E.2d at 134.

In sum, the role of the courts in this constitutional dispute is over. As the Framers of our constitution intended, the judiciary "performed its function to the limit of its constitutional powers" by entering a judgment against the State and in favor of the Richmond County Board of Education. *Smith*, 289 N.C. at 321, 222 S.E.2d at 424. The State must honor that judgment. But it is now up to the legislative and executive branches, in the discharge of their constitutional duties, to do so. The Separation of Powers Clause prevents the courts from stepping into the shoes of the other branches of government and assuming their constitutional duties. We have pronounced our judgment. If the other branches of government still ignore it, the remedy lies not with the courts, but at the ballot box.

Conclusion

For the reasons discussed above, we reverse the trial court's order and writ of mandamus.

REVERSED.

Judges ELMORE and ARROWOOD concur.

SLAUGHTER v. SLAUGHTER

[254 N.C. App. 430 (2017)]

MARTIN T. SLAUGHTER, PLAINTIFF
v.
NICOLE B. SLAUGHTER, DEFENDANT

No. COA16-1153

Filed 18 July 2017

1. Divorce—equitable distribution—valuation of law practices—sufficiency of findings of fact—sufficiency of conclusions of law

The trial court did not err in an equitable distribution order by considering and relying upon the report of a valuation expert appointed by the court on the valuation of the husband's law practices. Although the trial court did not consider the computational factors the husband favored, calculation of those specific factors was not necessary.

2. Divorce—equitable distribution—value of law practices—findings

The trial court did not err by not making certain findings about the valuation of law practices that the husband argued were required and did not err in its subsequent distribution of the divisible portion of the law practices.

3. Divorce—equitable distribution—marital shares—active and passive appreciation

The trial court did not err in an equitable distribution action in its distribution of the appreciation in a company in which plaintiff and defendant owned shares. The trial court relied on the report of an expert in valuations in classifying the appreciation that resulted from marital efforts as active and the appreciation attributable to inflation and "other" as passive.

4. Divorce—equitable distribution—distributive award—means to pay

The trial court did not err in an equitable distribution action by finding that the husband had the means to pay a distributive award. The husband did not challenge a finding that he had two sources of income from his law practices, the ability to unilaterally obtain liquid distributions from a company, and the ability and willingness to use the company credit card to pay personal expenses.

5. Attorney Fees—alimony—affidavits—reasonableness

The trial court did not abuse its discretion in an alimony order in its award of attorney fees. Although plaintiff husband contended that the wife's affidavits regarding the attorney fees did not differentiate between fees owed for child support, post-separation support, or alimony, the affidavits were admitted without objection, and thus, formed a sufficient basis for the trial court to recognize the amounts charged.

6. Costs—expert fees—court-appointed expert—prior court order required

The trial court erred in an alimony order by awarding expert witness costs. The costs of an expert may be awarded only for testimony given, except that the costs of a court-appointed expert are not subject to that limitation. Contrary to the wife's contention that her expert in forensic accounting became a court-appointed expert since he was used by the court and the husband did not have an expert in this area, there was no prior court order appointing an expert that would place the parties on notice that the expert might be considered court-appointed pursuant to N.C.G.S. § 8C-1, Rule 706.

7. Appeal and Error—timeliness of appeal—cross-appeal—issue of first impression

The trial court erred by denying a husband's motion to dismiss a wife's child support appeal where the husband only appealed the equitable distribution and alimony orders. The wife was limited to the addressing only those orders the husband addressed in his appeal because her challenge to the child support order was not timely.

8. Divorce—equitable distribution—transfer of ownership—limited liability company

Although defendant wife contended that the trial court erred in an equitable distribution order by failing to recognize that it had the legal authority to transfer her ownership interest in a limited liability company to defendant husband, the Court of Appeals declined to instruct the trial court as the wife suggested where the wife conceded that the equitable division was not erroneous.

Appeal by plaintiff and defendant from orders entered 31 March 2016 and 1 April 2016, and by plaintiff from order entered 29 September 2016, by Judge Lillian B. Jordan in New Hanover County District Court. Heard in the Court of Appeals 3 May 2017.

Pennington & Smith, P.L.L.C., by Ralph S. Pennington, for plaintiff-appellant.

Ward and Smith, P.A., by John M. Martin, for defendant-appellee/cross-appellant.

CALABRIA, Judge.

Where competent evidence supported the trial court's findings of fact in its equitable distribution and alimony orders, and those findings in turn supported its conclusions of law, the trial court did not err in its findings and conclusions. Where affidavits on attorney's fees were admitted into evidence without objection, and the trial court made explicit findings regarding trial counsel's experience and the reasonableness of his fees, the trial court did not abuse its discretion in awarding attorney's fees. However, where there was no evidence that an expert witness was a court-appointed expert, the trial court erred in awarding expert witness costs for any expense other than the expert's testimony. Where wife raised issues on cross-appeal that were not raised on appeal, and did so outside of the 30-day window for appeals but within the 10-day window for cross-appeals, the trial court erred in denying defendant's motion to dismiss her appeal with respect to the child support order. We affirm in part, remand in part, reverse in part, and dismiss in part.

I. Factual and Procedural Background

Martin T. Slaughter ("husband") and Nicole B. Slaughter ("wife") were married on 21 September, 1996. Two children were born to the marriage. The parties separated on 18 May 2012, and husband filed a complaint on 1 April 2013, seeking child custody, child support, equitable distribution, and an interim distribution. He also filed a stipulation of marital misconduct. On 5 June 2013, wife filed an answer and counterclaim, seeking child custody, child support, equitable distribution, post-separation support and alimony, attorney's fees, and an interim distribution.

On 8 October 2012, a temporary consent order on custody and release of records was entered. This order provided that husband would release his mental health records, and that subject to his compliance in releasing those records, the parties would be awarded joint custody of the children, with wife having primary physical custody and husband having visitation.

On 26 June 2014, husband voluntarily dismissed his second and third claims (child support and equitable distribution) without prejudice.

On 5 August 2014, husband moved for partial summary judgment with respect to the classification of shares owned by husband and wife in Winner Enterprises of Carolina Beach, LLC ("Winner"). Husband's motion alleged that his shares should be classified as his separate property, and wife's shares as her separate property.

On 17 September 2014, the trial court entered an order on permanent custody. In this order, the trial court concluded that joint custody was in the children's best interest, and ordered that (1) the parties share joint legal custody; and (2) the parties share joint physical custody, with a schedule set out in the order.

On 4 February 2015, wife moved that the court appoint an expert to value Winner, and by extension value the shares of husband and wife in the company, as well as Baker & Slaughter, P.A., a law firm in which husband had an interest. On 26 March 2015, wife filed a motion requesting, if the North Carolina Child Support Guidelines were applicable to the instant case, that the trial court deviate from the guidelines.

On 31 March 2015, the trial court entered an order addressing multiple issues. First, the order required husband to pay wife an immediate interim distribution of $60,000. Second, husband was to be solely responsible for the children's school tuition. The trial court also set dates for mediation and trial, and appointed an expert to value Winner. This expert was also to value husband's interest in Baker & Slaughter, P.A.

On 19 June 2015, the parties agreed to several stipulations. First, they stipulated that their respective shares of Winner were separate property. They then stipulated to several facts about the value and date of acquisition of their shares of Winner.

On 8 October 2015, the trial court entered an order appointing an expert to value all real property owned by the parties, including real property owned by Winner. On 31 March 2016, the trial court entered its order on equitable distribution ("the ED order"). The trial court concluded that an unequal division of marital and divisible property in favor of wife was equitable, and that a division of 60%/40% in wife's favor was appropriate. The trial court then ordered (1) that separate property be distributed; (2) that husband deed a certain piece of real property to wife; (3) that wife deed a certain piece of real property to husband; and (4) that husband pay wife a distributive award of $494,772.

On 1 April 2016, the trial court entered its order on child support ("the child support order"). The trial court concluded that wife was entitled to child support from husband, and that the North Carolina Child

Support Guidelines were applicable to the case. The trial court then ordered husband to pay $1,700 in monthly child support, to terminate when the younger child reached majority, plus medical and dental health coverage and all premiums, plus all of the children's unreimbursed health care costs. Husband was also ordered to pay all summer camp expenses. Husband was entitled to claim one child as a dependent for tax purposes, and wife was entitled to claim the other child.

On 1 April 2016, the trial court also entered its order on alimony ("the alimony order"). The trial court concluded that wife was a dependent spouse and husband was a supporting spouse, that wife was entitled to alimony, that husband had engaged in infidelity prior to separation, that husband had the means and ability to pay alimony, and that wife, as a dependent spouse, was also entitled to an award of a portion of her attorney's fees. The trial court then ordered husband to pay $2,786 in monthly alimony payments, to terminate in 2024. Husband was also ordered to pay wife's attorney's fees in the amount of $50,000, minus a $30,000 stipulated credit, for a total of $20,000.

On 25 April 2016, husband filed notice of appeal from the ED order and the alimony order. On 3 May 2016, wife filed notice of cross-appeal from the ED order and the child support order.

On 10 June 2016, husband filed a motion to dismiss wife's cross-appeal of the child support order, on the grounds that (1) wife's cross-appeal of the child support order was filed more than 30 days after entry of that order, and (2) North Carolina Rule of Appellate Procedure 3(c), which permits a cross-appellant to file a cross-appeal within 10 days of receiving notice of appeal, should not apply here, because husband did not appeal the child support order. On 29 September 2016, the trial court denied this motion. On 3 October 2016, husband appealed this order as well.

II. Findings of Fact and Conclusions of Law

In numerous arguments, husband contends that the trial court erred in failing to make certain findings of fact and conclusions of law, and in making erroneous findings of fact. We disagree.

A. Standard of Review

"The standard of review on appeal from a judgment entered after a non-jury trial is 'whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment.' " *Cartin v. Harrison*, 151 N.C. App. 697, 699, 567 S.E.2d 174, 176 (quoting *Sessler v. Marsh*, 144 N.C. App. 623, 628, 551 S.E.2d 160, 163 (2001)), *disc. review denied*, 356 N.C. 434, 572 S.E.2d 428 (2002).

B. Analysis

Husband challenges numerous findings of fact in the ED order and alimony order. We address husband's arguments with respect to each order in turn.

1. ED Order

Husband contends that, in the ED order, the trial court failed to make proper findings of fact and conclusions of law as to the value of husband's law practices; as to the value of an adjustment in value based on attorney compensation; as to North Carolina Rule of Evidence 414, governing the admissibility of evidence of past medical expenses; as to the capitalization rate for the valuation of husband's law practices; and as to goodwill. He also contends that the trial court erred by distributing divisible portions of the law practices to wife. With respect to Winner, he further contends that, in its ED order, the trial court made erroneous findings and failed to make findings as to Winner's appreciation; that the trial court erred in its valuation of wife's shares of Winner and in using that as a distributional factor; and that the trial court failed to make sufficient findings of fact and conclusions of law as to husband's ability to pay a distributional payment.

With respect to making "proper findings as to the law practices[,]" husband contends that the trial court's "entire substantive findings as to the valuation of the Law Practices . . . are just recitations of what Crawford said, not proper findings." Husband further notes that the two substantive issues on which Asa H. Crawford, Jr. ("Crawford"), the valuator appointed by the court pursuant to stipulation by both parties, and Dr. Craig Galbraith ("Galbraith"), plaintiff's expert, disagreed were "the attorney compensation adjustment and the calculation of the Cap Rate (including small firm premium)[,]" and that the trial court "made absolutely no findings as to these two *crucial* issues."

[1] In the ED order, the trial court entered numerous findings of fact as to the expertise of both Crawford and Galbraith. The court also noted and found that "when two experts value the same businesses and or professional associations" attorney compensation adjustment and the calculation of the discount rate and capitalization rate "are the two issues most often disagreed upon by the two experts." The trial court then examined Crawford's valuation and methodology used in his report in great detail, determined that Crawford "considered approved methods to value a business and /or a professional practice[,]" and ultimately relied upon Crawford's valuation in valuing and distributing the law practices. We acknowledge that the trial court did not make explicit

holdings with respect to attorney compensation adjustment and the calculation of the discount rate, as husband argues. However, calculation of these specific and disputed factors is not mandatory; rather, the trial court must make sufficient findings of fact based upon competent evidence, and must in turn base its conclusions of law upon those findings. In essence, husband argues that the trial court's findings are insufficient because the trial court did not consider the computational factors husband favors; that is not our standard of review on appeal. We hold that the trial court properly considered Crawford's report, and properly computed value and distributions based thereupon.

Similarly, husband raises a somewhat tortuous argument regarding Rule 414 of the North Carolina Rules of Evidence. Rule 414 limits the admissibility of evidence offered to pay past medical expenses. Husband contends that the application of this rule impacted his personal injury law practice. While we decline to rule on whether Rule 414 has any impact on the valuation of a law practice, we note that, as stated above, the trial court based its determination upon Crawford's report. Husband makes similar arguments with respect to "insufficient findings as to [the] capitalization rate" and "no findings as to goodwill[.]" The fact that the trial court may or may not have considered the evidence or factors husband preferred is not the issue before us; the issue is whether there was competent evidence to support the trial court's findings, and whether those findings in turn supported the trial court's conclusions. Husband concedes that Crawford recognized a decrease in the value of husband's personal injury practice. We hold that Crawford's report constituted competent evidence, and that it supported the trial court's findings on the valuation of the law practices.

[2] Husband next contends that the trial court erred by distributing the divisible portions of the law practices to wife. He bases this argument on the fact that "the trial court here failed to make required findings about the valuation of the Law Practices (including goodwill, attorney compensation, Rule 414 and the Cap Rate)." Inasmuch as we have held that the trial court did not err in failing to make these findings, we hold that the trial court did not err in its subsequent distribution of the divisible portion of the law practices.

[3] Next, husband challenges the trial court's determination as to the classification of appreciation in Winner as active or passive. We note, as a preliminary matter, that plaintiff did not object to Crawford opining on whether the appreciation was active or passive. In fact, plaintiff's counsel elicited testimony on this issue. Specifically, counsel noted that Crawford was "not commissioned to determine the active or passive

nature of these appreciations[,]" but that "once we look at it, it makes sense." Crawford was then directed to break down the appreciation in the value of the parties' shares of Winner based on passive increases, like inflation, and active increases, such as gifts. Counsel then noted that "this is really where the fight is" with respect to whether the valuation was active or passive.

In its order, the trial court relied upon Crawford's report in valuing the shares of Winner, specifically with respect to their appreciation, and in determining that "this appreciation was active appreciation during the marriage and prior to the date of separation that resulted from marital efforts during the marriage. This appreciation is marital property." The trial court further separated this active appreciation from "the appreciation attributable to 'Inflation' and 'Other'[,]" which it found to be passive appreciation. It therefore distributed the active appreciation as marital property, and the passive appreciation as divisible property.

On review of the record, we hold that the trial court's findings of fact were supported by competent evidence, specifically Crawford's report which was admitted without objection. Husband's arguments notwithstanding, Crawford opined as to the nature of whether income was passive or active, and the trial court relied upon that evidence in entering its findings, which in turn supported the trial court's conclusions. Accordingly, we hold that the trial court did not err in classifying the appreciation in parties' interests in Winner as active or passive, and distributing the increase accordingly.

[4] Lastly, husband contends that the trial court "erred by failing to make sufficient findings [of fact] and conclusions of law as to Husband's ability to pay $494,772.00 by 15 July 2016." Specifically, the trial court considered the parties' evidence in favor of unequal division, and, in considering that evidence, held that:

> [Husband] shall be distributed 40% of the total net estate that totals $1,376,823.00 and [wife] shall be distributed 60%. 60% is $826,094.00. Subtract from that the marital and divisible property distributed to [wife] of $331,322.00 and [wife] is entitled to a distributive award of $494,772.00.

The trial court then went on to observe, in its Finding of Fact 46, that

> [Husband] owns a very lucrative law practice and still has an interest in another law practice. Although he is a minority interest in Winner Enterprises, the evidence demonstrated that he has absolute control as a co-manager with

> his mother of Winner [E]nterprises. He is able to get distributions from Winner [E]nterprises whenever he needs to as evidenced by his unilaterally obtaining distributions from Winner Enterprises of more than $250,000.00 in the past two years. In addition, [husband] utilizes the Winner Enterprises American Express card for the payment of personal expenses, and his shares of Winner Enterprises are worth $825,294.00. Plaintiff has the means to pay the distributive award ordered below.

Husband contends that both the trial court and Crawford found that husband's Winner shares were not liquid, and that thus the trial court could not cite them as a liquid source for the distributive award payment. However, husband fails to challenge Finding 46, above, namely that husband has two sources of income from his law practices, an ability to unilaterally obtain liquid distributions from Winner, and the ability and willingness to use the Winner credit card to pay personal expenses. Since husband does not challenge Finding 46, it is binding upon us. We hold that this evidence supports the trial court's finding that husband has the means to pay the distributive award, and that that finding in turn supports the order to pay it.

2. Alimony Order

With respect to the alimony order, husband contends that the trial court failed to make proper findings of fact and conclusions of law with respect to Rule 414, with respect to the valuation of wife's shares of Winner, and with respect to husband's ability to pay the distributional payment. Husband's arguments on these points specifically reference his arguments made with respect to the ED order, and as we have addressed those arguments above, we need not repeat our conclusions here. We incorporate our holdings on these arguments herein, and once more hold that the trial court did not err in its findings of fact or conclusions of law with respect to these issues.

III. Fees and Costs

In numerous additional arguments, husband contends that the trial court erred in awarding various fees, costs, and distributions to wife. We agree in part and disagree in part.

A. Standard of Review

"The decision regarding whether to award attorney's fees 'lies solely within the discretion of the trial judge, and that such allowance is reviewable only upon a showing of an abuse of the judge's discretion.' "

Kelly v. Kelly, 167 N.C. App. 437, 448, 606 S.E.2d 364, 372 (2004) (quoting *Rickert v. Rickert*, 282 N.C. 373, 378, 193 S.E.2d 79, 82 (1972)). "North Carolina statutes and case law place the award of expert witness fees within the discretion of the trial court." *Bennett v. Equity Residential*, 192 N.C. App. 512, 513, 665 S.E.2d 514, 515 (2008).

B. Analysis

Husband contends that the trial court erred by awarding attorney's fees to wife relating to her alimony claim, and in awarding expert witness costs to wife in purported excess of statutory limits.

1. Attorney's Fees

[5] In the alimony order, the trial court ordered that husband "shall pay partial fees to [wife] for her incurred attorney fees in the amount of $50,000.00 minus the $30,000.00 credit he received upon stipulation of the parties[.]" Husband notes that, in order to award attorney's fees, the trial court had to make a finding as to defense counsel's skill, his hourly rate and the reasonableness thereof, what he did, and the hours he spent on the case. *See Falls v. Falls*, 52 N.C. App. 203, 221, 278 S.E.2d 546, 558 (1981). While husband concedes that wife submitted two affidavits regarding counsel's bill, and that the trial court found wife's attorney's hourly rate to be reasonable, husband nonetheless contends that the trial court "made no findings as to the reasonableness of fees charged, time spent or as to the reasonableness of the $50,000.00 it ordered to be paid."

Husband contends that the affidavits did not differentiate fees owed for child support, post-separation support, or alimony. Wife notes, however, that the affidavits were admitted into evidence without any objection. "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, . . . It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion." N.C.R. App. P. 10(a)(1). Inasmuch as husband failed to object to the affidavits or their sufficiency at trial, he has failed to preserve that issue for appeal.

With respect to the trial court's findings, the trial court found:

> 39. [Wife's] attorney of record, John M. Martin, has submitted to the Court an affidavit. John M. Martin has been licensed as an attorney by the N.C. State Bar since 1975. His normal hourly rate is $395.00 per hour and this hourly rate is normal, customary, and reasonable for an attorney possessing the years of experience and expertise of John M. Martin. In addition, as indicated in [wife]'s Affidavit,

> other members of his firm including paralegals assisted Mr. Martin.
>
> 40. In [wife]'s attorney's Affidavit, she is requesting an attorney's fee award of $67,754.75 for time spent *on the alimony case only* up to and through February 21, 2016.
>
> 41. In the discretion of the Court, [wife] should be awarded $50,000.00 as partial attorney fees for the prosecution of her alimony claim against [husband]. Said amount of attorney fees is a reasonable amount of fees to be paid by [husband] on [wife]'s behalf and [husband] has the ability to pay the amount of attorney fees awarded.

(Emphasis added.) Because the affidavits were admitted without objection, we hold that they formed a sufficient evidentiary basis to permit the trial court to recognize wife's attorney's services, and the amount charged for them. The trial court explicitly found, within its discretion, that this fee was reasonable, based upon counsel's skill and expertise. The finding further reflects, notwithstanding husband's contentions, that the trial court made its determination solely based upon fees charged for work done in wife's alimony case, and not in prosecution of the remaining orders. As such, we hold that the trial court did not abuse its discretion in its award of attorney's fees.

2. Expert Witness Costs

[6] In the alimony order, the trial court also ordered that husband pay part of wife's fees for the cost of her expert witness, Melissa Dupuis ("Dupuis"), "in the amount of $20,000.00[.]" Husband contends that although the trial court awarded $20,000.00 in expert witness costs to wife, Dupuis' bills show only one entry, for $2,100.00, for actual testimony. Husband further contends that "there is no indication that Dupuis actually testified."

Husband's contention is somewhat curious, because Dupuis' testimony is present in the transcript of trial. Her direct and cross-examination spans over one hundred pages of transcript. Dupuis was accepted by the court as an expert in forensic accounting, without objection, and testified as to her accounting of the parties' incomes, specifically with respect to Winner and husband's law practices, and the calculation of alimony. Her testimony and reports were relied upon in both the child support order and the alimony order. It is clear, therefore, that Dupuis testified as an expert witness, and that the trial court was authorized by statute to award expert witness costs for that testimony.

The question, then, is whether the trial court could award costs for Dupuis' non-testimonial work. Our statutes provide that:

> In actions where allowance of costs is *not otherwise provided by the General Statutes*, costs may be allowed in the discretion of the court. Costs awarded by the court are subject to the limitations on assessable or recoverable costs set forth in G.S. 7A-305(d), unless specifically provided for otherwise in the General Statutes.

N.C. Gen. Stat. § 6-20 (2015) (emphasis added). Husband correctly notes that, pursuant to our general statutes, expert witness costs may be awarded "solely for actual time spent providing testimony at trial, deposition, or other proceedings." N.C. Gen. Stat. § 7A-305(d)(11) (2015). Were these the only statutory provisions on point, it would seem that wife should only be able to cover for Dupuis' testimony, and no more.

However, the North Carolina Rules of Evidence are also codified in statute. Rule 706(b) provides that court-appointed experts "are entitled to reasonable compensation in whatever sum the court may allow" and that "the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs." N.C. Gen. Stat. § 8C-1, Rule 706(b) (2015). Thus, while ordinarily the costs of an expert may only be awarded for testimony given, the costs of a court-appointed expert are not subject to such limitation.

Wife contends that, despite submitting Dupuis as her own expert, Dupuis became a court-appointed expert. Wife cites several cases in which a prior order by the court required that an expert be appointed, and that, despite the expert being retained by one party, that expert was functionally a court-appointed expert, entitled to fees pursuant to Rule 706. *See Swilling v. Swilling*, 329 N.C. 219, 223-24, 404 S.E.2d 837, 840 (1991) (where the trial court ordered that, if parties could agree on an appraiser, it would appoint that appraiser, and if they could not, it would one of its own choosing; this was held to be "a show cause order within the meaning of Rule 706(a)[,]" and the expert was properly entitled to compensation under Rule 706); *Weaver Inv. Co. v. Pressly Dev. Assoc.*, 234 N.C. App. 645, 661, 760 S.E.2d 755, 764-65 (2014) (where the trial court ordered the appointment of forensic experts, and there was no evidence that the experts were not court-appointed, it was not error to award their fees as costs).

In the instant case, there is a subpoena in the record, compelling Dupuis to testify. And there are both motions to appoint expert witnesses,

and orders appointing expert witnesses, in the record. However, there are no orders in the record appointing a forensic accountant for purpose of alimony, nor any order mentioning Dupuis by name or role.

The instant case is thus distinguishable from the cases cited by wife. In those cases, there was some form of prior court order appointing an expert, thus placing the parties on notice that the expert might be considered court-appointed pursuant to Rule 706. In the instant case, however, no such prior order exists with respect to Dupuis. Although Dupuis' work was relied upon by the trial court in its alimony order, and although husband provided no expert of his own for alimony purposes, there does not appear to be a basis upon which Dupuis could have been considered a court-appointed expert. Accordingly, we hold that the trial court erred in awarding expert fees as costs, except inasmuch as those fees encompassed fees for testimony only. We remand this matter for the court to make more detailed findings as to the extent of fees owed for Dupuis' testimony, and to enter an award accordingly.

IV. Motion to Dismiss

[7] Lastly, husband contends that the trial court erred in denying husband's motion to dismiss wife's child support appeal. We agree.

A. Standard of Review

" 'Failure to give timely notice of appeal in compliance with . . . Rule 3 . . . is jurisdictional, and an untimely attempt to appeal must be dismissed.' " *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 198, 657 S.E.2d 361, 365 (2008) (quoting *Booth v. Utica Mut. Ins. Co.*, 308 N.C. 187, 189, 301 S.E.2d 98, 99-100 (1983)).

B. Analysis

On 31 March 2016, the trial court entered the ED order. On 1 April 2016, the trial court entered the child support order and the alimony order. On 25 April 2016, within thirty days of all orders being filed, husband filed notice of appeal from the ED order and the alimony order. On 4 May 2016, within ten days of husband's notice of appeal, wife filed notice of cross-appeal from the ED order and the child support order. In his motion to dismiss wife's appeal with respect to child support, husband contended that (1) the time for wife to appeal the child support order had expired, and (2) as husband had not appealed the child support order, wife could not cross-appeal it.

Pursuant to Rule 3 of the North Carolina Rules of Appellate Procedure, appeals must be taken within thirty days after entry of judgment if the party has been properly served. N.C.R. App. P. 3(c)(1).

However, "[i]f timely notice of appeal is filed and served by a party, any other party may file and serve a notice of appeal within ten days after the first notice of appeal was served on such party." N.C.R. App. P. 3(c). The rules are not explicit regarding whether such a notice of appeal, in a single proceeding resulting in multiple orders, is limited to the orders contained in the initial notice of appeal. Nor does our case law make explicit whether a cross-appeal is so limited. This is therefore a matter of first impression before this Court.

Although the matter is one of first impression, it is not altogether novel. We find our decision in *Surratt v. Newton*, 99 N.C. App. 396, 393 S.E.2d 554 (1990), enlightening. In *Surratt*, Jerry Newton brought a claim for summary ejectment against Katherine Surratt. Katherine Surratt filed counterclaims against Jerry Newton, in which she joined Paul Jeffrey Newton as a defendant. At the conclusion of a trial which ended in Katherine Surratt's favor, both Jerry and Paul Jeffrey Newton moved for judgment notwithstanding the verdict ("JNOV"); the trial court denied these motions on 17 April 1989. Jerry Newton gave notice of appeal on 19 April 1989. Paul Jeffrey Newton gave notice of appeal on 1 May 1989. Katherine Surratt moved to dismiss Paul Jeffrey Newton's untimely appeal. The trial court granted this motion, and Paul Jeffrey Newton appealed. *Id.* at 399-401, 393 S.E.2d at 556-57.

At the time of *Surratt*, Rule 3 provided a 10-day window for appeal, rather than the 30-day window for appeal in the present day. Paul Jeffrey Newton's notice of appeal was thus filed outside of the initial 10-day window for appeals. Nonetheless, on appeal, Paul Jeffrey Newton contended that he had 10 days to file his appeal after Jerry Newton did so. This Court acknowledged the language of Rule 3(c), which provides that, " '[i]f a timely notice of appeal is filed and served by a party, any other party may file and serve a notice of appeal within 10 days after the first notice of appeal was served on such party.' " *Id.* at 402, 393 S.E.2d at 557 (quoting N.C.R. App. P. 3(c)). However, we then proceeded to distinguish the scenario from that contemplated by the Rules:

> Here, defendant Paul Jeffrey Newton was not an original party to this action but brought into the suit by counterclaim of the plaintiff. Defendants Paul Jeffrey Newton and Jerry Newton were charged with separate violations for separate time periods that each managed the property. Each defendant was represented by his own counsel. The trial court carefully separated each issue as it related to each defendant and the jury rendered separate and distinct verdicts against each defendant. We hold that Rule 3(c) merely contemplates an additional, extended time

> period for a response only from other parties to that same appeal. Defendant Jerry Newton's appeal was totally unrelated and unaffected by the appeal of defendant Paul Jeffrey Newton.

Id. at 402, 393 S.E.2d at 557. As a result, we affirmed the trial court's dismissal of Paul Jeffrey Newton's untimely appeal.

We find particularly helpful the operative language "parties to that same appeal." While it is clear that, in the instant case, both husband and wife were parties to the entirety of the *proceedings* below, appeal is taken from an *order or judgment*, not an entire proceeding. Despite the appeals all involving the same underlying facts, as was somewhat true in *Surratt*, husband appealed only from the ED order and alimony order. Since he did not appeal from the child support order, he was not a party "to that same appeal."

This is not to say that wife could not have appealed from the child support order at all. We decline to rule that husband, in filing his notice of appeal first, was able to frame all issues and orders on appeal to the exclusion of any others. However, for wife to appeal from an order that husband did not challenge, it was incumbent upon her to do so within the initial 30-day window available to all new appeals. Her filing during the 10-day window for cross-appeals, inasmuch as it exceeded the initial 30-day window, limited her to address only those orders husband addressed in his appeal.

Our ruling is firmly rooted in the interests of fairness. Wife contends that husband's filing of notice of appeal, so close to the end of the 30-day window, prevented her from properly filing an appeal of her own, and thus limited her to filing a cross-appeal. We note, however, that her cross-appeal of the child support order had the same impact on husband, in that it precluded him from filing a cross-appeal from the child support order in response to wife's cross-appeal. We further note that, even in the event of an untimely appeal, a remedy exists in the form of the petition for certiorari, which wife did not file.

In the interests of clarity, we shall now make our holding on this issue explicit. In a matter in which multiple, separate orders issue, and one party appeals from some, but not all, of those orders, a cross-appellant who files her cross-appeal outside of the 30-day window contemplated by Rule 3(c), but within the 10-day window for cross-appeals, shall be limited to appeal from only those orders challenged in the original appeal. We strongly admonish parties who are considering appeal to act promptly to preserve their rights, even if they subsequently choose to

voluntarily dismiss their appeals, rather than to rely on the magnanimity of opposing counsel.

We hold therefore that, in the instant case, the trial court erred in denying husband's motion to dismiss wife's appeal of the child support order. We reverse the trial court's order denying the motion to dismiss.

V. Ownership Interest

[8] In her first argument, wife contends that the trial court erred in "failing to recognize that it had the legal authority to" transfer wife's ownership interest in Winner to husband. Wife concedes that she does not contend that the trial court's equitable division was in error, but instead offers that, if this Court "requires a remand to the District Court on equitable distribution," it should instruct the trial court to exercise its authority to transfer wife's shares of Winner to husband. Because we do not remand to the trial court on the ED order, we decline to instruct the trial court as wife suggests.

VI. Other Arguments

In her second, third, and fourth arguments, wife raises issues with respect to the child support order. Because we have held that the trial court erred in denying husband's motion to dismiss wife's cross-appeal of the child support order, we hold that this matter is not properly before us, and dismiss these arguments.

VII. Conclusion

With respect to husband's arguments on appeal, the trial court did not err in its findings of fact or conclusions of law, nor in awarding attorney's fees. However, it could only award expert witness fees for time actually spent testifying, and we remand for recalculation of those fees. We hold that wife's appeal of the child support order was untimely, and that the trial court erred in denying husband's motion to dismiss it.

With respect to wife's arguments on appeal, we dismiss her arguments with respect to the ED order, as she did not appeal from that order. We further hold that because the trial court erred in denying husband's motion to dismiss wife's cross-appeal of the child support order, that issue is not properly before us. We therefore dismiss wife's remaining arguments, all of which concern the child support order.

AFFIRMED IN PART, REMANDED IN PART, REVERSED IN PART, DISMISSED IN PART.

Judges DIETZ and MURPHY concur.

STATE OF NORTH CAROLINA
v.
FELIX RICARDO SALDIERNA

No. COA14-1345-2

Filed 18 July 2017

Confessions and Incriminating Statements—juvenile—totality of circumstances—knowing, willing, and understanding waiver of rights

The trial court erred by denying defendant juvenile's motion to suppress his statement to an interrogating officer where the totality of circumstances showed he did not knowingly, willingly, and understandingly waive his rights. Defendant, who had difficulty with English, signed a waiver that was in English only, and his unintelligible answers to questions did not show a clear understanding and a voluntary waiver of those rights.

On remand from the Supreme Court of North Carolina in accordance with their opinion, ___ N.C. ___, 794 S.E.2d 474 (2016). Previously heard by this Court on 2 June 2015, ___ N.C. App. ___, 775 S.E.2d 326 (2015), from appeal by defendant from order entered 20 February 2014 by Judge Forrest D. Bridges and judgment entered 4 June 2014 by Judge Jesse B. Caldwell in Mecklenburg County Superior Court. The issue addressed on remand is the validity of defendant's waiver of his statutory and constitutional rights.

Attorney General Roy Cooper, by Assistant Attorney General Jennifer St. Clair Watson, for the State.

Goodman Carr, PLLC, by W. Rob Heroy, for defendant.

BRYANT, Judge.

Where the totality of the circumstances shows that the juvenile defendant did not knowingly, willingly, and understandingly waive his rights pursuant to the State and federal constitutions or N.C. Gen. Stat. § 7B-2101(d), the trial court erred in denying defendant's motion to suppress his statement made to an interrogating officer, and we reverse, vacate, and remand.

Juvenile defendant Felix Ricardo Saldierna was arrested on 9 January 2013 at his home in South Carolina in connection with incidents involving

several homes around Charlotte that had been broken into on 17 and 18 December 2012.[1] Before questioning, the detective read defendant his rights and asked whether he understood them. Defendant ultimately signed a Juvenile Waiver of Rights form, of which defendant had been given two copies—one in English and one in Spanish. After initialing and signing the English language form, Felix, who was sixteen years old at the time, asked to call his mother before undergoing custodial questioning by Detective Kelly of the Charlotte-Mecklenburg Police Department. The call was allowed, but defendant could not reach his mother. The custodial interrogation then began. Over the course of the interrogation, defendant confessed his involvement in the incidents in Charlotte on 17 and 18 December 2012.

On 22 January 2013,

> [d]efendant was indicted . . . for two counts of felony breaking and entering, conspiracy to commit breaking and entering, and conspiracy to commit common law larceny after breaking and entering. On 9 October 2013, defendant moved to suppress his confession, arguing that it was illegally obtained in violation both of his rights as a juvenile under N.C.G.S. § 7B-2101 and of his rights under the United States Constitution. After conducting an evidentiary hearing, the trial court denied the motion in an order entered on 20 February 2014, finding as facts that defendant was advised of his juvenile rights and, after receiving forms setting out these rights both in English and Spanish and having the rights read to him in English by [Detective] Kelly, indicated that he understood them. In addition, the trial court found that defendant informed [Detective] Kelly that he wished to waive his juvenile rights and signed the form memorializing that wish.
>
> . . . .
>
> On 4 June 2014, defendant entered pleas of guilty to two counts of felony breaking and entering and two counts of conspiracy to commit breaking and entering, while reserving his right to appeal from the denial of his motion to suppress. The court sentenced defendant to a

1. *See State v. Saldierna*, ___ N.C. App. ___, ___, 775 S.E.2d 326, 327–30 (2015) and *State v. Saldierna*, ___ N.C. ___, 794 S.E.2d 474, 477–76 (2016) for more comprehensive statements of the facts.

> term of six to seventeen months, suspended for thirty-six months subject to supervised probation.
>
> The Court of Appeals reversed the trial court's order denying defendant's motion to suppress, vacated the judgments entered upon defendant's guilty pleas, and remanded the case to the trial court for further proceedings. The Court of Appeals recognized that the trial court correctly found that defendant's statement asking to telephone his mother was ambiguous at best. . . . [but it] held that when a juvenile between the ages of fourteen and eighteen makes an ambiguous statement that potentially pertains to the right to have a parent present, an interviewing officer must clarify the juvenile's meaning before proceeding with questioning.

Saldierna, ___ N.C. at ___, 794 S.E.2d at 476–77 (footnote omitted) (citations omitted). The Supreme Court of North Carolina granted the State's petition for discretionary review. *Id.* at ___, 794 S.E.2d at 477.

In reviewing this Court's opinion in *Saldierna*, the Supreme Court reasoned that "[a]lthough defendant asked to call his mother, he never gave any indication that he wanted to have her present for his interrogation, nor did he condition his interview on first speaking with her." *Id.* at ___, 794 S.E.2d at 479. As a result, the Supreme Court reversed the decision of the Court of Appeals "[b]ecause defendant's juvenile statutory rights were not violated[.]" *Id.* However, in doing so, the Supreme Court noted that "[e]ven though we have determined that defendant's N.C.G.S. § 7B-2101(a)(3) right [(to have a parent present during questioning)] was not violated, defendant's confession is not admissible unless he knowingly, willingly, and understandingly waived his rights." *Id.* (citing N.C.G.S. § 7B-2101(d)). Thus, the case was remanded to this Court "for consideration of the validity of defendant's waiver of his statutory and constitutional rights." *Id.*

As the Supreme Court of North Carolina has determined that defendant's N.C.G.S. § 7B-2101(a)(3) right was not violated as "defendant's request to call his mother was not a clear invocation of his right to consult a parent or guardian before proceeding with the questioning[,]" *Saldierna*, ___ N.C. at ___, 794 S.E.2d at 475, the question before us now on remand is whether defendant knowingly, willingly, and understandingly waived his rights under section 7B-2101 of the North Carolina General Statutes and under the constitutions of North Carolina and the

United States, so as to make his confession admissible. We conclude that he did not.

> "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) (citing *State v. Brooks*, 337 N.C. 132, 140–41, 446 S.E.2d 579, 585 (1994)). Findings of fact [as to whether a waiver of rights was made knowingly, willingly, and understandingly] are binding on appeal if [they are] supported by competent evidence, *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982) (citations omitted), while conclusions of law [regarding whether a waiver of rights was valid and a subsequent confession voluntary,] are reviewed de novo, *State v. Ortiz-Zape*, 367 N.C. 1, 5, 743 S.E.2d 156, 159 (2013) (citing *Biber*, 365 N.C. at 168, 712 S.E.2d at 878), *cert. denied*, — U.S. —, 134 S. Ct. 2660, 189 L. Ed. 2d 208 (2014).

Id. at ___, 794 S.E.2d at 477.

"In order to protect the Fifth Amendment right against compelled self-incrimination, suspects, including juveniles, are entitled to the warnings set forth in *Miranda v. Arizona*, prior to police questioning." *In re K.D.L.*, 207 N.C. App. 453, 457, 700 S.E.2d 766, 770 (2010) (citing 384 U.S. 436, 478–79, 16 L. Ed. 2d 694, 726 (1966)). Thus,

> [t]he North Carolina Juvenile Code provides additional protection for juveniles. Juveniles who are "in custody" must be advised of the following before questioning begins:
>
> (1) That the juvenile has the right to remain silent;
>
> (2) That any statement the juvenile does make can be and may be used against the juvenile;
>
> (3) That the juvenile has a right to have a parent, guardian, or custodian present during questioning; and
>
> (4) That the juvenile has a right to consult with an attorney and that one will be appointed for the juvenile if the juvenile is not represented and wants representation.

Id. at 457–58, 700 S.E.2d at 770 (quoting N.C. Gen. Stat. § 7B-2101(a)(1)–(4) (2009)). "Previous decisions by our appellate division indicate the general *Miranda* custodial interrogation framework is applicable to section 7B-2101." *Id.* at 458, 700 S.E.2d at 770 (citing *In re W.R.*, 363 N.C. 244, 247, 675 S.E.2d 342, 344 (2009)); *see id.* at 459, 700 S.E.2d at 771 ("[W]e cannot forget that police interrogation is inherently coercive—particularly for young people." (citations omitted)).

"Before admitting into evidence any statement resulting from custodial interrogation,[2] the court shall find that the juvenile knowingly, willingly, and understandingly waived the juvenile's rights." N.C. Gen. Stat. § 7B-2101(d) (2015); *State v. Oglesby*, 361 N.C. 550, 555, 648 S.E.2d 819, 822 (2007) ("Before allowing evidence to be admitted from a juvenile's custodial interrogation, a trial court is required to 'find that the juvenile knowingly, willingly, and understandingly waived the juvenile's rights.' " (quoting N.C.G.S. § 7B-2101(d))).[3]

"Whether a waiver is knowingly and intelligently made depends on the specific facts and circumstances of each case, including the background, experience, and conduct of the accused." *State v. Simpson*, 314 N.C. 359, 367, 334 S.E.2d 53, 59 (1985) (citations omitted). "When determining the voluntariness of a confession, we examine the 'totality of the circumstances surrounding the confession.' " *State v. Hicks*, 333 N.C. 467, 482, 428 S.E.2d 167, 176 (1993) (quoting *State v. Barlow*, 330 N.C. 133, 140–41, 409 S.E.2d 906, 911 (1991)), *abrogated by State v. Buchanan*, 353 N.C. 332, 543 S.E.2d 823 (2001). Furthermore, "an express *written* waiver, while strong proof of the validity of the waiver, is not inevitably sufficient to establish a *valid* waiver." *Simpson*, 314 N.C. at 367, 334 S.E.2d at 59 (emphasis added) (citation omitted).

"The State must show by a preponderance of the evidence that the defendant made a knowing and intelligent waiver of his rights and that his statement was voluntary." *State v. Flowers*, 128 N.C. App. 697, 701, 497 S.E.2d 94, 97 (1998) (citing *State v. Thibodeaux*, 341 N.C. 53, 58, 459

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2. The parties do not dispute that defendant was in custody at the time of questioning

3. Notably, in 2015, the General Assembly amended subsection (b) of N.C.G.S. § 7B-2101 to raise the age from 14 to 16 with regard to the admissibility of juveniles' in-custody admissions where a parent is not present: "When the juvenile is less than 16 years of age, no in-custody admission or confession resulting from interrogation may be admitted into evidence unless the confession or admission was made in the presence of the juvenile's parent, guardian, custodian, or attorney." N.C. Sess. Laws 2015-58, § 1.1, eff. Dec. 1, 2015. At the time of his custodial interrogation on 9 October 2013, defendant in the instant case had turned 16 on 19 August 2013, less than two months before.

S.E.2d 501, 505 (1995)). Indeed, "the burden upon the State to ensure a juvenile's rights are protected is greater than in the criminal prosecution of an adult." *In re M.L.T.H.*, 200 N.C. App. 476, 489, 685 S.E.2d 117, 126 (2009) (citing *In re T.E.F.*, 359 N.C. 570, 575, 614 S.E.2d 296, 299 (2005)); *see also Simpson*, 314 N.C. at 367, 334 S.E.2d at 59 ("The prosecution bears the burden of demonstrating that the waiver was knowingly and intelligently made[.]" (citation omitted)).

Here, in denying defendant's motion to suppress his confession, the trial court found and concluded in relevant part as follows regarding defendant's waiver of his juvenile rights:

FINDINGS OF FACT

1. That Defendant was in custody.
2. That Defendant was advised of his juvenile rights pursuant to North Carolina General Statute § 7B-2101.
3. That Detective Kelly of the Charlotte-Mecklenburg Police Department advised Defendant of his juvenile rights.
4. That Defendant was advised of his juvenile rights in three manners. Defendant was advised of his juvenile rights in spoken English, in written English, and in written Spanish.
5. That Defendant indicated that he understood his juvenile rights as given to him by Detective Kelly.
6. That Defendant indicated he understood his rights after being given and reviewing a form enumerating those rights in Spanish.
7. That Defendant indicated he understood that he had the right to remain silent. Defendant understood that to mean that he did not have to say anything or answer any questions. Defendant initialed next to this right at number 1 on the English rights form provided to him by Detective Kelly to signify his understanding.
8. That Defendant indicated he understood that anything he said could be used against him. Defendant initialed next to this right at number 2 on the English rights form provided to him by Detective Kelly to signify his understanding.

9. That Defendant indicated he understood that he had the right to have a parent, guardian, or custodian there with him during questioning. Defendant understood the word parent meant his mother, father, stepmother, or stepfather. Defendant understood the word guardian meant the person responsible for taking care of him. Defendant understood the word custodian meant the person in charge of him where he was living. Defendant initialed next to this right at number 3 on the English rights form provided to him by Detective Kelly to signify his understanding.

10. That Defendant indicated he understood that he had the right to have a lawyer and that he had the right to have a lawyer there with him at the time to advise and help him during questioning. Defendant initialed next to this right at number 4 on the English rights form provided to him by Detective Kelly to signify his understanding.

11. That Defendant indicated he understood that if he wanted a lawyer there with him during questioning, a lawyer would be provided to him at no cost prior to questioning. Defendant initialed next to this right at number 5 on the English rights form provided to him by Detective Kelly to signify his understanding.

12. That Defendant initialed a space below the enumerated rights on the English rights form then stated the following: "I am 14 years old or more and I understand my rights as explained by Detective Kelly. I DO with [sic] to answer questions now, WITHOUT a lawyer, parent, guardian, or custodian here with me. My decision to answer questions now is made freely and is my own choice. No one has threatened me in any way or promised me special treatment. Because I have decided to answer questions now, I am signing my name below."

13. That Defendant's signature appears on the English rights form below the initialed portions of the form. Defendant's signature appears next to the date, 1-9-13, and the time, 12:10. Detective Kelly signed her name as a witness below Defendant's signature.

14. That after being informed of his rights, informing Detective Kelly he wished to waive those rights, and signing the rights form, Defendant communicated to Detective Kelly that he wished to contact his mother by phone. . . .

. . . .

CONCLUSIONS OF LAW

1. That the State carried its burden by a preponderance of the evidence that Defendant knowingly, willingly, and understandingly waived his juvenile rights.

2. That the interview process in this case was consistent with the interrogation procedures as set forth in North Carolina General Statute § 7B-2101.

3. That none of Defendant's State or Federal rights were violated during the interview conducted of Defendant.

4. That statements made by Defendant were not gathered as a result of any State or Federal rights violation.[4]

In the instant case, defendant was sixteen years of age at the time he was interviewed by Detective Kelly and had only obtained an eighth

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4. "With respect to juveniles, both common observation and expert opinion emphasize that the distrust of confessions made in certain situations . . . is imperative in the case of children from an early age through adolescence." *In re Gault*, 387 U.S. 1, 48, 18 L. Ed. 2d 527, 557 (1967) (internal citation omitted); *see also In re J.D.B.*, 564 U.S. 261, 269, 180 L. Ed. 2d 310, 321 (2011) ("[The] risk [of false confessions] is all the more troubling—and recent studies suggest, all the more acute—when the subject of custodial interrogation is a juvenile. See Brief for Center on Wrongful Convictions of Youth et al. as *Amici Curiae* 21–22 (collecting empirical studies that 'illustrate the heightened risk of false confessions from youth')."). Indeed, even Justice Alito, in his dissenting opinion, acknowledged the "particular care" that must be taken with juveniles to ensure against involuntary confessions:

> [W]here the suspect is much younger than the typical juvenile defendant, courts should be instructed to take particular care to ensure that incriminating statements were not obtained involuntarily. The voluntariness inquiry is flexible and accommodating by nature, and the Court's precedents already make clear that "special care" must be exercised in applying the voluntariness test where the confession of a "mere child" is at issue. If *Miranda*'s rigid, one-size-fits-all standards fail to account for the unique needs of juveniles, the response should be to rigorously apply the constitutional rule against coercion to ensure the rights of minors are protected.

Id. at 297–98, 180 L. Ed. 2d at 340 (Alito, J., dissenting) (internal citations omitted).

grade education. Defendant indicated Spanish was his primary language. He stated he could write in English, but that he had difficulty reading English and difficulty in understanding English as spoken. The interrogation took place in the booking area of the Justice Center, and defendant was at all times in the presence of three law enforcement officers.[5] The transcript of the audio recording of Detective Kelly's conversation with defendant in which defendant was said to have "knowingly, willingly, and understandingly" waived his rights and agreed to speak with the detective reads, in full, as follows:

> K: You understand I'm a police officer, right?
>
> F: Yes maam.
>
> K: Ok, and that I would like to talk to you about this. And this officer has also explained to me and I understand that I have the right to remain silent, that means that I don't have to say anything or answer any questions. Should be right there number 1 right on there. Do you understand that?
>
> F: *[unintelligible] questions?*
>
> K: Yes, that is your right? So do you understand that? If you understand that, put your initials right there showing that you understand that. On this sheet. On this one. You can put it on both. Anything I say can be used against me. Do you understand that?
>
> F: Yes maam.
>
> K: I have the right to have a parent guardian or custodian here with me now during questioning. Parent means my mother, father, stepmother, or stepfather. Guardian means the person responsible for taking care of me. Custodian means the person in charge of me where I am living. Do you understand that? Do you want to read that?
>
> F: Yeah.[6]
>
> K: Do you understand that?

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5. Four officers were involved in defendant's arrest, including Detective Kelly.

6. It is unclear whether defendant's response—"Yeah"—is a response to the first question, "Do you understand that?" or a response to the second question, "Do you want to read that?"

F: *[no response]*

K: I have the right to talk to a lawyer and to have a lawyer here with me now to advise and help during questioning. Do you understand that?

F: *[unintelligible]*

K: If I want to have a lawyer with me during questioning one will be provided to me at no cost before any questioning. Do you understand that?

F: Yes maam.

K: Ok. Now I want to talk to you about some stuff that's happened in Charlotte. And um, I will tell you this. There's been some friends of yours that have already been questioned about these items and these issues. And they've been locked up. And that's what I want to talk to you about. Do you want to help me out and help me understand what's been going on with some of these cases and talk to me about this now here?

F: Uh

K: Are you willing to talk to me is what I'm asking.

F: Yes maam.

K: Ok. So I am 14 years or more. Let me see that pen. And I understand my rights as they've been explained by [D]etective Kelly. I do wish to answer questions now without a lawyer, parent, guardian or custodian here with me? My decision to answer questions now is made freely and is my own choice. No one has threatened me in any way or has promised me any special treatment because I have decided to answer questions now. I am signing my name below. Do you understand this? Initial, sign, date and time.[7]

[noise]

K: *it is 1/9/13. It is 12:10PM. [unintelligible background talking among officers]*

F: *Um, Can I call my mom?*

K: *Call your mom now?*

7. Notably, there is no recorded affirmative response by defendant to this question.

F: *She's on her um. I think she is on her lunch now.*

K: *You want to call her now before we talk?*

K [to other officers]: *He wants to call his mom.*

F: *Cause she's on, I think she's on her lunch.*

Other officer: *[unintelligible] He left her a message on her phone.*

F: *But she doesn't speak English.*

[conversation among officers]

K: I have mine. Can he dial it from a landline you think?

[more unintelligible conversation among officers]

[other officer]: step back outside and we'll let you call your mom outside. [unintelligible]. You're going to have to talk to her. Neither one of us speak Spanish, ok.

[more unintelligible conversation among officers].

9:50: [[defendant] can be heard on phone. Call is not intelligible.]

10:40 F [Phone can be heard making a phone call in Spanish]

[Sound of door closing].

K: 12:20: Alright Felix, so, let's talk about this thing going on. Like I said a lot of your friends have been locked up and everybody's talking. They're telling me about what's going on and what you've been up to. I'm not saying you're the ringleader of this here thing and some kind of mastermind right but I think you've gone along with these guys and gotten yourself into a little bit of trouble here. This is not something that's going to end your life. You know what I'm saying. This is not a huge deal. I know you guys were going into houses when nobody was home. You weren't looking to hurt anybody or anything like that. I just want to hear your side of the story. We can start off. I'm going to ask you questions I know the answer to. A lot of these questions are to tell if you're being truthful to me . . .

(emphasis added).

While our Supreme Court has held that defendant's question "Um, Can I call my mom?" was not sufficient to clearly invoke his statutory right to have his mother present, *see Saldierna*, ___ N.C. at ___, 794 S.E.2d at 475, this transcript nevertheless contains several "[unintelligible]" remarks or non-responses by defendant, mostly used to indicate defendant's "answers" to Detective Kelly's questions regarding whether or not he understood his statutory and constitutional rights. *Cf. Fare v. Michael C.*, 442 U.S. 707, 726–27, 61 L. Ed. 2d 197, 213 (1979) (concluding that a 16 ½-year-old juvenile "voluntarily and knowingly waived his Fifth Amendment rights" where "[t]here [was] no indication in the record that [the juvenile] failed to understand what the officers told him[,]" "no special factors indicate[d] that [the juvenile] was unable to understand the nature of his actions[,]" and the juvenile had "considerable experience with the police"). *But see* N.C.G.S. § 7B-2101(c) ("If the juvenile indicates in any manner and at any stage of questioning pursuant to this section that the juvenile does not wish to be questioned further, the officer shall cease questioning.").

Although decided almost twenty years before *In re Gault*, and with much more egregious facts regarding the coercion of a confession from a juvenile, the United States Supreme Court in *Haley v. State of Ohio*, reasoned as follows:

> The age of petitioner, the hours when he was grilled, the duration of his quizzing, the fact that he had no friend or counsel to advise him, the callous attitude of the police towards his rights combine to convince us that this was a confession wrung from a child by means which the law should not sanction. Neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law.
>
> But we are told that this boy was advised of his constitutional rights before he signed the confession and that, knowing them, he nevertheless confessed.[8] That assumes, however, that a boy of fifteen, without aid of counsel, would have a full appreciation of that advice and that on the facts of this record he had a freedom of

8. By stating "we are told that this boy was advised of his constitutional rights before he signed the confession," *Haley*, 332 U.S. at 601, 92 L. Ed. at 229, the Supreme Court was acknowledging that contrary to the police officers' testimony otherwise, the juvenile was not, in fact, advised of his right to counsel at any time, but was only given a typed version of his confession to sign, which included language at the beginning purporting to advise the juvenile of his "constitutional rights." *Id.* at 598, 92 L. Ed. at 228.

> choice. We cannot indulge those assumptions. *Moreover, we cannot give any weight to recitals which merely formalize constitutional requirements. Formulas of respect for constitutional safeguards cannot prevail over the facts of life which contradict them.* They may not become a cloak for inquisitorial practices and make an empty form of the due process of law for which free men fought and died to obtain.

332 U.S. 596, 600–01, 92 L. Ed. 224, 229 (1948) (emphasis added) (reversing a fifteen-year-old boy's conviction for murder where his confession was obtained after a five-hour-long interrogation, which began at midnight, and where the boy was not advised of his rights and was not permitted to have counsel or a parent or family member present).

"The totality of the circumstances *must be carefully scrutinized* when determining if a youthful defendant has legitimately waived his *Miranda* rights." *State v. Reid*, 335 N.C. 647, 663, 440 S.E.2d 776, 785 (1994) (emphasis added) (citing *State v. Fincher*, 309 N.C. 1, 19, 305 S.E.2d 685, 697 (1983)). The circumstances to consider in determining whether a wavier is voluntary (knowingly, willingly, and understandingly made) "includ[e] the background, experience, and conduct of the accused." *See Simpson*, 314 N.C. at 367, 334 S.E.2d at 59 (citation omitted).

In the instant case, there is no indication that defendant had any familiarity with the criminal justice system. Unlike the defendant in *Fare v. Michael C.*, there is no indication of "considerable experience with the police," 442 U.S. at 726, 61 L. Ed. 2d at 213, and, unlike in *Fare*, there are factors in the record in the instant case which indicate defendant did not fully understand (or might not have fully understood) Detective Kelly's questions such that he freely and intelligently waived his rights. *See id.*; *cf. Gallegos v. Colorado*, 370 U.S. 49, 54, 8 L. Ed. 2d 325, 328 (1962) ("The prosecution says that the boy was advised of his right to counsel, but that he did not ask either for a lawyer or for his parents. But a 14-year-old boy, *no matter how sophisticated*, is unlikely to have any conception of what will confront him when he is made accessible only to the police. That is to say, we deal with a person who is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and who is unable to know how to protect his own interests or how to get the benefits of his constitutional rights." (emphasis added)). Because the evidence does not support the trial court's findings of fact in the instant case that defendant "understood" Detective's Kelly's questions and statements regarding his rights, we conclude that he did not "legitimately waive[] his *Miranda* rights."

See Fare, 442 U.S. at 726–27, 61 L. Ed. 2d at 213. As a result, we decline to "give any weight to recitals," like the juvenile rights waiver form signed by defendant, "which merely formalize[d] constitutional requirements." *Haley*, at 601, 92 L. Ed. at 229; *see also Simpson*, 314 N.C. at 367, 334 S.E.2d at 59.

To be valid, a waiver should be voluntary, not just on its face, i.e., the paper it is written on, but *in fact*. It should be unequivocal and unassailable when the subject is a juvenile. The fact that the North Carolina legislature recently raised the age that juveniles can be questioned without the presence of a parent from age fourteen to age sixteen is evidence the legislature acknowledges juveniles' inability to fully and voluntarily waive essential constitutional and statutory rights.[9] Here, despite the trial court's many findings of fact that defendant "indicated he understood" Detective Kelly's questions and statements regarding his rights, the evidence as recorded contemporaneously during the questioning and as noted in testimony from the hearing, does not support those findings. Further, the findings do not reflect the scrutiny that a trial court is required to give in juvenile cases. At the very least, the evidence supporting the findings made by the trial court in the instant case was not substantial under the totality of the circumstances. *See Reid*, 335 N.C. at 663, 440 S.E.2d at 785.

Indeed, during voir dire and in response to the question "Did [defendant] also state that he might have some issues understanding English as it is spoken as well?" Detective Kelly answered, "I believe he did." Detective Kelly also testified that defendant told her "he wasn't very good at reading English." Thus, even if defendant did sign the English version of the Juvenile Waiver of Rights form, the evidence in the record simply does not fully support that defendant knew or understood the implications of what he was signing when he was signing it. *See Simpson*, 314 N.C. at 367, 334 S.E.2d at 59 ("[A]n express written waiver, while strong proof of the validity of the waiver, is not inevitably sufficient to establish a valid waiver." (citation omitted)).

Furthermore, when Detective Kelly tells defendant "I am signing my name below," she then asks, "Do you understand this? Initial, sign, date and time," presumably instructing defendant to initial, sign, and date the *English* version of the form, which he does. But no response is recorded that he "understood" what was being asked by Detective Kelly—indeed, the next intelligible utterance made by defendant is "Um, can I call my mom now?" In fact, no copy of the Spanish version of the Juvenile Waiver

9. *See supra* note 3.

of Rights form, purportedly given to defendant contemporaneously with the English version which he signed, exists in the record; defendant was instructed to initial the English version of the form, which is in the record. Thus, Finding of Fact No. 4—"[t]hat [d]efendant was advised of his juvenile rights . . . in written Spanish," is not supported by competent *documentary* evidence in the record. Accordingly, despite defendant's "express written waiver," *see id.*, the evidence does not support the trial court's ultimate conclusion that defendant executed a valid waiver.

In addition, before beginning her questioning of defendant about multiple felony charges, Detective Kelly said, "This is not something that is going to end your life. You know what I am saying? This is not a huge deal[.]" Arguably, this statement mischaracterized the gravity of the situation in an attempt to extract information from a juvenile defendant.

Although there may be no duty for an interrogating official to explain a defendant's juvenile rights in any greater detail than what is required by statute, *see Flowers*, 128 N.C. App. at 700, 497 S.E.2d at 97, "[i]t is well established that juveniles differ from adults in significant ways and that these differences are especially relevant in the context of custodial interrogation." *Saldierna*, ___ N.C. at ___, 794 S.E.2d at 483 (Beasley, J., dissenting) (citations omitted). Such a mischaracterization by an interrogating official, then, surely cuts squarely against our legislature's "well-founded policy of special protections for juveniles," especially where, as here, nothing in the record indicates that defendant had any prior experience with law enforcement officers such that he would have been aware of criminal procedure generally or the consequences of speaking with the police. *Cf. Fare*, 442 U.S. at 726–27, 61 L. Ed. at 213 (concluding that a 16½-year-old juvenile "voluntarily and knowingly waived his Fifth Amendment rights" where, *inter alia*, the juvenile had "considerable experience with the police"); *Simpson*, 314 N.C. at 367, 334 S.E.2d at 59 (considering the "background" and "experience" of the accused in determining the voluntariness of waiver); *see also* Cara A. Gardner, *Failing to Serve and Protect: A Proposal for an Amendment to a Juvenile's Right to a Parent, Guardian, or Custodian During a Police Interrogation After* State v. Oglesby, 86 N.C. L. Rev. 1685, 1698 (2008) ("[The] policy of special protection [for juvenile defendants] is well-founded because of juveniles' unique vulnerabilities. Juveniles are uniquely vulnerable for two reasons: (1) *they are less likely than adults to understand their rights*; and (2) they are distinctly susceptible to police interrogation techniques." (emphasis added)).

Generally, we accept that the trial court resolves conflicts in the evidence and weighs the credibility of evidence and witnesses. *See State*

v. O'Connor, 222 N.C. App. 235, 241, 730 S.E.2d 248, 252 (2012). However, as we have noted, juvenile cases require special attention. *See Reid*, 335 N.C. at 663, 440 S.E.2d at 785.

Our Supreme Court has determined that this juvenile's request to call his mother after signing a waiver form was not an invocation of his right to have a parent present. *Saldierna*, ___ N.C. at ___, 794 S.E.2d at 475. However, defendant's act of requesting to call his mother immediately after he ostensibly executed a form stating he was giving up his rights, including his right to have a parent present, shows enough uncertainty, enough anxiety on the juvenile's behalf, so as to call into question whether, under all the circumstances present in this case, the waiver was (unequivocally) valid.

Here, the waiver was signed in English only, and defendant's unintelligible answers to questions such as, "Do you understand these rights?" do not show a clear understanding and a voluntary waiver of those rights.[10] Defendant stated firmly to the officer that he wanted to call his mother, even after the officer asked (unnecessarily), "Now, before you talk to us?" Further, defendant reiterated this desire, even in spite of the officer's aside to other officers in the room: "He wants to call his mom." Such actions would show a reasonable person that this juvenile defendant did not knowingly, willingly, and understandingly waive his rights. Rather, his last ditch effort to call his mother (for help), after his prior attempt to call her had been unsuccessful, was a strong indication that he did not want to waive his rights at all. Yet, after a second unsuccessful attempt to reach his working parent failed, this juvenile, who had just turned sixteen years old, probably felt that he had no choice but to talk to the officers. It appears, based on this record, that defendant did not realize he had the choice to refuse to waive his rights, as the actions he took were not consistent with a voluntary waiver. As a result, any "choice" defendant had to waive or not waive his rights is meaningless where the record does not indicate that defendant truly understood that he had a choice at all.

Furthermore, the totality of the circumstances set forth in this record ultimately do not fully support the trial court's conclusions of law, namely, "[t]hat the State carried its burden by a preponderance of the evidence that [d]efendant knowingly, willingly, and understandingly waived his juvenile rights." *See Ortiz-Zape*, 367 N.C. at 5, 743 S.E.2d at 159 (citing *Biber*, 365 N.C. at 168, 712 S.E.3d at 878) ("[C]onclusions of law are reviewed de novo and are subject to full review."). Here, too

10. *See supra* notes 6 and 7 and accompanying text.

much evidence contradicts the English language written waiver signed by defendant, which, in any event, is merely a "recital" of defendant's purported decision to waive his rights. *See Haley*, 332 U.S. at 601, 92 L. Ed. 2d at 229 ("[W]e cannot give any weight to recitals which merely formalize constitutional requirements."). Accordingly, it should not be considered as significant evidence of a valid waiver. *See Simpson*, 314 N.C. at 367, 334 S.E.2d at 59 ("[A]n express *written* waiver, while strong proof of the validity of the waiver, is not inevitably sufficient to establish a *valid* waiver." (emphasis added) (citation omitted)).

"Our criminal justice system recognizes that [juveniles'] immaturity and vulnerability sometimes warrant protections well beyond those afforded adults. It is primarily for that reason that a separate juvenile code with separate juvenile procedures exists." *In re Stallings*, 318 N.C. 565, 576, 350 S.E.2d 327, 333 (1986) (Martin, J., dissenting). Indeed, "at least two empirical studies show that the vast majority of juveniles are *simply incapable of understanding* their *Miranda* rights and the meaning of waiving those rights." *Oglesby*, 361 N.C. at 559 n.3, 648 S.E.2d at 824 n.3 (Timmons-Goodson, J., dissenting) (emphasis added) (citation omitted).

> Even for an adult, the physical and psychological isolation of custodial interrogation can undermine the individual's will to resist and . . . compel him to speak where he would not otherwise do so freely. Indeed, the pressure of custodial interrogation is so immense that it can induce a frighteningly high percentage of people to confess to crimes they never committed. That risk is all the more troubling—and recent studies suggest, all the more acute—when the subject of custodial interrogation is a juvenile.

J.D.B. v. North Carolina, 564 U.S. 261, 269, 180 L. Ed. 2d 310, 321 (2011) (alteration in original) (internal citations omitted).

In conclusion, based on the totality of the circumstances, we hold the trial court erred in concluding that defendant knowingly, willingly, and understandingly waived his statutory and constitutional rights, and therefore, the trial court erred in denying defendant's motion to suppress. Accordingly, we reverse the order of the trial court, vacate the judgments entered upon defendant's guilty pleas, and remand to the trial court with instructions to grant the motion to suppress and for any further proceedings it deems necessary.

VACATED, REVERSED, AND REMANDED.

Chief Judge McGEE and Judge DIETZ concur.

STATE v. BACON

[254 N.C. App. 463 (2017)]

STATE OF NORTH CAROLINA
v.
JAWANZ BACON

No. COA16-1268

Filed 18 July 2017

1. Larceny—felonious—variance in indictment and proof at trial—ownership of stolen property—no special custodial interest—additional property was surplusage

The trial court did not err by denying defendant's motion to dismiss a felonious larceny charge based on an alleged fatal variance between the owner of the stolen property taken from a home as alleged in the indictment and the proof of ownership of the stolen items presented at trial where the indictment properly alleged the owner of some but not all of the stolen property. The homeowner had no special custodial interest in the stolen property belonging to her adult daughter who did not live with her or the stolen property belonging to a friend. Any allegations in the indictment for the additional property that were not necessary to support the larceny charge were mere surplusage.

2. Larceny—felonious—motion to dismiss—sufficiency of evidence—value

The trial court erred by failing to dismiss a felonious larceny charge based on insufficient evidence of the value of the stolen goods where the jury was only instructed on felonious larceny based upon the stolen items having a value in excess of $1,000.00, and not based on larceny pursuant to breaking or entering. The State presented no evidence of the combined value of a television and earrings, and the property was not, by its very nature, obviously greater than $1,000.00.

3. Discovery—sanctions—alibi witness—failure to give proper notice

The trial court did not abuse its discretion in a felonious larceny case by excluding defendant's alibi witness as a sanction for defendant's violation of discovery rules regarding proper notice of a witness. Even assuming error, defendant failed to show it was prejudicial or that there was a reasonable possibility of a different outcome where the alibi witness's testimony was contradictory and two State witnesses identified defendant as the perpetrator after viewing the video of the actual break-in.

4. Constitutional Law—effective assistance of counsel—failure to meet burden of proof—objective standard of reasonableness—deficient performance

Although defendant's ineffective assistance of counsel claim in a felonious larceny case was premature and should have been initially considered by a motion for appropriate relief to the trial court, the Court of Appeals concluded he did not receive ineffective assistance of counsel where he failed to meet his burden of showing that his attorney's performance fell below an objective standard of reasonableness or that any deficient performance of his attorney prejudiced him.

Appeal by Defendant from judgment entered 29 June 2016 by Judge D. Jack Hooks in Superior Court, Columbus County. Heard in the Court of Appeals 15 May 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General James Bernier, Jr., for the State.

Sarah Holladay for Defendant.

McGEE, Chief Judge.

I. *Statement of the Facts*

April Faison's ("Ms. Faison") residence at 276 Lakeview Drive in Whiteville, North Carolina ("the residence"), was broken into on 4 December 2013. Ms. Faison's adult daughter, Ashley Colson ("Ms. Colson"), lived next door, and discovered the break-in. Ms. Colson called Ms. Faison that afternoon and informed Ms. Faison of the break-in. Ms. Faison came home to find her back door open with the glass broken out of it, the home "tossed," and several items missing, including a flatscreen television ("the television"), a PlayStation 3 videogame system with three video games ("the gaming system"), a laptop computer ("the laptop"), a Canon camera ("the camera"), and two gold earrings ("the earrings"). Ms. Faison called 911 to report the break-in, and police responded. After the police officers left the residence, Ms. Faison and Ms. Colson reviewed video recorded from her home surveillance system that was stored in a DVR box in Ms. Faison's bedroom ("the video"). The video showed a man breaking the glass in the back door to the residence,

entering, and removing items from the residence.[1] The man's face was clearly visible in the video.

On 5 December 2013, Ms. Faison informed Detective Trina Worley of the Columbus County Sheriff's Office ("Detective Worley") about the video, and Detective Worley inquired about obtaining a copy of the video. When Ms. Faison could not figure out how to make a copy of the video, she carried the DVR box to the sheriff's office for law enforcement to view the video. Three detectives plugged in the DVR box and attempted to view the video, but were unable to locate the video.

At trial, Defendant objected to any reference to the video, arguing that the proper foundation had not been laid for admission of the video as evidence. During Ms. Faison's *voir dire*, the trial court determined that Ms. Faison was competent to testify about the video. Ms. Faison testified to the following: The video showed a man break the glass in the back door of Ms. Faison's residence, enter her residence through that door, and then remove items from Ms. Faison's residence. The man's face was clearly visible on the video and there were multiple instances, as the man looked around, when his face was directly visible. The man was not wearing a "hoodie," mask, or hat to obscure his face. Ms. Faison later saw a man walking down the road near her residence whom she believed to be the man in the video. She observed him enter a nearby house. Ms. Faison reported this information to the police, who initiated surveillance of the house and identified the man as Jawanz Bacon ("Defendant").

In accordance with the policy of the Columbus County Sheriff's Office, Detective Worley had a photo lineup prepared, with six pictures (Defendant and five "fillers") of men of similar age, race, height, and build. Captain Soles — an officer not involved in the investigation of the case — and who did not know the facts of the case or the identity of Defendant, administered the lineup to Ms. Faison on 31 December 2013. About thirty minutes later, Captain Soles administered the lineup to Ms. Colson, who was not present at the earlier lineup presentation. Both Ms. Faison and Ms. Colson positively identified Defendant as the man who broke into Ms. Faison's residence. Defendant was arrested on 31 December 2013 and was indicted for felony breaking or entering and felonious larceny. Defendant's indictment for felonious larceny reads as follows:

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1. Ms. Faison testified that she did not think about her surveillance equipment until after the police had left her residence.

> [D]efendant named above unlawfully, willfully and feloniously did steal, take and carry away a flatscreen television, PlayStation 3 video game system, three video games for PlayStation 3, laptop computer, Canon camera, two gold earrings, the personal property of April Faison, such property having a value of $1,210.00, pursuant to a violation of Section 14-54 of the General Statutes of North Carolina.

Section 14-54 states in relevant part: "Any person who breaks or enters any building with intent to commit any . . . larceny therein shall be punished as a Class H felon." N.C. Gen. Stat. § 14-54(a) (2015). Although all of the stolen items were taken from Ms. Faison's home, and the television and the earrings belonged to Ms. Faison, the laptop belonged to her daughter, Ms. Colson, and the camera and the gaming system belonged to a friend of Ms. Faison. The stolen items were never recovered.

At trial, Defendant sought to call his grandfather, Jimmy Bacon ("Mr. Bacon"), as an alibi witness. However, the State objected because Defendant had not provided adequate notice of this alibi witness as required by N.C. Gen. Stat. § 15A-905(c)(1). The trial court allowed a *voir dire* of Mr. Bacon in which Mr. Bacon testified that Defendant was with him at his home the entire day of 4 December 2013. However, when questioned, Mr. Bacon could not recall any details as to specific dates of Defendant's stay or what Defendant did during his stay. The trial court ultimately granted the State's motion to exclude Mr. Bacon's testimony.

Defendant moved to dismiss at the close of the State's evidence and again at the close of all evidence, but Defendant's motions were denied. During the charge conference, Defendant pointed out that the State had not presented any evidence to prove the value of the items stolen and, therefore, the jury should not be instructed on felony larceny based upon the stolen items being in excess of $1,000.00. The State maintained that specific evidence of the value of the stolen items was unnecessary because the jury, based upon the nature of the items themselves, could determine that the items had a value of more than $1,000.00. The trial court agreed with the State and instructed the jury on felonious larceny based upon value in excess of $1,000.00, with misdemeanor larceny as a lesser-included charge. However, the trial court declined to instruct the jury on felony larceny resulting from a breaking or entering. The jury found Defendant guilty of felony breaking or entering and felonious larceny with value in excess of $1,000.00. Defendant appeals.

II. *Analysis*

Defendant contends the trial court erred: (1) by denying Defendant's motion to dismiss the larceny charge due to a fatal variance between the indictment and the evidence presented at trial; (2) by failing to dismiss the larceny charge for insufficiency of the evidence as to the value of the stolen items; and (3) by abusing its discretion in excluding Mr. Bacon's alibi testimony.

A. *Fatal Variance in the Indictment*

[1] Defendant first argues the trial court erred in denying his motion to dismiss the felonious larceny charge. More specifically, Defendant contends there was a fatal variance between the owner of the stolen property as alleged in the indictment and the proof of ownership of the stolen items presented at trial. We agree in part.

Defendant asks this Court to vacate his felonious larceny conviction. Defendant argues that, while the indictment alleged Ms. Faison to be the owner of all the property stolen from her residence, the evidence at trial demonstrated she was not the owner of the laptop or the gaming system. We agree with Defendant, but note that Defendant failed to address the items properly attributed to Ms. Faison in the indictment – the television and the earrings – and what that means for Defendant's motion to dismiss. Although Defendant concedes that some of the items listed in the indictment were correctly listed as the property of Ms. Faison, he contends that fatal variances with respect to other items included in the indictment require quashing the indictment and further require dismissal of all larceny charges.

In support of his argument, Defendant cites *State v. Seelig* for the proposition that " 'the evidence in a criminal case must correspond to the material allegations of the indictment, and where the evidence tends to show the commission of an offense not charged in the indictment, there is a fatal variance between the allegations and the proof requiring dismissal.' " *State v. Seelig*, 226 N.C. App. 147, 162, 738 S.E.2d 427, 438 (2013) (citation omitted). However, Defendant appears to have overlooked the following paragraph in *Seelig*:

> "[A]n indictment 'must allege lucidly and accurately all the essential elements of the offense endeavored to be charged.' " In order to be fatal, a variance must relate to "an essential element of the offense." Alternately, "[w]hen

> an averment in an indictment is not necessary in charging the offense, it will be 'deemed to be surplusage.' "

Id. at 162–63, 738 S.E.2d at 438 (citations omitted).

Defendant provides no argument or citations to any legal authority to support the proposition that a larceny indictment that properly alleges the owner of certain stolen property, but improperly alleges the owner of additional property, must be dismissed in its entirety. Because Defendant fails to make this argument on appeal, it is abandoned. *See State v. Evans*, __ N.C. App. __, __, 795 S.E.2d 444, 455 (2017); N.C.R. App. P. 28 (2017) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned. . . . . The body of the argument . . . shall contain citations of the authorities upon which the appellant relies."). Defendant has abandoned this argument, and we dismiss it.

Assuming, *arguendo*, that Defendant has not abandoned this argument, we find no error.

> In North Carolina our courts have been clear that:
>
> > The general law has been that the indictment in a larceny case must allege a person who has a property interest in the property stolen and that the State must prove that that person has ownership, meaning title to the property or some special property interest. If the person alleged in the indictment to have a property interest in the stolen property is not the owner or special owner of it, there is a fatal variance entitling defendant to a nonsuit.
> >
> > Furthermore, although the law acknowledges that a parent has a special custodial interest in the property of his minor child kept in the parent's residence, that special interest does not extend to a caretaker of the property even where the caretaker had actual possession.

State v. Salters, 137 N.C. App. 553, 555–56, 528 S.E.2d 386, 389 (2000) (citations omitted).

The indictment in a larceny case is required to allege the ownership of the stolen property in order to: "(1) inform defendant of the elements of the alleged crime, (2) enable him to determine whether the allegations constitute an indictable offense, (3) enable him to prepare for trial, and (4) enable him to plead the verdict in bar of subsequent prosecution for the same offense." *State v. Holley*, 35 N.C. App. 64, 67, 239 S.E.2d 853, 855 (1978) (internal citations and quotations omitted).

Concerning ownership of stolen property, a variance between an indictment and the evidence presented at trial can be fatal: " 'If the proof shows that the article stolen was not the property of the person alleged in the indictment to be the owner of it, the variance is fatal and a motion for judgment of nonsuit should be allowed.' " *State v. Schultz*, 294 N.C. 281, 285, 240 S.E.2d 451, 454 (1978) (citation omitted). "It is, however, sufficient if the person alleged in the indictment to be the owner has a special property interest, such as that of a bailee or a custodian." *Id.* at 285, 240 S.E.2d at 454-55; *see also State v. Carr*, 21 N.C. App. 470, 472, 204 S.E.2d 892, 894 (1974); *State v. Smith*, 266 N.C. 747, 749, 147 S.E.2d 165, 166 (1966) (where no fatal variance occurred when a father, who had custody and control of his daughter's pistol at the time the pistol was stolen, was found to be a bailee). The fact that items were stolen from a particular residence does not automatically give rise to a special property interest in the owner of that residence. *See State v. Eppley*, 282 N.C. 249, 259-60, 192 S.E.2d 441, 448 (1972) (where a fatal variance was found when a stolen shotgun belonged to the homeowner's father, and not the homeowner named in the indictment).

In the present case, while Ms. Faison did have actual possession of all of the stolen items — as they were taken from her home — she was not the owner of the laptop, the camera, or the gaming system. Further, the State failed to produce any evidence that Ms. Faison was a bailee or otherwise had a special property interest in those items. *Id.*

The State, relying on *State v. Carr*, argues that a possessor has a special property interest in an item when that person has sole possession, use, and control of the item. *State v. Carr*, 21 N.C. App. 470, 471-72, 204 S.E.2d 892, 893-94 (1974). However, *Carr* is readily distinguishable from the present case because, in *Carr*, a son was found to have a special interest in a vehicle owned by his father's business and the son regarded the vehicle as his own, possessing it at all times and taking it with him to college. *See id.* When Ms. Faison was asked whether she owned all of the items stolen from her house, she answered: "No. . . . . The laptop was my daughter's, and the . . . camera and the game[ing system] was [sic] my friend's." Ms. Faison merely stated that the items were in her possession in her home at the time of the theft, but provided no more information relating to any possible special interest in the property. Not only did the State fail to produce evidence tending to show that Ms. Faison regarded the laptop, the camera, and the gaming system as her own, it also failed to show how Ms. Faison came to possess these items or that she had any special interest in them whatsoever.

The State further argues that "a parent has a special custodial interest in the property of his minor child kept in the parent's residence," and therefore Ms. Faison had a special property interest in her daughter's laptop. *See State v. Salters*, 137 N.C. App. 553, 555-56, 528 S.E.2d 386, 389 (2000). However, as Defendant points out, Ms. Colson is not the minor child of Ms. Faison, but rather is an adult child who did not live in Ms. Faison's home. Therefore, we distinguish the present case from *Salters* and turn to *Eppley* for guidance. In *Eppley*, no special property interest was found where a father's shotgun was stolen from his son's home, but no evidence was presented that the person named in the indictment – the son – was a bailee or had any special property interest in the shotgun. *Eppley*, 282 N.C. at 259-60, 192 S.E.2d at 448. When asked whether she owned all of the items stolen from her house, Ms. Faison answered: "No. . . . . The laptop was my daughter's." Nothing in the evidence beyond Ms. Faison's actual possession of the laptop suggests that she had a special property interest in it. The present case is much like *Eppley* in that Ms. Faison actually possessed an adult relative's property in her home when the property was stolen, but no evidence whatsoever was provided to show that Ms. Faison held any special interest in the property.

We, therefore, hold that the evidence presented at trial was sufficient to demonstrate that Ms. Faison was the owner of the television and the earrings, but that there was a fatal variance between the ownership of the laptop, the camera, and the gaming system as alleged in the indictment, and the evidence of ownership presented at trial.

While we have located no authority directly on point regarding a fatal variance in ownership of some, but not all, of the items alleged to have been stolen, in general: "A defect in an indictment is considered fatal if it *wholly fails to charge some offense* . . . or fails to state some essential and necessary element of the offense of which the defendant is found guilty." *State v. Wilson*, 128 N.C. App. 688, 691, 497 S.E.2d 416, 419 (1998) (emphasis added) (internal citations and quotations omitted). Further, "[w]hen an averment in an indictment is not necessary in charging the offense, it will be 'deemed to be surplusage.' " *Seelig*, 226 N.C. App. at 163, 738 S.E.2d at 438 (citations omitted). As the indictment included all the required elements alleging Defendant stole the television and the earrings from Ms. Faison's residence, the indictment properly alleged all the elements of larceny. Any allegations in the indictment that were not necessary to support the larceny charge – whether felony larceny or the lesser-included offense of misdemeanor larceny – are deemed to be surplusage. *Id.* We are therefore left with an indictment that reads as follows:

> The defendant named above unlawfully, willfully and feloniously did steal, take and carry away a flatscreen television, . . . [and] two gold earrings, the personal property of April Faison, such property having a value of $1,210.00, pursuant to a violation of Section 14-54 of the General Statutes of North Carolina.

"It is usually held . . . that the verdict of the jury is not vulnerable to a motion in arrest of judgment because of defects in the indictment, unless the indictment *wholly* fails to charge some offense cognizable at law or fails to state some essential and necessary element of the offense of which the defendant is found guilty." *State v. Gregory*, 223 N.C. 415, 418, 27 S.E.2d 140, 142 (1943) (internal citations omitted) (emphasis added). Where there are less serious defects, it is proper to object by motion to quash the indictment or to demand a bill of particulars. *Id.* We therefore affirm the trial court's denial of Defendant's motion to dismiss the larceny charge based upon an alleged fatal variance between the indictment and the evidence presented at trial, and we address Defendant's additional arguments without considering the surplusage contained in the larceny indictment.

B. *Evidence of Value to Support Felonious Larceny*

[2] Next, Defendant argues the trial court erred in failing to dismiss the felonious larceny charge for insufficiency of the evidence. Specifically, Defendant contends there was insufficient evidence as to the value of the stolen items. We agree.

We review the denial of a motion to dismiss *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993) (citation omitted). The evidence is viewed in the light most favorable to the State. *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

N.C. Gen. Stat. § 14-72 provides two separate bases for elevating misdemeanor larceny to felonious larceny relevant to this appeal: (1) "Larceny of goods of the value of more than one thousand dollars ($1,000) is a Class H felony[,]" N.C. Gen. Stat. § 14-72(a) (2015); and (2) "[t]he crime of larceny is a felony, without regard to the value of the property in question, if the larceny is . . . [c]ommitted pursuant to a violation of . . . [N.C. Gen. Stat. §] 14-54[.]" N.C. Gen. Stat. § 14-72(b)(2)

(2015). N.C. Gen. Stat. § 14-54(a) states: "Any person who breaks or enters any building with intent to commit any felony or larceny therein shall be punished as a Class H felon." N.C. Gen. Stat. § 14-54(a) (2015).

The language of the indictment appears to have charged Defendant with felonious larceny pursuant to both N.C.G.S. § 14-72(a) and 14-72(b)(2):

> [D]efendant named above unlawfully, willfully and feloniously did steal, take and carry away a flatscreen television . . . [and] two gold earrings, the personal property of April Faison, such property having a value of $1,210.00, pursuant to a violation of Section 14-54 of the General Statutes of North Carolina.[2]

However, the trial court expressly declined to instruct the jury on the charge of felony larceny committed pursuant to N.C.G.S. § 14-54 – intent to commit larceny after breaking or entering. When the State requested that the trial court instruct the jury on felonious larceny after breaking or entering, the judge responded:

> You may be right, and when it's over, you show me and I'll apologize to you and tell you I'm wrong. But we tried it this way off this indictment, and we are going to stay with the instructions off this indictment, which to my mind are value in excess of $1,000.

We have long recognized that "a defendant may not be convicted of an offense on a theory of his guilt different from that presented to the jury." *State v. Smith*, 65 N.C. App. 770, 773, 310 S.E.2d 115, 117 (1984). For example: "[A] conviction for felony larceny may not be based on the value of the thing taken when the trial court has instructed the jury only on larceny pursuant to burglarious entry." *Id.* Thus, because the jury was only instructed on felonious larceny based upon the stolen items having a value in excess of $1,000.00, Defendant's conviction could not have been based on larceny pursuant to breaking or entering.

The trial court instructed the jury solely on felonious larceny based upon the stolen property having a value in excess of $1,000.00 pursuant to N.C.G.S. § 14-72(a). The trial court also instructed the jury on the lesser-included offense of misdemeanor larceny. In response to

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2. We have removed the language deemed surplusage in our analysis of Defendant's first argument above, and only consider the property of Ms. Faison in our analysis – the television and the earrings.

Defendant's objection to the lack of evidence of value presented at trial, the trial court ruled that the value of the stolen items was a question of fact for the jury to decide, even though the State presented no specific evidence concerning the value of any of the stolen items.

However, this Court has held that a jury cannot estimate the value of an item without any evidence put forth to establish a basis for that estimation. *See In re J.H.*, 177 N.C. App. 776, 778-79, 630 S.E.2d 457, 459 (2006) (where the jury could not presume that a five-year-old Ford Focus had a value over $1,000.00 absent any evidence of the car's condition or value). Though certain property may, by its very nature, be of value obviously greater than $1000.00, like the Ford Focus in *J.H.*, the television and the earrings in this matter are not such items. Because the State presented no evidence upon which the jury could reasonably ascertain the combined value of the television and the earrings, the State failed to meet its burden of proving the value element of felonious larceny. We hold that the State failed to present sufficient evidence at trial to support the charge of felonious larceny and, therefore, the trial court erred in denying Defendant's motion to dismiss that charge.

It is proper to vacate and remand for entry of judgment and resentencing on a lesser-included offense when a trial court instructed the jury on a lesser-included offense, along with the greater offense, and the jury necessarily found that all the elements necessary to establish the lesser-included offense were proven, but the evidence presented at trial was insufficient to prove an essential element of the greater offense. *State v. Snead*, 239 N.C. App. 439, 448, 768 S.E.2d 344, 350 (2015); *see also State v. Jolly*, 297 N.C. 121, 130, 254 S.E.2d 1, 7 (1979) ("in finding defendant guilty of [the greater offense], the jury necessarily had to find facts establishing the [lesser offense] . . . [so] it follows that the verdict returned by the jury must be considered a verdict of guilty of [the lesser offence]"). Accordingly, we vacate Defendant's conviction of felonious larceny and remand for entry of judgment and re-sentencing for misdemeanor larceny.

C. *Defendant's Alibi Witness*

[3] Finally, Defendant argues that the trial court abused its discretion by excluding Defendant's alibi witness as a sanction for Defendant's violation of discovery rules. We disagree.

The trial court granted the State's motion to exclude Mr. Bacon based upon Defendant's failure to give timely notice that he intended to call Mr. Bacon as an alibi witness. When the State complies with its

discovery obligations, the defendant is required to give notice of any alibi defense within twenty working days after the case is set for trial. N.C. Gen. Stat. § 15A-905(c)(1).

> (a) If at any time during the course of the proceedings the court determines that a party has failed to comply with this Article or with an order issued pursuant to this Article, the court in addition to exercising its contempt powers may
>
> . . . .
>
> (3) Prohibit the party from introducing evidence not disclosed[.]
>
> (b) Prior to finding any sanctions appropriate, the court shall consider both the materiality of the subject matter and the totality of the circumstances surrounding an alleged failure to comply with this Article or an order issued pursuant to this Article.

N.C. Gen. Stat. § 15A-910 (2015).

"A trial court's decision concerning the imposition of discovery-related sanctions . . . may only be reversed based upon a finding that the trial court abused its discretion, which means that the trial court's ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Allen*, 222 N.C. App. 707, 733, 731 S.E.2d 510, 528 (2012) (internal citation, quotation, and bracketing omitted).

In making its decision, the trial court considered the materiality of Mr. Bacon's proposed testimony. When asked about specifics regarding Defendant's stay at his home, Mr. Bacon testified as follows:

> Q. Now, on the day in question, that is, December 4, 2013, was [Defendant] residing with you?
>
> A. Yes.
>
> Q. And how long had that been the case?
>
> A. He comes and stay with me weeks at a time. I remember the incident good, because it was my birthday. December 2nd is on my birthday.
>
> Q. *So he had come to visit you on December 2nd?*
>
> A. Yeah.
>
> Q. And he had stayed over through December 4th?

A. Yeah.

Q. Were you aware of his whereabouts over the course of December 4th?

A. Yeah. He was there with me.

Q. For what period of time was he there with you?

A. He was there earlier. *He was there a couple days before my birthday and stayed until – I remember my wife taking him home and bringing – and coming back with the newspaper. The newspaper come out on Thursday. And she read about it in the newspaper. And I said, "Well, how could he do that when he was here?"*

Q. In particular, sir, what we are asking about is – you may not have been with him every second of every moment, every minute. *What period of time can you definitely testify as to his whereabouts?*

A. I don't live on no big estate, you know. I live in a small house. *I had an eye on him. He was right there. He didn't go nowhere.*

Q. For December 12th – excuse me – December 4th?

A. Yeah. *Until that Thursday. That's when his grandma took him home.*

Q. And *do you recall what date that was*, sir?

A. It was – *I know the newspaper come out on Thursday. Because my birthday is on the 2nd. So he was there until Thursday. I can't recall what date that was.*

Q. All right, sir.

A. But *it had to happen before then, because it was already in the newspaper when my wife came home with it.* (Emphasis added).

The incident occurred on 4 December 2013. Generally, Mr. Bacon's testimony was very vague concerning Defendant's whereabouts during the relevant time period. Mr. Bacon could not account for Defendant's whereabouts for any specific part of 4 December 2013, even had he been able to establish that Defendant was residing with him on that day.

More specifically, Mr. Bacon ties the date he remembers Defendant being with him — 4 December 2013 — to an article in the paper that

apparently identified Defendant as the suspect in the 4 December 2013 incident. Mr. Bacon testified that he knew Defendant was with him on 4 December 2013 because the very next day, "[t]he newspaper come [sic] out[.] And [my wife] read about it in the newspaper. And I said, 'Well, how could he do that when he was here?' " However, Defendant was not arrested until 31 December 2013, and no article related to his arrest could have been published before that date. Therefore, Mr. Bacon's testimony suggested he was remembering Defendant being at Mr. Bacon's residence on a date after 31 December 2013. This contradicts the record, which shows that, after his arrest on 31 December 2013, Defendant was in custody until 9 October 2014. Given that no article could have been published about Defendant's arrest before Defendant was arrested and given that Defendant spent 283 days incarcerated after his arrest, Mr. Bacon's testimony regarding his wife taking Defendant home and bringing back the alleged newspaper article is not reliable.

Considering the materiality of Mr. Bacon's proposed testimony, which we find minimal, and the totality of the circumstances surrounding Defendant's failure to comply with his discovery obligations, we cannot find that the trial court abused its discretion in excluding this testimony pursuant to N.C.G.S. § 15A-910.[3] *Allen*, 222 N.C. App. at 733, 731 S.E.2d at 528.

Even were we to assume, *arguendo*, that it was error for the trial court to exclude Mr. Bacon's testimony as a discovery sanction, Defendant has failed to show that the error was prejudicial. In order to show prejudice requiring reversal, Defendant must show "that there is a reasonable possibility that a different result would have been reached had the error not been committed. N.C. Gen. Stat. § 15A–1443(a) (2005)." *State v. Jones*, 188 N.C. App. 562, 569, 655 S.E.2d 915, 920 (2008). As discussed above, Mr. Bacon's testimony was disjointed, imprecise, and seemingly contradicted by the facts. We do not believe Mr. Bacon's testimony would have provided meaningful alibi evidence for Defendant on 4 December 2013.

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3. Defendant argues that he should be awarded a new trial because the trial court failed to make findings of fact, as required by N.C.G.S. § 15A-910(d), beyond that notice had not been given. However, the failure to make findings of fact does not *per se* require a new trial. *State v. Adams*, 67 N.C. App. 116, 122, 312 S.E.2d 498, 501 (1984) ("the failure to make such findings here thus does not merit reversal or remand"). In the present case, Defendant fails to show how the exclusion of the single alibi witness equates to the "extreme sanction" of dismissal of charges or what prejudice Defendant suffered from the lack of detailed findings of fact. *State v. Foster*, 235 N.C. App. 365, 379, 761 S.E.2d 208, 218 (2014). Given the circumstances of this case, we decline to hold that the trial court abused its discretion by excluding the testimony of Defendant's alibi witness. *Adams*, 67 N.C. App. at 122, 312 S.E.2d at 501.

Ms. Faison recognized Defendant as he was walking down the street and reported this to the police, who followed up and identified Defendant. Both Ms. Faison and Ms. Colson *independently* identified Defendant, with near certainty, as the perpetrator after they had, according to their testimony, viewed the video of the actual break-in and had received multiple good looks at Defendant during the break-in and larceny. We conclude there was no reasonable possibility that the jury would have reached a different result had Mr. Bacon's alibi testimony been allowed. *See Jones*, 188 N.C. App. at 570, 655 S.E.2d at 920.

[4] Finally, Defendant's ineffective assistance of counsel claim is premature and should have been initially considered pursuant to a motion for appropriate relief by the trial court. *State v. Parmaei*, 180 N.C. App. 179, 185, 636 S.E.2d 322, 326 (2006) ("claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal"). However, we hold that Defendant's ineffective assistance of counsel claim must fail for the same reasons mentioned immediately above.

To prevail on an ineffective assistance of counsel claim, Defendant must demonstrate not only that the trial counsel's conduct fell below an objective standard of reasonableness, but must also prove that his attorney's deficient performance prejudiced Defendant such that Defendant was deprived of a fair trial. *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985). For the reasons discussed above, we hold that Defendant has failed to meet the burden of showing either that his attorney's performance fell below an objective standard of reasonableness, or that any deficient performance of his attorney prejudiced Defendant. Defendant's claim of ineffective assistance of counsel is without merit.

III. *Conclusion*

Defendant does not challenge his conviction for felony breaking or entering, so that conviction stands. We hold that the trial court erred in denying Defendant's motion to dismiss with respect to the charge of felony larceny, but that the evidence and the elements properly found by the jury support entry of judgment for the lesser- included offense of misdemeanor larceny. We therefore vacate Defendant's conviction for felony larceny and remand for resentencing based upon misdemeanor larceny. Defendant's arguments related to the exclusion of Mr. Bacon's testimony fail.

NO ERROR IN PART, VACATED IN PART, AND REMANDED.

Judges TYSON and INMAN concur.

STATE OF NORTH CAROLINA
v.
JONATHAN WAYNE BROYHILL, DEFENDANT

No. COA16-841

Filed 18 July 2017

1. Evidence—expert witness testimony—psychiatrist—failure to proffer witness as an expert

The trial court did not err in a first-degree murder, attempted murder, and assault with a deadly weapon with intent to kill inflicting serious injury case by excluding the proffered testimony of defendant's psychiatrist based on failure to disclosure him as an expert witness under N.C.G.S. § 15A-905(c)(2). Even if he was testifying as a lay witness, the court acted within its discretion by excluding the testimony under N.C.G.S. § 8C-1, Rule 403 where the probative value was substantially outweighed by the danger of unfair prejudice, misleading the jury, and confusion of the issues.

2. Jury—voir dire—prospective jurors—ability to assess credibility of witnesses—stakeout questions—indoctrination of jurors

The trial court did not abuse its discretion in a first-degree murder, attempted murder, and assault with a deadly weapon with intent to kill inflicting serious injury case by restricting defendant's voir dire of prospective jurors concerning their ability to fairly assess the credibility of witnesses where the questions were designed to stakeout and indoctrinate prospective jurors. Defendant was allowed to achieve the same inquiry when he resumed questioning in line with the pattern jury instructions.

3. Confessions and Incriminating Statements—prior custodial statements—exclusion of some but not all

The trial court did not abuse its discretion in a first-degree murder, attempted murder, and assault with a deadly weapon with intent to kill inflicting serious injury case by excluding two of defendant's prior custodial statements while admitting a third statement into evidence at trial even though defendant maintained the two prior statements should have been admitted under N.C.G.S. § 8C-1, Rule 106 to enhance the jury's understanding of the third. A review of the two prior interview transcripts revealed no statement which, in fairness, should have been considered contemporaneously with the third.

Appeal by defendant from judgments entered 19 March 2015 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 19 April 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Mary Carla Babb, for the State.

Rudolf Widenhouse, by M. Gordon Widenhouse Jr., for defendant-appellant.

ELMORE, Judge.

Defendant Jonathan Broyhill was convicted of first-degree murder for the death of Jamie Hahn, and attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury against Nation Hahn. Defendant appeals, arguing that (1) the trial court erred in excluding the testimony of his psychiatrist, Dr. Badri Hamra, on the basis that Dr. Hamra's proffered testimony constituted expert opinion testimony which had not been disclosed pursuant to a reciprocal discovery order; (2) the trial court unduly restricted defendant's *voir dire* of prospective jurors concerning their ability to fairly assess the credibility of witnesses; and (3) the trial court erred in excluding defendant's two prior custodial statements while admitting the third statement into evidence at trial. Upon review, we conclude that defendant received a fair trial, free from error.

I. Background

On 20 May 2013, a Wake County Grand Jury indicted defendant on charges of first-degree murder, attempted first-degree murder, and assault with a deadly weapon with intent to kill inflicting serious injury. A jury trial was held at the 23 February 2015 Criminal Session of the Superior Court for Wake County, the Honorable Paul C. Ridgeway presiding. The State's evidence at trial tended to show the following:

Defendant was a close friend to Nation and Jamie Hahn. He and Nation became friends after a church trip, when Nation was entering his freshman year of high school in Lenoir. Defendant had just graduated from the same school but Nation would often visit him at his job in a local paint store. After high school, Nation attended the University of North Carolina at Chapel Hill, where he met Jamie while both were volunteering for a presidential campaign. Nation and Jamie started dating and were eventually married. As with Nation, defendant and Jamie quickly became friends. Defendant even served as Nation's best man at the Hahns' wedding.

In April 2010, Jamie hired defendant at her political consulting firm, Sky Blue Strategies. Sky Blue provided clients with a variety of campaign services, including strategy, fundraising, and compliance. U.S. Congressman Brad Miller hired Sky Blue the following year for his re-election campaign. Jamie focused on fundraising and strategy, while defendant handled Federal Elections Commission (FEC) compliance, managed campaign donations, and disbursed funds for campaign expenses. Defendant was a signatory on the campaign's bank account.

In fall 2011, Congressman Miller suspended his re-election campaign, leading Sky Blue to shift its focus from fundraising toward issuing refund checks to donors. Due to the change in circumstances, defendant became primarily responsible for the remaining work on the campaign. Unbeknownst to Jamie, defendant wrote checks to himself out of the campaign account from June 2011 to March 2013. The checks totaled more than $46,500.

Near the end of his employment with Sky Blue, defendant started to complain of various health issues. In August 2012, he told the Hahns he had Multiple Sclerosis and was seeking treatment. Defendant also reported problems with his gallbladder, claiming he had scheduled surgery to remove gallstones. In November or December 2012, defendant expressed to Jamie that, in light of his health problems, he would need to find a less stressful job. Recognizing that Sky Blue could no longer afford to pay defendant without revenue from the Miller campaign, Jamie agreed to help defendant find a job elsewhere.

Jamie soon discovered that certain Miller campaign expenses had not been paid. Although he was no longer employed by Sky Blue, defendant continued to manage campaign finances and FEC quarterly reports. In early 2013, Jamie received inquiries from campaign staffers concerning delays in refund check disbursements. Defendant avoided Jamie's requests for information on the campaign finances, citing his preoccupation with the upcoming gallbladder surgery.

Defendant eventually agreed to meet with Jamie at the Hahns' home on 8 April 2013 to draft the quarterly report due the following week. When he failed to show, defendant claimed he was working late at his new job with LabCorp, a job he did not have. Defendant agreed to reschedule their meeting for the next evening. Upon his arrival, defendant appeared "very weak, sort of white faced." He told Nation that doctors had discovered a spot when they removed his gallstones, a spot which they believed was pancreatic cancer. Stunned by the news, the Hahns spent the evening comforting defendant rather than drafting the report.

Two days later, the Hahns arranged to take defendant to Duke Cancer Hospital to confirm his diagnosis. When defendant failed to meet at their home as planned, Nation and Jamie became concerned and drove to defendant's house. He answered the door "in a daze," claiming he overslept. At this point, defendant realized he would certainly miss the appointment. He pretended to call the hospital to reschedule for the next day and, at Jamie's suggestion, agreed to help with the quarterly report for the rest of the afternoon. Moments after arriving at the Hahns' home, defendant informed Jamie that he forgot to bring his computer. He left to retrieve it but never returned. Jamie made repeated attempts to contact defendant to no avail.

When the Hahns finally heard from defendant the next morning, he told them he was at the beach. He said he had been fired from LabCorp, and with his "presumed cancer diagnosis," he "just needed to get away." Defendant apologized and assured Jamie that he would be back in time to prepare the quarterly report. The Hahns, meanwhile, had planned a week-long vacation at the beach to celebrate their anniversary and Nation's birthday. Jamie asked defendant to reschedule his doctor's appointment for 15 April 2013, so that she and Nation could attend before leaving for the beach.

On Sunday, 14 April 2013, defendant purchased a large chef's knife before driving to the Hahns' residence to finalize the quarterly report with Jamie. He and Jamie met downstairs while Nation worked upstairs in his office. During their meeting, Jamie received a message from Nation informing her that, according the FEC website, the Miller campaign's 2012 fourth quarter report had never been filed. When pressed by Jamie, defendant assured her that he filed the report and had received confirmation via facsimile from the FEC.

The next morning, Jamie and defendant met with Congressman Miller's campaign treasurer, John Wallace, to review the completed draft of the quarterly report. The report revealed a continuing indebtedness to Congressman Miller, a debt which Wallace believed had been retired. He requested that the draft be amended to reflect the debt as paid before the report was submitted to the FEC. At the time, a separate discrepancy in the draft report was overlooked. The report indicated that the campaign had $62,914.52 in cash at the end of the first quarter when, in fact, the campaign account had a negative balance of $3,587.06.

After the meeting with Wallace, Nation and Jamie drove defendant to Duke Cancer Hospital for his appointment. Upon their arrival, the Hahns dropped defendant off at the entrance to check in while Nation

and Jamie parked the car. When they reconvened inside, defendant said he had to go in for tests and the nurses would call the Hahns if needed. Nation and Jamie sat down in the lobby while defendant went through a set of double doors behind the reception desk. Defendant admitted to police that he did not have a doctor's appointment that day. He walked around the hospital for nearly two hours while the Hahns waited in the lobby. When he returned, defendant told them "he did indeed have pancreatic cancer but the doctors were hopeful."

The Hahns drove defendant back to Raleigh before leaving for the beach. On the way out of town, Jamie received a call from Congressman Miller's office informing her that a check written from the campaign account had bounced. Based on the first quarter report, Jamie believed the campaign account had more than sufficient funds. She decided that the returned check must have been a mistake.

On Wednesday, 17 April 2013, Wallace e-mailed Jamie and defendant about recent communications between the FEC and the Miller campaign. The FEC had requested additional information to address concerns over suspicious disbursements from the campaign account. The FEC had also informed the campaign that it had failed to timely file a report covering the last quarter of 2012. Defendant responded on the e-mail thread: "Good afternoon, John. I am working on this now, and I will be in touch." In light of defendant's prior assurances and his e-mail response, Jamie assumed that defendant had the issues under control. Defendant never followed up with Wallace.

The Hahns returned from the beach the following Sunday. Shortly after midnight, defendant used Nation's credit card to purchase a one-way airline ticket from Charlotte to Las Vegas, departing Monday afternoon. He canceled his flight reservation one hour before take-off. Defendant opted instead to purchase a one-way train ticket from Raleigh to Charlotte, departing Tuesday morning.

On Monday, 22 April 2013, defendant and Jamie met at the Hahns' home to finalize matters with Congressman Miller's campaign. In his backpack, defendant concealed the chef's knife he had recently purchased. Nation arrived home around 5:00 p.m. Jamie, he noticed, was on the phone in her office downstairs and defendant was walking through the kitchen. Nation greeted defendant with a hug and invited him to stay the night before another doctor's appointment in the morning. Defendant answered equivocally but added that "he had his clothes packed with him in case he did." After their brief conversation, Nation proceeded upstairs to change out of his work clothes and into his running gear.

Shortly thereafter, Nation heard Jamie screaming from downstairs. He threw open the bedroom door and ran down the stairs shouting, "What's happening?" Jamie cried out, "He's trying to kill me." Nation rounded the corner of the staircase when he saw blood on the floor and defendant standing over Jamie with a knife. Nation shouted, "What the fuck are you doing?" Defendant said nothing as he turned and came at Nation, raising the knife in the air as he moved closer. Nation grabbed the blade with one hand and started striking defendant in the face with the other. As the struggle continued, Nation yelled at Jamie to get out of the house. Jamie, covered in blood, ran out the side door and collapsed in a neighbor's yard. After gaining separation from defendant, Nation followed Jamie out of the house while shouting for someone to call 9-1-1. Neighbors tended to Nation and Jamie until the ambulance arrived.

Police surrounded the Hahns' home and ordered defendant to come outside. He exited the house calmly with his hands in the air. Officer Roy Smith observed self-inflicted knife wounds on defendant's wrists and a stab wound to his stomach. To Officer Smith, defendant's self-inflicted wounds were indicative of an attempted suicide. Officer Smith rode in the ambulance transporting defendant to the hospital. As EMS workers spoke with defendant, he became visibly upset and started weeping. He told them, "It's been a long time coming," and said repeatedly, "I just want to die."

Jamie died in the hospital two days later as a result of her injuries. An autopsy revealed multiple stab wounds, including one to her torso which penetrated her liver, and another to her chest which penetrated her lung and severed an artery. Nation survived the attack with injuries to his hands, including a deep laceration which transected an artery, tendons, and nerves in two fingers on his left hand.

While defendant was hospitalized, police conducted three custodial interviews on 23, 25, and 26 April 2013, respectively. The State introduced the recording and transcript of the 26 April interview, which were published to the jury. Over defendant's objection, the court declined to admit transcripts of the 23 and 25 April interviews.

During the 26 April 2013 interview, defendant admitted that he had embezzled money from the Miller campaign and had lied about his gallbladder surgery, his pancreatic cancer, and his appointments at Duke Cancer Hospital. Defendant also reported bouts with depression and thoughts of suicide, claiming he often heard voices telling him to hurt other people, he had bought the knife to hurt himself, and he had planned on traveling to Las Vegas to commit suicide. At his last meeting

with Jamie, defendant anticipated a conversation about the discrepancies in the campaign account. When asked to describe his memory of that night, defendant recalled stabbing Jamie but did not recall attacking Nation or cutting himself.

At trial, defendant offered testimony of his family members and a nurse psychotherapist, Susan Simon, who saw defendant for ten sessions between February and May 2012. Among other things, Ms. Simon testified that during the sessions defendant expressed feelings of worthlessness and depression. Upon the State's objections, the court refused to admit the proffered testimony of Dr. Badri Hamra, a psychiatrist with the North Carolina Department of Public Safety, who treated defendant fifteen months after his arrest.

At the conclusion of trial, the jury found defendant guilty of first-degree murder, attempted first-degree murder, and assault with a deadly weapon with intent to kill inflicting serious injury. The trial court sentenced defendant to a term of life in prison without parole, and consecutive terms of 157 to 201 months and 73 to 100 months. Defendant entered notice of appeal in open court.

II. Discussion

A. Discoverable Expert Opinion Testimony

[1] Defendant first argues that the trial court erred in excluding the proffered testimony of Dr. Hamra. After *voir dire*, the court determined that Dr. Hamra was rendering expert opinion testimony, thereby triggering the discovery requirements of N.C. Gen. Stat. § 15A-905(c)(2). Because defendant failed to disclose Dr. Hamra as an expert witness pursuant to the reciprocal discovery order, the court did not allow Dr. Hamra to testify at trial. The court also concluded, in the alternative, that Dr. Hamra's testimony was not relevant, and if it was, the probative value of his testimony was substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury. Defendant maintains that Dr. Hamra was testifying as a fact witness, outside the scope of the reciprocal discovery order, and the testimony was relevant to the issue of premeditation and deliberation, such that the court's decision to exclude it constitutes reversible error.

Rule 702(a) of the North Carolina Rules of Evidence provides: "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise . . . ."

N.C. Gen. Stat. § 8C-1, Rule 702(a) (2015). An expert's testimony relies upon "scientific, technical or other specialized knowledge" to "provide insight beyond the conclusions that jurors can readily draw from their ordinary experience." *State v. McGrady*, 368 N.C. 880, 889, 787 S.E.2d 1, 8 (2016). Lay testimony, by contrast, is based on personal knowledge of facts "which can be perceived by the senses." N.C. Gen. Stat. § 8C-1, Rule 602 cmt. (2015); *see also* N.C. Gen. Stat. § 8C-1, Rule 701 (2015) (providing that lay opinion testimony is limited to opinions which are "rationally based on the perception of the witness"). A lay witness may state " 'instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, *derived from observation of a variety of facts presented to the senses at one and the same time*.' " *State v. Leak*, 156 N.C. 643, 647, 72 S.E. 567, 568 (1911)[1] (emphasis added) (quoting John Jay McKelvey, *Handbook of the Law of Evidence* § 132 (rev. 2d ed. 1907)), *quoted in State v. Stager*, 329 N.C. 278, 321, 406 S.E.2d 876, 901 (1991).

Our Supreme Court recently explained the threshold difference between expert opinion and lay witness testimony: "[W]hen an expert witness moves beyond reporting what he saw or experienced through his senses, and turns to interpretation or assessment 'to assist' the jury based on his 'specialized knowledge,' he is rendering an expert opinion." *State v. Davis*, 368 N.C. 794, 798, 785 S.E.2d 312, 315 (2016) (footnote omitted) (quoting N.C. Gen. Stat. § 8C-1, Rule 702(a)); *see also* David P. Leonard, *The New Wigmore: Expert Evidence* § 2.6 (2009) ("[W]hile an expert relies on scientific, technical, or other specialized knowledge, lay testimony is based solely on the perception of the witness. . . . Application of specialized knowledge from whatever source would bring the testimony within the sphere of expertise." (footnote omitted) (internal quotation marks omitted)).

Ultimately, "what constitutes expert opinion testimony requires a case-by-case inquiry" through an examination of "the testimony as a whole and in context." *Davis*, 368 N.C. at 798, 785 S.E.2d at 315. We review *de novo* the trial court's conclusion that Dr. Hamra's proffered testimony constitutes discoverable expert opinion testimony. *See id.* at 797–98, 785 S.E.2d at 314–15 (applying *de novo* review to determine "whether the State's expert witnesses gave opinion testimony so as to trigger the discovery requirements under section 15A-903(a)(2)").

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1. We have maintained the predominant citation to the North Carolina Reports, for the sake of consistency, but include the correct citation for those individuals referencing the bound volumes: *State v. Leak*, 156 N.C. 518, 521 (1911).

" '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)).

During *voir dire*, defendant elicited the following testimony from Dr. Hamra:

Q. As a psychiatrist, do you ever prescribe medication for an inmate if you believe that it will help them to deal with any mental health issues they may be dealing with?

A. Yes, sir.

. . . .

Q. When you treated Mr. Broyhill, did you prescribe any medications for him to take to deal with his mental health issues?

A. Yes, I did.

Q. Among the medications that you prescribed for Mr. Broyhill, were any of them for anxiety, depression, or psychosis?

A. All of them were.

Q. Could you please tell us what medications you prescribed for Mr. Broyhill when he was your patient.

A. There are four medications given to him. One is called Effexor XR. . . . The next one is Zoloft . . . . The third one is Buspar . . . . And the last one is Risperdal . . . .

. . . .

Q. Even though you review a patient's past summary, do you still make your own evaluation as to whether that patient is in need of medication?

A. That is my job, sir.

. . . .

Q. Did your review of the medical summary that was provided indicate that he had been on psychiatric medications prior to coming into your care?

A. Yes, he was.

. . . .

Q. When a patient gets transferred from one facility to another, does that patient continue to get psychiatric medications that had been prescribed for him at the previous facility?

A. He will be automatically on them until he sees the doctor, which is in case me [sic], and then I make a decision whether to keep them or change them.

Q. And then if you decide to change it, at that point, you can change it?

A. Oh, absolutely, yes.

Q. Is this what happened in Mr. Broyhill's case?

A. No, sir. He stayed on the same medications.

Q. Did he stay—did he continue to receive psychiatric medications until you were able to see him yourself?

A. Yes.

Q. After you saw him, you continued him on these medications?

A. Yes, I did.

. . . .

Q. . . . Dr. Hamra, to your knowledge and based upon the records you reviewed, is it fair to say that since his arrest Mr. Broyhill has been held in custody as a safekeeper and has consistently been prescribed psychiatric medications for his mental health needs?

A. Yes, sir.

Q. Would you prescribe these types of medications for an inmate if they didn't need it?

A. That would be unprofessional, sir.

Q. In the present system, do inmates sometimes request a psychiatric medication even though they might not suffer from a mental illness?

A. Sometimes that happens, yes.

Q. Would you prescribe a medication for an inmate simply because they asked for it?

A. I hope not. I don't.

Q. Would there have to be a legitimate medical reason for prescribing a patient a psychiatric medication?

A. That's the way it should be.

Based on the foregoing, we agree with the trial court that Dr. Hamra intended to offer expert opinion testimony. He testified in no uncertain terms that defendant had a psychiatric condition for which he, Dr. Hamra, prescribed medication. He then clarified that his decision to prescribe medication was based not merely on his review of defendant's medical history but on his own evaluation of defendant. Finally, he confirmed that he would only have prescribed medication for "a legitimate medical reason," dismissing the notion that he would write a prescription simply because defendant asked him to do so.

As the Supreme Court concluded in *Davis*, it is immaterial that Dr. Hamra's testimony was not elicited through the typical question: " 'Doctor, do you have an opinion?' " *Davis*, 368 N.C. at 802, 785 S.E.2d at 317. His testimony was tantamount to a diagnosis, which requires the application of specialized knowledge to his observations of defendant, and which ventures beyond simply "reporting what he saw or experienced through his senses." *Id.* at 798, 785 S.E.2d at 315. And while defendant argued at trial that the testimony was offered not as proof of diminished capacity but to show he was truthful with police about his mental faculties, the relevance of the latter still rests upon Dr. Hamra's psychiatric evaluation.

Assuming *arguendo* that Dr. Hamra was not testifying as an expert, the trial court nevertheless acted within its discretion by excluding his testimony under Rule 403. "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). The trial court is in the best position to evaluate relevance. *Dunn v. Custer*, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004). While its rulings on relevance are not entirely discretionary, such rulings are afforded "great deference on appeal." *Id.*

Even if 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). Whether relevant evidence satisfies the Rule 403 balancing test is a discretionary ruling reviewed on appeal for abuse of discretion. *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). 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) (citation omitted).

Dr. Hamra first met with defendant fifteen months after defendant's arrest. He reviewed a summary of defendant's medical records from Raleigh's Central Prison, but it is not clear whether Dr. Hamra had access to records of defendant's treatment before his arrest. Although his diagnosis and treatment may have *some* probative value, bearing on defendant's state of mind and credibility, Dr. Hamra's testimony does not speak directly to defendant's condition at the time of Jamie Hahn's death.

To the extent that it was relevant, there was a substantial risk that the testimony would unfairly prejudice the State, mislead the jury, and result in confusion of the issues. As the trial court aptly explained in its order:

> [T]he naked testimony of Dr. Hamra that medications were required and helpful to the Defendant in July 2014, without being subjected to the strictures of Rule 702, would have the substantial likelihood of confusing the issues of this case, misleading the jury, and would invite the jury to speculate the nature of these medication[s], the nature of the conditions these medications are used to treat, the reliability of the diagnosis, the duration of the condition(s), and the effect of these conditions on the Defendant's state of mind and credibility at any time relevant to the alleged criminal conduct.

Defendant offered Dr. Hamra's testimony without evidence of his credentials, the medical reports he reviewed, the results of any examinations he performed, or the underlying basis for his opinions. To admit the testimony without the required prior disclosure would have deprived the State of effective cross-examination and hindered the trial court's ability to fulfill its gatekeeping obligations under Rule 702. Both the court and the State would have been left to accept Dr. Hamra's evaluation at face value.

Because Dr. Hamra's proffered testimony constituted expert opinion testimony, which defendant failed to disclose pursuant to the reciprocal discovery order, the trial court did not err in excluding the testimony at trial. Alternatively, even if Dr. Hamra was testifying as a fact witness, the trial court did not abuse its discretion in excluding his testimony under Rule 403. The probative value of the testimony was substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury.

B. *Voir Dire* of Prospective Jurors

[2] Defendant next argues that the trial court erred during jury selection by unduly restricting defendant's inquiry into whether prospective jurors could fairly evaluate credibility if faced with evidence that a person had lied in the past.

The primary goal of jury selection "is to empanel an impartial and unbiased jury." *State v. Garcia*, 358 N.C. 382, 407, 597 S.E.2d 724, 743 (2004) (citations omitted). A defendant is entitled to a jury composed of members "free from a preconceived determination to vote contrary to [the defendant's] contention concerning [his] guilt of the offense for which he is being tried." *State v. Williams*, 286 N.C. 422, 427–28, 212 S.E.2d 113, 117 (1975) (citing *Witherspoon v. Illinois*, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968)). As an appropriate means to that end, "counsel may question prospective jurors concerning their fitness or competency to serve as jurors to determine whether there is a basis to challenge for cause or whether to exercise a peremptory challenge." *State v. Fullwood*, 343 N.C. 725, 733, 472 S.E.2d 883, 886–87 (1996) (citing N.C. Gen. Stat. § 15A-1214(c) (1988)), *cert. denied*, 520 U.S. 1122, 117 S. Ct. 1260, 137 L. Ed. 2d 339 (1997).

Counsel may not, however, "ask questions that use hypothetical evidence or scenarios to attempt to 'stake-out' prospective jurors and cause them to pledge themselves to a particular position in advance of the actual presentation of the evidence." *State v. Fletcher*, 348 N.C. 292, 308, 500 S.E.2d 668, 677 (1998) (citations omitted); *see also State v. Vinson*, 287 N.C. 326, 336, 215 S.E.2d 60, 68 (1975) ("Counsel may not pose hypothetical questions designed to elicit in advance what the juror's decision will be under a certain state of the evidence or upon a given state of facts."), *sentence vacated on other grounds*, 428 U.S. 902, 96 S. Ct. 3204, 49 L. Ed. 2d 1206 (1976). These "stakeout" questions are improper because they cause a juror "to pledge himself to a decision in advance of the evidence to be presented." *State v. Jones*, 339 N.C. 114, 134, 451 S.E.2d 826, 835 (1994) (citing *Vinson*, 287 N.C. at 336, 215 S.E.2d

at 68); *see also State v. Simpson*, 341 N.C. 316, 336, 462 S.E.2d 191, 202 (1995) ("[T]he parties should not be able to elicit in advance what the jurors' decision will be under a certain set of facts. This type of 'staking out' is improper." (citations omitted)). It is also improper for counsel to ask "[q]uestions that seek to indoctrinate prospective jurors regarding potential issues before the evidence has been presented and jurors have been instructed on the law." *State v. Richmond*, 347 N.C. 412, 425, 495 S.E.2d 677, 683–84 (1998) (citing *State v. Parks*, 324 N.C. 420, 423, 378 S.E.2d 785, 787 (1989)).

While the law affords counsel "wide latitude" in the *voir dire* of prospective jurors, "the form and extent of the inquiry rests within the sound discretion of the court." *State v. Johnson*, 317 N.C. 343, 382, 346 S.E.2d 596, 618 (1986) (citations omitted). "[T]o show reversible error in the trial court's regulation of jury selection, a defendant must show that the court abused its discretion and that he was prejudiced thereby." *State v. Lee*, 335 N.C. 244, 268, 439 S.E.2d 547, 559 (citations omitted), *cert. denied*, 513 U.S. 891, 115 S. Ct. 239, 130 L. Ed. 2d 162, *reh'g denied*, 513 U.S. 1035, 115 S. Ct. 624, 130 L. Ed. 2d 532 (1994). A defendant's "right to an adequate *voir dire* to identify unqualified jurors does not give rise to a constitutional violation unless the trial court's exercise of discretion in preventing a defendant from pursuing a relevant line of questioning renders the trial fundamentally unfair." *Fullwood*, 343 N.C. at 732–33, 472 S.E.2d at 887 (citing *Morgan v. Illinois*, 504 U.S. 719, 730 n.5, 112 S. Ct. 2222, 2230 n.5, 119 L. Ed. 2d 492, 503 n.5 (1992); *Mu'Min v. Virginia*, 500 U.S. 415, 425–26, 111 S. Ct. 1899, 1905–06, 114 L. Ed. 2d 493, 506 (1991)).

In this case, the trial court sustained several objections by the State to defendant's line of questioning concerning credibility:

> [DEFENSE COUNSEL]: . . . . *People who lie, does that necessarily mean that they lie about everything?*
>
> [PROSECUTOR]: Well, objection.
>
> THE COURT: Sustained.
>
> [DEFENSE COUNSEL]: *If you hear testimony . . . about a person lying, does that diminish all their credibility on everything?*
>
> [PROSECUTOR]: Objection.
>
> THE COURT: Sustained.

> [DEFENSE COUNSEL]: Wish to be heard.
>
> THE COURT: It's a stakeout question so it's sustained.

(Emphasis added.) The trial court later explained: "[M]any of the questions are stakeout questions, a number of which have been objected to and a number of which have not been objected to. Those are impermissible in *voir dire*." In particular, the court expressed concern over defendant's questions which "described a set of facts and then [ ] asked the jurors to indicate how they would view that set of facts."

Before resuming *voir dire*, the court requested that defendant use the pattern jury instructions to guide his line of questioning. The pattern jury instruction on the credibility of a witness provides:

> You are the sole judges of the believability of (a) witness(es).
>
> *You must decide for yourselves whether to believe the testimony of any witness. You may believe all, any part, or none of a witness's testimony.*
>
> In deciding whether to believe a witness you should use the same tests of truthfulness that you use in your everyday lives. Among other things, these tests may include: the opportunity of the witness to see, hear, know, or remember the facts or occurrences about which the witness testified; the manner and appearance of the witness; any interest, bias, prejudice or partiality the witness may have; the apparent understanding and fairness of the witness; whether the testimony is reasonable; and whether the testimony is consistent with other believable evidence in the case.

N.C.P.I.—Crim. 101.15 (2011) (emphasis added).

When compared to the pattern jury instructions, defendant's rejected line of questioning did not "amount[ ] to a proper inquiry as to whether the jury could follow the law or 'whether the juror would be able to follow the trial court's instructions.' " *State v. Hill*, 331 N.C. 387, 404, 417 S.E.2d 765, 772 (1992) (quoting *State v. Phillips*, 300 N.C. 678, 682, 268 S.E.2d 452, 455 (1980)). Under the pattern instructions, a juror may choose to "believe all, any part, or none of a witness's testimony." N.C.P.I.—Crim. 101.15. Defendant, however, was concerned solely with whether a juror was likely to believe "none of a witness's testimony." He sought to discover what a prospective juror's decision would be under

a set of circumstances—in particular, knowledge that defendant had embezzled money and lied about his health. In other words, defendant attempted to stakeout prospective jurors based on their likelihood to discredit evidence favorable to the defense upon learning that defendant had lied in the past.

The trial court also sustained objections to another, similar line of questioning by defendant:

> [DEFENSE COUNSEL]: *Have you ever known people to lie to get attention?*
>
> [PROSECUTOR]: Objection.
>
> THE COURT: Sustained.
>
> [DEFENSE COUNSEL]: *Can you consider the possibility that people would lie to get attention, not necessarily people you know?*
>
> [PROSECUTOR]: Objection.
>
> THE COURT: Sustained.
>
> [DEFENSE COUNSEL]: *Is lying to get attention one of the things that you would consider as a juror in evaluating evidence?*
>
> PROSPECTIVE JUROR NO. 6: Yes.
>
> [DEFENSE COUNSEL]: How about you . . . ?
>
> PROSPECTIVE JUROR NO. 5: Yes.
>
> [DEFENSE COUNSEL]: In evaluating that lie, would you evaluate it not only for whether it is for that or whether it's—whether the lie is logical, whether it makes sense.
>
> [PROSECUTOR]: Objection.
>
> [DEFENSE COUNSEL]: Or it's something someone would expect to be believed?
>
> THE COURT: Sustained.

(Emphasis added.)

The trial court explained, and we agree, that the foregoing questions "tend[ed] to indoctrinate the jury to a particular point of view, which is also not permissible in *voir dire*." Defendant was aware of the State's

intention to offer evidence that defendant had lied about his health on several occasions. His line of questioning indicates an attempt to plant a seed in the minds of prospective jurors—that is, any lie defendant may have told was told to get attention. In their objected form, the questions posed a distinct risk that jurors would be inclined to view the evidence bearing on credibility through the lens provided by defendant at *voir dire*.

In any event, defendant was still "allowed to ask other questions to achieve the same inquiry sought by . . . the questions to which the court sustained the State's objection[s]." *State v. Larry*, 345 N.C. 497, 510, 481 S.E.2d 907, 914 (1997) (citing *State v. Bishop*, 343 N.C. 518, 534–35, 472 S.E.2d 842, 850 (1996), *cert. denied*, 519 U.S. 1097, 117 S. Ct. 779, 136 L. Ed. 2d 723 (1997)). Defendant resumed his line of questioning in a manner consistent with the pattern jury instructions. And as the State points out, several prospective jurors demonstrated a nuanced understanding of how they should evaluate credibility.

Based on the foregoing, we conclude that the trial court did not abuse its discretion by restricting defendant's *voir dire* examination of prospective jurors. The court properly sustained objections to defendant's improper stakeout questions and questions tending to indoctrinate the jurors. In addition, the court did not close the door on defendant's inquiry into whether the prospective jurors could fairly assess credibility. Rather, defendant was permitted to ask similar questions in line with the pattern jury instructions, which were an adequate proxy to gauge a prospective juror's ability to fairly assess credibility at trial.

C. Exclusion of Custodial Interview Statements

[3] Finally, defendant argues that the trial court erred in excluding statements from his custodial interviews on 23 and 25 April 2013, while admitting statements from his third custodial interview on 26 April 2013. In its ruling, defendant contends, the court improperly placed a burden upon defendant to show how the third statement was "out of context," and how the two prior statements were "explanatory or relevant." Although he acknowledges there was no substance to his second statement, as he refused to answer questions during the interview, defendant maintains that his two prior statements should have been admitted under Rule 106 because they would have enhanced the jury's understanding of the third.

Pursuant to Rule 106 of the North Carolina Rules of Evidence, when a party introduces "a writing or recorded statement or part thereof . . . , an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." N.C. Gen. Stat. § 8C-1, Rule 106

(2015). Rule 106 "is an expression of the rule of completeness." *Id.* cmt. (quoting Fed. R. Evid. 106 advisory committee's note). It "codifies the standard common law rule that when a writing or recorded statement or a part thereof is introduced by any party, an adverse party can obtain admission of the entire statement or anything so closely related that in fairness it too should be admitted." *State v. Thompson*, 332 N.C. 204, 219–20, 420 S.E.2d 395, 403 (1992). The purpose of the rule "is merely to ensure that a misleading impression created by taking matters out of context is corrected on the spot," due to "the inadequacy of repair work when delayed to a point later in the trial." *Id.* at 220, 420 S.E.2d at 403–04 (citations and internal quotation marks omitted); *see also* N.C. Gen. Stat. § 8C-1, Rule 106 cmt. (explaining the two considerations upon which Rule 106 is based).

As *Thompson* instructs, defendant had to demonstrate that the third statement was "somehow out of context" when it was introduced into evidence, and that the two prior statements were "either explanatory of or relevant to" the third. *Thompson*, 332 N.C. at 220, 420 S.E.2d at 404; *see*, *e.g.*, *State v. Castrejon*, 179 N.C. App. 685, 692–93, 635 S.E.2d 520, 524–25 (2006) (holding that the trial court did not err by excluding the defendant's exculpatory statements while admitting testimony that he gave a false name to police, where the defendant failed to show that the testimony "was taken out of context" or the exculpatory statements were "explanatory of or relevant to" the testimony).

We review the trial court's ruling pursuant to Rule 106 for abuse of discretion. *Thompson*, 332 N.C. at 220, 420 S.E.2d at 403 (citation omitted); *see also State v. Fowler*, 353 N.C. 599, 620, 548 S.E.2d 684, 699 (2001) ("[W]hether evidence should be excluded . . . under the common law rule of completeness codified in Rule 106 is within the trial court's discretion." (citations omitted)).

Contrary to defendant's assertion, the trial court correctly applied Rule 106 in its decision to exclude the first two statements at trial. After reviewing all three recorded statements and comparing the contents thereof, the court concluded that defendant made no statement during the first or second interview "that under Rule 106 ought, in fairness, to be considered contemporaneously with the statements of April 26." The court found "no instance where the statements in the April 26 interview require further explanation by any excerpts from the April 23 or the April 25 interview," and "no instance where the statements in the [April 26] interview were rendered out of context or misleading in the absence of excerpts from the April 23 or April 25 interview." Defendant harps on the "temporal connection and interrelated nature" of the statements but

fails to explain precisely how the first two statements would "enhance the jury's understanding" of the third. And upon our review of the interview transcripts, we conclude defendant has failed to show that the court abused its discretion in excluding defendant's first two statements at trial.

III. Conclusion

Defendant received a fair trial, free from error. The trial court properly concluded that Dr. Hamra's proffered testimony constituted expert opinion testimony which defendant failed to disclose pursuant to the reciprocal discovery order. Even if Dr. Hamra was testifying as a lay witness, the court acted within the bounds of its discretion by excluding his testimony under Rule 403 in that the probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury. The court exercised the same, appropriate level of discretion at jury selection by sustaining the State's objections to questions designed to stakeout and indoctrinate prospective jurors, and by restricting defendant's *voir dire* to a proper inquiry in line with the pattern instructions on witness credibility. Finally, we conclude that the trial court did not abuse its discretion by excluding defendant's two prior interview statements from evidence at trial. Our review of the two prior interview transcripts reveals no statement which, in fairness, should have been considered contemporaneously with the third.

NO ERROR.

Judges TYSON and BERGER concur.

STATE v. COLEMAN

[254 N.C. App. 497 (2017)]

STATE OF NORTH CAROLINA
v.
MATTHEW ANDREW COLEMAN

No. COA16-1150

Filed 18 July 2017

1. Homicide—voluntary manslaughter—directed verdict denied—automatism defense—low blood sugar

The trial court did not err by denying defendant's motion for a directed verdict for a charge of voluntary manslaughter for killing his wife where defendant's sole defense of automatism (due to his low blood sugar) was refuted by the State's expert, thus allowing the jury to conclude that defendant intentionally shot and killed his wife. Any error in the denial of directed verdict for the murder charges was not prejudicial where the jury only convicted defendant of voluntary manslaughter.

2. Evidence—expert testimony—amount paid for testifying—relevancy—partiality—"fact of consequence"

The trial court did not commit prejudicial error in a voluntary manslaughter case by allowing the State to question defendant's expert witness regarding the amount of fees the expert received for testifying in other unrelated criminal cases where the challenged evidence was relevant to test partiality towards the party by whom the expert was called. The fact that an expert witness may have a motive to testify favorably for the party calling him is a "fact of consequence" to the jury's assessment of that witness's credibility.

3. Evidence—expert testimony—state of mind—low blood sugar—automatism—hypoglycemia

The trial court did not commit prejudicial error in a voluntary manslaughter case by allowing the State's expert witness to testify about defendant's state of mind at the time he shot his wife where defendant used the defense of automatism (based on his low blood sugar) as justification. The expert was an endocrinologist whose expertise included automatism primarily as it related to responsibility in driving motor vehicles and collisions by those suffering from hypoglycemia.

4. Jury—jury instruction—defense of automatism—pattern jury instructions

The trial court did not commit plain error in a voluntary manslaughter case by its instructions to the jury on the defense of

automatism where the trial court used almost verbatim the pattern jury instructions.

5. Homicide—voluntary manslaughter—failure to instruct on lesser-included offense—involuntary manslaughter

The trial court did not commit plain error in a voluntary manslaughter case by failing to instruct the jury on the lesser-included offense of involuntary manslaughter where there was no evidence at trial suggesting that defendant did not intend to shoot his wife.

Appeal by defendant from judgment entered 14 December 2015 by Judge J. Thomas Davis in Clay County Superior Court. Heard in the Court of Appeals 24 May 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General John P. Barkley, for the State.

Parker Law Firm, PC, by James V. Parker, Jr., for defendant.

DIETZ, Judge.

Defendant Matthew Coleman appeals his conviction for voluntary manslaughter. At trial, Coleman admitted that he shot and killed his wife. But he argued that, as a result of diabetes, his blood sugar was dangerously low at the time of the shooting, causing Coleman to act in a manner that was not voluntary.

On appeal, Coleman challenges the sufficiency of the evidence and argues that the trial court committed plain error in various evidentiary and instructional rulings. As explained below, there was sufficient evidence to send the charge of voluntary manslaughter to the jury and the trial court's rulings were well within the court's sound discretion. Accordingly, we find no error in the trial court's judgment.

Facts and Procedural History

On 22 April 2013, Matthew Coleman and his wife went to the grocery store and returned home around 1 p.m. Soon after, Coleman's neighbor, Barbara Hardee, observed Coleman walking toward her house carrying three briefcases and an unidentified object. Coleman dropped the object (later discovered to be a gun) in a brush pile in the yard. Coleman then approached Ms. Hardee's house and told her that he killed his wife. Ms. Hardee told Coleman not to "kid that way," but Coleman responded, "I'm not kidding, didn't you hear the shot?"

Ms. Hardee called 911 while her husband, Roland Hardee, checked Coleman for weapons. Mr. Hardee was concerned about Coleman's blood sugar level and gave Coleman a granola bar. Mr. Hardee asked Coleman why he shot his wife and Coleman responded, "I don't know, something told me." When Mr. Hardee asked Coleman if it was an accident, Coleman stated "I just went to get my gun and couldn't find it, then I just shot her."

Police and EMS were dispatched and arrived at approximately 1:40 p.m. In their initial investigation, law enforcement determined that Coleman shot his wife, picked up three briefcases and the gun, locked the house, walked past his truck, threw the gun into a brush pile, and then approached Ms. Hardee and told her that he shot his wife. In the three briefcases, the police found approximately $110,000 in cash, savings bonds, and foreign currency, and various important documents. Coleman told a police officer that "he didn't know why he had done it, why did he kill the woman he loved, they had plans together, plans he made." Coleman also said, "Why did I kill the woman I loved? We never fought in 30 years. We had plans together, plans I made. How could I do such a horrible thing?" Coleman then told the officer that his blood sugar was dropping.

On 31 May 2013, the State indicted Coleman for first degree murder. Coleman entered a plea of not guilty and gave notice of his intent to assert the affirmative defense of automatism based on his low blood sugar at the time of the shooting. Coleman was diagnosed as a Type I diabetic in 1981 and had a history of hypoglycemic episodes where his blood sugar dropped to very low levels. The evidence presented at trial included a glucometer reading of 39 from 1:22 p.m. on 21 April 2013, along with a handwritten log of corresponding glucose readings indicating that the glucometer's date stamps may have been one day behind, meaning the 39 reading could have been recorded the day Coleman shot his wife.

At trial, Coleman presented expert testimony from Dr. George Corvin, a psychiatrist Coleman retained to evaluate him. Dr. Corvin testified that, in his opinion, Coleman was acting in a state of automatism due to hypoglycemia when he shot his wife. On cross-examination, over Coleman's objection, the State questioned Dr. Corvin about the amount of fees he was paid to testify as a defense expert in criminal cases from 2013-2015.

The State presented expert testimony from Dr. Warner Burch, an endocrinologist, who testified that in his opinion, Coleman was not in a

state of automatism due to hypoglycemia at the time of the offense. This testimony was admitted over Coleman's objection to Dr. Burch giving an opinion as to Coleman's state of mind.

The jury found Coleman guilty of the lesser-included offense of voluntary manslaughter. The trial court sentenced Coleman to 64-89 months in prison. Coleman timely appealed.

Analysis

Coleman raises five issues on appeal. We address each in turn below.

I. Denial of motion for directed verdict

[1] Coleman first argues that the trial court erred by denying his motion for a directed verdict of not guilty because the State failed to present evidence of all of the required elements of first degree murder and the lesser-included offenses of second degree murder and voluntary manslaughter. We disagree.

In a criminal case, a motion for directed verdict and a motion to dismiss have the same effect and are reviewed under the same standard of review on appeal. *See State v. Mize*, 315 N.C. 285, 290, 337 S.E.2d 563, 565 (1985). "This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "Upon 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). "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, 265 S.E.2d 164, 169 (1980). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

Although Coleman argues that the trial court erred in denying his motion for directed verdict on all of the charges, the jury found Coleman not guilty of the greater offenses of first and second degree murder, convicting him only of voluntary manslaughter. Therefore, any error in the denial of Coleman's motion as to the murder charges is not prejudicial and we need only address his argument as to the voluntary manslaughter charge. *See* N.C. Gen. Stat. § 15A-1443(a).

"Voluntary manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation." *State v. Norris*, 303 N.C. 526, 529, 279 S.E.2d 570, 572 (1981). Voluntary manslaughter requires the State to prove two elements: "(1) Defendant killed [the victim] by an intentional and unlawful act and (2) Defendant's act was the proximate cause of [the victim's] death." *State v. English*, 241 N.C. App. 98, 105, 772 S.E.2d 740, 745 (2015); *see also* N.C.P.I. – Crim. 206.13.

Coleman argues that the trial court should have granted his motion for directed verdict on the voluntary manslaughter charge because "no evidence was presented by the State to even suggest that [Coleman] acted in the heat of passion." We reject this argument because acting in the "heat of passion" is not an essential element of voluntary manslaughter. To be sure, evidence that a defendant acted in the heat of passion can negate the malice element required for the greater offenses of first or second degree murder. *See State v. Rainey*, 154 N.C. App. 282, 288, 574 S.E.2d 25, 29 (2002). But to prove voluntary manslaughter, the State need not prove that the defendant acted in the heat of passion; instead, the State must prove only that the defendant killed the victim by an intentional and unlawful act and that the defendant's act was a proximate cause of the victim's death.

Here, the State presented evidence showing that Coleman shot his wife and admitted that he shot her. His sole defense was that he did not act voluntarily due to his low blood sugar, which placed him in a state of automatism. The State presented admissible expert testimony that Coleman was not in a state of automatism when he shot his wife. Thus, there was substantial evidence from which a reasonable jury could reject Coleman's automatism defense and conclude that Coleman intentionally shot and killed his wife—the only elements necessary to prove voluntary manslaughter. Accordingly, the trial court properly denied Coleman's motion.

II. Cross-examination of Coleman's expert witness regarding fees

[2] Coleman next argues that the trial court committed plain error by allowing the State to question his expert witness, Dr. George Corvin, regarding the amount of fees Dr. Corvin received for testifying in other, unrelated criminal cases. Coleman argues that the question was not relevant and thus was inadmissible.

As an initial matter, although Coleman asserts that this was plain error (the standard of review for unpreserved evidentiary challenges), Coleman's counsel timely objected to this line of questioning at trial by

stating "objection, relevance." We therefore review it for ordinary prejudicial error, rather than the more onerous standard for plain error.

This Court reviews a ruling on relevance de novo, but affords the trial court "great deference" on appeal. *State v. Capers*, 208 N.C. App. 605, 615, 704 S.E.2d 39, 45 (2010). 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.

Applying this definition, we hold that the challenged evidence was relevant to "test partiality towards the party by whom the expert was called." *State v. Cummings*, 352 N.C. 600, 620, 536 S.E.2d 36, 51 (2000). From the large sums of money that Coleman's expert earned by testifying solely on behalf of criminal defendants, a reasonable jury could infer that the expert had an incentive to render opinions favorable to the criminal defendants who employ him. As our Supreme Court has observed, this inference readily can be addressed and rebutted on redirect, for example through the expert's testimony that his fees are consistent with those charged by others with similar levels of specialized knowledge and expertise. *State v. Brown*, 335 N.C. 477, 493, 439 S.E.2d 589, 599 (1994). Moreover, in appropriate cases, a court might exclude this testimony because it is substantially more prejudicial than probative. But as to the threshold question of relevance, the fact that an expert witness may have a motive to testify favorably for the party calling him certainly is a "fact of consequence" to the jury's assessment of that witness's credibility. Thus, the challenged testimony was relevant and the trial court did not err in overruling Coleman's relevancy objection.

III. Expert testimony concerning Coleman's state of mind

[3] Coleman next contends that the trial court committed plain error by allowing Dr. Burch, the State's expert witness, to testify to Coleman's state of mind at the time of the shooting. Coleman argues that this testimony fell outside the permissible range of Dr. Burch's expert testimony.

Again, we note that although Coleman asserts plain error, his counsel timely objected to the challenged testimony, preserving this issue for appellate review. We therefore review it for prejudicial error, rather than the more onerous standard for plain error.

"The trial court's decision regarding what expert testimony to admit will be reversed only for an abuse of discretion." *State v. Alderson*, 173 N.C. App. 344, 350, 618 S.E.2d 844, 848 (2005). "Rule 702(a) has three main parts, and expert testimony must satisfy each to be admissible.

First, the area of proposed testimony must be based on scientific, technical or other specialized knowledge that will assist the trier of fact to understand the evidence or to determine a fact in issue." *State v. McGrady*, 368 N.C. 880, 889, 787 S.E.2d 1, 8 (2016). "Second, the witness must be qualified as an expert by knowledge, skill, experience, training, or education." *Id.* at 889, 787 S.E.2d at 9. "Third, the testimony must meet the three-pronged reliability test that is new to the amended rule: (1) The testimony [must be] based upon sufficient facts or data. (2) The testimony [must be] the product of reliable principles and methods. (3) The witness [must have] applied the principles and methods reliably to the facts of the case." *Id.* at 890, 787 S.E.2d at 9.

Here, Dr. Burch, an endocrinologist, testified that, based on his experience with hypoglycemia and his review of Coleman's medical records and accounts of what had occurred the day of the shooting, Coleman's actions were "not caused by automatism due to hypoglycemia. Automatism due to hypoglycemia is possible but not probable given the bulk of the evidence." Dr. Burch testified that he reached this opinion largely because Coleman did not experience any amnesia which, in Dr. Burch's experience, is one of the characteristic features of automatism caused by hypoglycemia.

Coleman argues that this testimony, while couched as expert medical testimony, is merely speculation about Coleman's state of mind at the time of the shooting. We disagree. Dr. Burch is an endocrinologist whose expertise includes "automatism primarily as it relates to responsibility in driving motor vehicles and collisions by those suffering from hypoglycemia." The trial court properly found that Dr. Burch was an expert in the signs and symptoms that accompany automatism caused by hypoglycemia and that his testimony was based on sufficient data and facts using "well documented and accepted principles and methods in the field of endocrinology."

Applying that expertise, Dr. Burch testified that, in his opinion, Coleman was not in a state of automatism when he shot his wife because he did not suffer from amnesia, a key characteristic of the condition. The trial court acted well within its sound discretion in admitting this expert testimony. *See McGrady*, 368 N.C. at 893, 787 S.E.2d at 11.

IV. Jury instruction on defense of automatism

[4] Coleman next argues that the trial court committed plain error in its instructions to the jury on the defense of automatism.

We agree that Coleman failed to preserve this error for appellate review and thus we review solely for plain error. "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Id.* Plain error should be "applied cautiously and only in the exceptional case" where the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.*

Coleman contends that the jury instruction was misleading because it implied that Coleman had to prove the defense of automatism beyond a reasonable doubt. As explained below, we reject this argument.

The trial court instructed the jury on the defense of automatism using the North Carolina Pattern Jury Instructions. The court instructed the jury:

> You may find there is evidence which tends to show that the defendant was physically unable to control his physical actions because of automatism or unconsciousness; that is a state of mind in which a person, though capable of action, is not conscious of what the person is doing at the time the crime was alleged to have been committed.
>
> In this case, one element that the State must prove beyond a reasonable doubt is that the act charged be done voluntarily. Therefore, unless you find from the evidence beyond a reasonable doubt that at the time the defendant was able to exercise conscious control of the defendant's physical actions, the defendant would be not guilty of the crime.
>
> *If the defendant was unable to act voluntarily the defendant would not be guilty of any offense.*
>
> The burden of persuasion rests on the defendant to establish this defense to the satisfaction of the jury. However, unlike the State, which must prove all the other elements beyond a reasonable doubt, *the defendant need only prove the defendant's unconsciousness to your satisfaction. That is, the evidence taken as a whole must satisfy you, not beyond a reasonable doubt but simply to your satisfaction*, that defendant was unconscious at the time of the alleged offense.

(Emphasis added). The trial court then instructed the jury on each charge and explained that if the jury found "beyond a reasonable doubt" that Coleman met all the elements of the particular offense, "it would be your duty to return a verdict of guilty . . . unless you are satisfied that the defendant was not guilty by reason of unconsciousness." And finally, the court concluded its instructions with, "If you do not so find or have a reasonable doubt as to one or more of these things, or if you are satisfied that the defendant was not guilty by reason of unconsciousness, it would be your duty to return a verdict of not guilty."

These instructions accurately stated the law. As an initial matter, the instructions are almost entirely a verbatim recitation of the pattern jury instructions, which this Court has held is the preferred manner of instructing the jury on all issues. *Henry v. Knudsen*, 203 N.C. App. 510, 519, 692 S.E.2d 878, 884 (2010). Moreover, even where these instructions depart from the pattern instructions, they accurately state the law. The instructions explained the proper burden of proof for the defense of automatism as well as the principle that if the jury found that Coleman had met his burden of proving the defense then he would not be guilty of any crime. The instructions explicitly stated that Coleman's burden was "to establish this defense to the satisfaction of the jury" and that "unlike the State, which must prove all the other elements beyond a reasonable doubt, *the defendant need only prove the defendant's unconsciousness to your satisfaction*." (Emphasis added). The instructions also explicitly stated that "[i]f the defendant was unable to act voluntarily *the defendant would not be guilty of any offense*." (Emphasis added). Finally, the instructions on each of the charged offenses indicated that a finding of unconsciousness or automatism would require a verdict of not guilty.

Accordingly, we hold that the trial court's jury instructions on automatism, considered in context, were a correct statement of the law. We therefore find no error and certainly no plain error.

V. Omission of involuntary manslaughter from jury charge

[5] Finally, Coleman argues that the trial court committed plain error by not instructing the jury on the lesser-included offense of involuntary manslaughter. This argument is not preserved for appellate review and thus is subject to the plain error standard described above.

"An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002). In the context of a shooting, the charge of involuntary manslaughter requires evidence of "the

absence of intent to discharge the weapon." *State v. Robbins*, 309 N.C. 771, 779, 309 S.E.2d 188, 192 (1983). This distinguishes involuntary manslaughter from its voluntary counterpart, which requires proof of intent.

Coleman's argument fails because there was no evidence at trial suggesting that Coleman did not intend to shoot his wife. Coleman's defense relied on his argument that he was in a state of automatism—a complete defense to all criminal charges. The jury rejected that defense. Setting automatism aside, there is no evidence suggesting the shooting was an accident. Accordingly, we find no error in the trial court's failure to instruct the jury on the lesser-included offense of involuntary manslaughter.

Conclusion

For the reasons discussed above, we find no error in the trial court's judgment.

NO ERROR.

Chief Judge McGEE and Judge MURPHY concur.

STATE OF NORTH CAROLINA
v.
DARIUS TERRELL HESTER

No. COA16-1120

Filed 18 July 2017

1. Criminal Law—plain error review—invited error

The trial court's denial of defendant's motion to suppress based on alleged lack of reasonable suspicion for a traffic stop was properly before the Court of Appeals based on plain error review where defendant was required to defend against the charges of attempted murder and felonious possession of a stolen firearm by testifying about the circumstances surrounding his possession of the stolen handgun.

2. Search and Seizure—stolen firearm—motion to suppress—separate crime—intervening event—causal link—unlawful stop

The trial court did not commit plain error in a felonious possession of a stolen firearm case by denying defendant's motion to suppress where evidence of a recovered stolen handgun was obtained

after defendant committed the separate crime of pointing a loaded gun at an officer and pulling the trigger. The State presented a sufficient intervening event to break any causal chain between the presumably unlawful stop and the discovery of the stolen handgun.

3. Appeal and Error—preservation of issues—attenuation—burden of proof on other party—appellate rules—intervening event

The trial court did not commit plain error in a felonious possession of a stolen firearm case by allowing into evidence a stolen and loaded handgun even presuming the State failed to preserve an attenuation issue for review where the burden was on defendant to show error in the lower court's ruling. Alternatively, the Court of Appeals ruled to invoke N.C. R. App. P. 2 to suspend the alleged requirements of N.C. R. App. P. 10 to allow it to consider the State's attenuation argument to prevent manifest injustice. The State presented a sufficient intervening event to break any causal chain between the presumably unlawful stop and the discovery of the stolen handgun.

Judge DILLON concurring in separate opinion.

Chief Judge McGEE dissenting.

Appeal by defendant from judgment entered 1 April 2016 by Judge Phyllis M. Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 20 April 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Kathryn L. VandenBerg, for defendant-appellant.

TYSON, Judge.

Darius Terrell Hester ("Defendant") appeals from his conviction of felonious possession of a stolen firearm following the trial court's denial of his motion to suppress. Due to Defendant's failure to object at trial, this issue is properly before us solely upon plain error review. Defendant has failed to carry his burden to show error or plain error in the jury's verdict or the judgment entered thereon.

I. Background

New Hanover County Sheriff's Deputy Joshua Cranford was familiar with the Rockhill Road area in Wilmington, as he regularly patrolled that area as part of his patrol route. He described the area as having a history of criminal gang and drug activity. Deputy Cranford testified a recent home invasion had occurred in the area and numerous "break-ins" in the past. He had personally made one arrest for home invasion. He was unable to specifically recall making any arrests for breaking and entering or drug activity in the area. Deputy Cranford testified that officers generally share information with each other about areas where criminal activity is afoot and crimes are committed.

New Hanover County Sheriff's Detective Kenneth Murphy had served as a law enforcement officer for seventeen years. He also testified about criminal activity in the Rockhill Road area. Three homicides occurred in the neighborhood between 1999 and 2003. Detective Murphy testified the area was "known for" breaking and entering, drug activity, and drive-by shootings. He was unaware of when the most recent breaking and entering crimes had occurred prior to 16 August 2013.

At around 10:30 a.m. on Friday, 16 August 2013, Deputy Cranford was patrolling the area in his marked patrol car and turned onto Rockhill Road. He was unaware of whether any crimes had been committed in the area that morning or the previous night. After driving approximately one-half mile on Rockhill Road, Deputy Cranford noticed a car was pulled over toward the side of the road, but was partially parked on the travel lane of the roadway. He initially believed the car might be disabled. As Deputy Cranford's marked patrol car approached the front of the parked vehicle and came within fifty yards of the vehicle, it moved and the driver drove away "in a normal fashion."

When the car pulled away, Deputy Cranford "saw [Defendant] walk away from the vehicle and cross the road in front of [him] and continue up Rockhill Road in the opposite direction." Deputy Cranford did not know whether Defendant had gotten out of the car or had been speaking with anyone inside the car.

Deputy Cranford also testified he believed the car had pulled away and Defendant had crossed the road in reaction to his arrival and presence. He further testified he did not know "if [Defendant] was lost," or whether a drug deal had just occurred. He believed Defendant may have been dropped off on the road in order to break into people's homes.

Deputy Cranford testified he "wanted to get outside and investigate and make sure everything was okay," because of the "area that we were

in" and the fact that Defendant walked from the car and the car pulled away as he approached. Deputy Cranford turned his vehicle around, activated his blue lights, and stopped Defendant.

Deputy Cranford exited his patrol car and asked Defendant whether he possessed any drugs or weapons. Defendant responded that he did not. Deputy Cranford asked Defendant for identification. Defendant did not possess a photo identification, but gave Deputy Cranford his name and date of birth. Defendant was initially polite and cooperative. He asked Deputy Cranford if he had done anything wrong. Deputy Cranford responded that he had not done anything wrong.

Deputy Cranford asked Defendant to remain at the front of his patrol car while he sat inside his patrol car. Deputy Cranford contacted the Sheriff's dispatcher to determine whether Defendant had any outstanding arrest warrants.

Defendant walked from the front of the patrol car to the driver's side and "stood [at] the entrance of the car door," which made Deputy Cranford "uncomfortable." Deputy Cranford instructed Defendant to return to the front of the patrol car. Moments later, Defendant "tried to do the same thing again." At that point, Deputy Cranford exited his patrol car, stood at the front of the car with Defendant, and awaited a response from the Sheriff's dispatcher. The Sheriff's dispatcher informed Deputy Cranford that Defendant had no outstanding warrants, but that he was "known to carry" a concealed weapon based upon a prior charge for carrying a concealed weapon.

Deputy Cranford again asked Defendant whether he possessed a weapon. Defendant lied and responded that he did not. At that point, Deputy Cranford observed a slight bulge under Defendant's shirt. Defendant became confrontational when Deputy Cranford asked him to lift his shirt. Defendant lifted his shirt and pulled a handgun from his waistband. Deputy Cranford testified that Defendant pointed the gun at him and pulled the trigger. He heard the hammer click, but the weapon did not discharge.

Deputy Cranford testified he backed up and drew his weapon. He began to fire shots at Defendant, who fled while still carrying his handgun. Deputy Cranford chased Defendant down a dirt path and lost sight of him as Defendant rounded a corner. Deputy Cranford turned the corner and saw Defendant lying on the ground. Defendant had been shot in the shoulder. Defendant told Deputy Cranford he had dropped his gun. Deputy Cranford placed Defendant under arrest.

Deputy Cranford recovered Defendant's handgun in the dirt path about twenty yards away. The recovered gun was found to be loaded with a full clip and it had been reported as stolen from a home in Wilmington in 2013. At trial, Defendant testified he had bought the gun "from off the streets" and that he knew such guns were typically stolen.

Defendant was indicted and tried on the charges of attempted murder and possession of a stolen firearm. Defendant testified he did not point the gun at Deputy Cranford or pull the trigger. He stated he was attempting to hand Deputy Cranford the gun, with the barrel pointed toward the ground.

Defendant testified Deputy Cranford reacted with shock and reached for his weapon. Defendant ran. He stated he was holding the handgun when he ran, but threw it prior to being shot. Defendant was acquitted of the attempted murder charge. The jury found him to be guilty of possession of a stolen firearm. 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. Standard of Review and Defendant's Preservation of Error

"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) (citing *State v. Brooks*, 337 N.C. 132, 140-41, 446 S.E.2d 579, 585 (1994)).

[1] Defendant's motion to suppress was heard prior to trial. The trial court denied the motion immediately following the presentation of evidence and arguments of counsel. Defendant concedes defense counsel failed to object when the evidence resulting from the stop, and particularly the stolen handgun, was offered at trial. The admission of the handgun evidence must be reviewed for plain error. *State v. Golphin*, 352 N.C. 364, 405, 533 S.E.2d 168, 198 (2000) (holding a motion *in limine* is insufficient "to preserve for appeal the question of admissibility of evidence if the defendant did not object to the evidence at the time it was offered at trial"), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001).

At trial, Defendant failed to object to numerous references to his possession of the stolen handgun, or to object to the tender and admission of the handgun into evidence. During his testimony, Defendant

acknowledged he had purchased and possessed the stolen handgun, but denied pointing it at Deputy Cranford or pulling the trigger.

The State argues Defendant elicited the same evidence and testified at trial, and is not entitled to plain error review, because he invited the error. *See* N.C. Gen. Stat. § 15A-1443(c) (2015) ("A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct."). The State cites *State v. Gobal*, 186 N.C. App. 308, 319, 651 S.E.2d 279, 287 (2007), *aff'd per curiam*, 362 N.C. 342, 661 S.E.2d 732 (2008) ("Statements elicited by a defendant on cross-examination are, even if error, invited error, by which a defendant cannot be prejudiced as a matter of law.").

Once the trial court denied Defendant's motion to suppress based upon lack of reasonable suspicion for the stop, Defendant was required to defend against the charges of attempted murder and felonious possession of a stolen firearm. He defended the charges by testifying about the circumstances surrounding his possession of the stolen handgun. This testimony was subject to cross-examination by the State.

While defending against the attempted murder charge, Defendant testified to explain his actions of surrendering the weapon and stated he did not point or fire his gun at Deputy Cranford. A defendant does not waive an objection to evidence by seeking "to explain, impeach or destroy its value." *State v. Badgett*, 361 N.C. 234, 246, 644 S.E.2d 206, 213 (citation omitted), *cert. denied*, 552 U.S. 977, 169 L. Ed. 2d 351 (2007). Defendant's appeal from the denial of his motion to suppress is properly before us on plain error review, and not invited error. *See id.*

"Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993) (citation omitted). This burden rests upon Defendant. *See id.*

IV. Denial of Defendant's Motion to Suppress

[2] Defendant's sole argument on appeal asserts the trial court erred by denying his motion to suppress the evidence obtained from the stop. Defendant argues Deputy Cranford did not possess a reasonable suspicion that he was involved in criminal activity when Deputy Cranford initially stopped and questioned him.

A. Fourth Amendment Protections

The United States and North Carolina Constitutions protect against unreasonable searches and seizures. U.S. Const. amend. IV; N.C. Const.

art. I, § 20. The protections of the Fourth Amendment apply "to seizures of the person, including brief investigatory detentions." *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 69-70 (1994) (citing *Reid v. Georgia*, 448 U.S. 438, 440, 65 L. Ed. 2d 890, 893 (1980)). A "seizure" has occurred under the Fourth Amendment when an officer uses a "show of authority" to stop a citizen. *Florida v. Royer*, 460 U.S. 491, 501-02, 75 L. Ed. 2d 229, 239 (1983). "[T]he crucial test [to determine if a person is seized] is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." *Florida v. Bostick*, 501 U.S. 429, 437, 115 L. Ed. 2d 389, 400 (1991) (citation and quotation marks omitted).

Here, Deputy Cranford turned his vehicle around and activated his blue lights after arrival upon the scene. Defendant stopped walking and voluntarily talked with Deputy Cranford. Defendant failed to provide a photo identification to the officer, but provided his name and address. The trial court properly analyzed this encounter as a stop. The State does not contest that Defendant was seized to implicate the Fourth Amendment. A reasonable person would not have felt at liberty to ignore Deputy Cranford's presence and the use of blue lights on his marked vehicle, and continue to walk away. *See id.*

To survive Fourth Amendment scrutiny, an investigatory stop must be justified by "a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." *Brown v. Texas*, 443 U.S. 47, 51, 61 L. Ed. 2d 357, 362 (1979) (citations omitted). As applied by the Supreme Court of North Carolina: "A court must consider the totality of the circumstances—the whole picture in determining whether a reasonable suspicion exists" to justify an officer's investigatory stop. *State v. Otto*, 366 N.C. 134, 138, 726 S.E.2d 824, 828 (2012) (citation and quotation marks omitted).

"The stop must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training." *Watkins*, 337 N.C. at 441-42, 446 S.E.2d at 70 (citing *Terry v. Ohio*, 392 U.S. 1, 21-22, 20 L. Ed. 2d 889, 906 (1968)); *State v. Thompson*, 296 N.C. 703, 706, 252 S.E.2d 776, 779, *cert. denied*, 444 U.S. 907, 62 L. Ed. 2d 143 (1979). "The only requirement is a minimal level of objective justification, something more than an 'unparticularized suspicion or hunch.' " *Watkins*, 337 N.C. at 442, 446 S.E.2d at 70 (quoting *U.S. v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10, (1989)).

At the conclusion of the suppression hearing, the trial court recited the evidence presented, as detailed above, and stated:

> The Court concludes as a matter of law that the Court takes into consideration the officer's personal observations at the time that he observed a vehicle and the defendant on Rockhill Road, that it was – that it is a high crime area where several breaking and enterings, drug activity, and drive-by shootings have occurred in the past; and that Deputy Cranford did not have all this information himself as he had not himself made several arrests for breaking and enterings or the activity in that area, that the officers shared this information and that Deputy Cranford would receive updates of information about the area in which he was patrolling on a regular basis when he was on duty.
>
> Therefore, the Court does find that the officer did have reasonable suspicion to believe that a crime was being committed at the time that he stopped the defendant on Rockhill Road. Therefore, the Court is going to deny the motion to suppress the evidence.

B. Intervening Circumstance

Even if this Court were to accept Defendant's argument that Deputy Cranford's initial stop of Defendant was not based upon a reasonable suspicion that Defendant was involved in criminal activity, the trial court's ultimate ruling on Defendant's motion to suppress to allow admission of the stolen handgun is properly upheld.

Viewed in the light most favorable to the State and under plain error review, evidence presented to the trial court at the hearing on Defendant's motion to suppress showed the recovered stolen handgun and all evidence related to the stolen handgun were obtained *after Defendant's commission of a separate crime*: pointing a loaded, stolen gun at Deputy Cranford and pulling the trigger. At the suppression hearing, the trial court expressly found Defendant pointed the gun at the officer and pulled the trigger.

Evidence discovered as a result of an illegal search or seizure is generally excluded at trial. *See Wong Sun v. United States*, 371 U.S. 471, 487-88, 9 L. Ed. 2d 441, 455 (1963). "[T]he exclusionary rule encompasses both the 'primary evidence obtained as a direct result of an illegal search or seizure and, relevant here, evidence later discovered and found to be derivative of an illegality,' the so-called 'fruit of the poisonous tree.' "

Utah v. Strieff, __ U.S. __, __, 195 L. Ed. 2d 400, 407 (2016) (quoting *Segura v. United States*, 468 U.S. 796, 804, 82 L. Ed. 2d 599, 608 (1984)). However,

> [w]e need not hold that all evidence is fruit of the poisonous tree simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead *by means sufficiently distinguishable to be purged of the primary taint.*

Wong Sun, 371 U.S. at 487-88, 9 L. Ed. 2d at 455 (citation and quotation marks omitted) (emphasis supplied). The Supreme Court of the United States has deemed the exclusionary rule " 'applicable only . . . where its deterrence benefits outweigh its substantial social costs.' " *Strieff*, __ U.S. at __, 195 L. Ed. 2d at 407 (quoting *Hudson v. Michigan*, 547 U. S. 586, 591, 165 L. Ed. 2d 56 (2006)).

"Suppression of evidence has always been our last resort, not our first impulse." *Id.* (ellipsis and citation omitted). Guided by these principles, the Supreme Court of the United States has recognized several exceptions to the exclusionary rule.

> First, the independent source doctrine allows trial courts to admit evidence obtained in an unlawful search if officers independently acquired it from a separate, independent source. Second, the inevitable discovery doctrine allows for the admission of evidence that would have been discovered even without the unconstitutional source. *Third, and at issue here, is the attenuation doctrine: Evidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.*

Id. (internal citations and quotation marks omitted) (emphasis supplied). We address the third exception, and hold the State presented a sufficient intervening event to break any causal chain between the presumably unlawful stop and the discovery of the stolen handgun. *See id.*

This Court can conceive only in the most rare instances "where [the] deterrence benefits" of police conduct to suppress a firearm "outweigh[s]

its substantial social costs" of preventing a defendant from carrying a concealed, loaded, and stolen firearm, pulling it at an identified law enforcement officer and pulling the trigger. *See Hudson*, 547 U. S. at 591, 165 L. Ed. 2d at 64 (citation and quotation marks omitted).

1. Preservation

[3] We initially address the dissenting opinion's notion that the State's "attenuation doctrine" argument must be dismissed, because the State failed to present that specific argument to the trial court during the hearing on Defendant's motion to suppress.

Defendant argued before the trial court that Deputy Cranford stopped him without reasonable suspicion of criminal activity, and Deputy Cranford's order to Defendant to lift his shirt, which revealed the handgun, constituted an unlawful search. Our review of the transcript of the hearing and record shows the State did not use the words "intervening circumstance" or "attenuation," and argued to the trial court that Deputy Cranford had reasonable suspicion to stop Defendant. The trial court denied Defendant's motion to dismiss on the basis that Deputy Cranford possessed reasonable suspicion to stop Defendant.

We are bound by precedents to conclude this issue is properly before us. It is well-settled in North Carolina that "[t]he question for review is whether the ruling of the trial court was correct and not whether the reason given therefor is sound or tenable. The crucial inquiry for this Court *is admissibility and whether the ultimate ruling was supported by the evidence*." *State v. Bone*, 354 N.C. 1, 8, 550 S.E.2d 482, 486 (2001) (quoting *State v. Austin*, 320 N.C. 276, 290, 357 S.E.2d 641, 650, *cert. denied*, 484 U.S. 916, 98 L. Ed. 2d 224 (1987)) (emphasis supplied).

" '[A] correct decision of a lower court will not be disturbed because a wrong or insufficient or superfluous reason is assigned.' " *State v. Dewalt*, 190 N.C. App. 158, 165, 660 S.E.2d 111, 116 (quoting *State v. Blackwell*, 246 N.C. 642, 644, 99 S.E.2d 867, 869 (1957)), *disc. review denied*, 362 N.C. 684, 670 S.E.2d 906 (2008).

The burden on appeal rests upon Defendant to show the trial court's ruling is incorrect. *See State v. Herring*, 322 N.C. 733, 749, 370 S.E.2d 363, 373 (1988). The occurrence of an intervening event, which purges the taint of an illegal stop, becomes an issue only if the court finds the underlying illegality.

The intervening event does not present an arguable issue until the trial court determines the defendant sustained his burden of persuasion on the illegality of the police conduct. While the State could have

requested the trial court's consideration of the attenuation issue as an alternative basis to admit the handgun, the State's failure to raise the attenuation issue at the hearing does not compel nor permit this Court to summarily exclude the possibility that the trial court's ruling was correct under this or some other doctrine or rationale. *See Bone*, 354 N.C. at 8, 550 S.E.2d at 486; *Blackwell*, 246 N.C. at 644, 99 S.E.2d at 869.

The dissenting opinion notes the well-established trot that "the law does not permit parties to swap horses between courts in order to get a better mount." *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934); *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982). However, those cases and all others cited only apply to instances where the party, whether Plaintiff, Defendant, or the State, is carrying the burden on appeal to show error in the lower court's ruling on appeal, and relies upon a theory not presented before the lower court.

That circumstance is not before us here. We review the trial court's ultimate ruling for error, prejudice, and, in this case, *solely* for plain error. This Court is free to and may uphold the trial court's "ultimate ruling" based upon a theory not presented below or even argued here. *See Bone*, 354 N.C. at 8, 550 S.E.2d at 486.

Our precedents clearly allow the party seeking to *uphold* the trial court's presumed-to-be-correct and "ultimate ruling" to, in fact, choose and run any horse to race on appeal to sustain the legally correct conclusion of the order appealed from. *See id.*; *Austin*, 320 N.C. at 290, 357 S.E.2d at 650; *Blackwell*, 246 N.C. at 644, 99 S.E.2d at 869.

The dissenting opinion relies upon this Court's decision in *State v. Gentile*, 237 N.C. App. 304, 766 S.E.2d 349 (2014). *Gentile* is easily distinguishable from the circumstances presented here. In *Gentile*, the State sought to overturn the trial court's ruling, which granted the defendant's motion to suppress. This Court did not allow the State, *who bore the burden on appeal* to show error in the trial court's presumably correct ruling, to "swap horses" on appeal. *Id.* at 310, 766 S.E.2d at 353-54. For the same reason, this Court routinely dismisses arguments advanced by defendants in criminal cases when the defendants attempt to mount and ride a stronger or better, and possibly prevailing steed not run before the trial court.

Rule 10 of our Rules of Appellate Procedure governs the preservation of issues during trial proceedings. N.C. R. App. P. 10. Our conclusion that the trial court did not commit plain error to allow into evidence the stolen and loaded handgun does not change, even if we were to presume the State failed to preserve the attenuation issue for our review.

Alternatively, we rule to invoke Rule 2 in this case to suspend the dissent's alleged requirements of Rule 10 to allow us to consider the State's attenuation argument.

> 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.

This matter involves "exceptional circumstances [and] significant issues of importance in the public interest," the firing of a stolen and loaded weapon upon a police officer by a private citizen illegally carrying a weapon. Defendant was not prejudiced by the State's failure to make the attenuation argument below. The State presented evidence at the suppression hearing that Defendant fired upon the officer, which Defendant had the opportunity to rebut.

The trial court specifically found that Defendant attempted to fire at the officer when it rendered its ruling on Defendant's motion to suppress. Further, we note Defendant argues denial of his suppression motion on appeal, under plain error review, even though he failed to properly preserve his objection when the evidence was introduced and commented on multiple times at trial. Even if the State failed to properly preserve the attenuation argument in the trial court for our review, the circumstances in this case alternatively compel us to invoke Rule 2 and also review the merits of the State's arguments to uphold the trial court's ultimate ruling in its order. This issue is properly before us.

2. Commission of a Crime

To determine whether an intervening event is sufficient to break "the causal chain between the unlawful stop and the discovery of the [evidence]," the Supreme Court of the United States has delineated the following three factors: (1) "the temporal proximity between the unconstitutional conduct and the discovery of evidence to determine how closely the discovery of evidence followed the unconstitutional search;" (2) "*the presence of intervening circumstances*;" and (3) "the purpose and flagrancy of the official misconduct." *Strieff*, __ U.S. at __, 195 L. Ed. 2d at 408 (emphasis supplied). "In evaluating these factors, we assume without deciding . . . that [the officer] lacked reasonable suspicion to initially stop [the defendant]." *Id.*

Here, the evidence presented in the light most favorable to the State at the suppression hearing showed after Deputy Cranford was warned Defendant might be carrying a concealed weapon, noticed a bulge in Defendant's waist, and asked Defendant to lift his shirt, Defendant responded by: (1) raising his shirt; (2) pulling a loaded and stolen handgun from his waistband; (3) pointing the gun at Deputy Cranford; and (4) pulling the trigger.

Deputy Cranford testified the handgun failed to discharge when Defendant pulled the trigger. Deputy Cranford's testimony that Defendant committed the independent criminal act in the presence of the officer breaks the causal chain between the presumably unconstitutional stop and the discovery of the evidence.

The facts of this case are directly on point with the United States Court of Appeals for the Fourth Circuit's decision in *State v. Sprinkle*, 106 F.3d 613 (4th Cir. 1997). In *Sprinkle*, the officers conducted an investigatory stop of the defendant without reasonable suspicion of criminal activity. *Id.* at 618-19. While an officer was performing a pat-down of the defendant, the defendant began to run with the officer in pursuit. *Id.* at 616. The defendant pulled a handgun from the front of his pants and continued to run with his gun still drawn and fired one shot toward the officer. *Id.*

The Court explained: "If a suspect's response to an illegal stop 'is itself a new, distinct crime, then the police constitutionally may arrest the [suspect] for that crime.' " *Id.* at 619 (quoting *United States v. Bailey*, 691 F.2d 1009, 1017 (11th Cir. 1982)). "Because the arrest for the new, distinct crime is lawful, evidence seized in a search incident to that lawful arrest is admissible." *Id.* (citing *Bailey* at 1018).

Our federal courts have explained the reasons for holding that a new and distinct crime, following an arguably illegal stop or search of the defendant, is a sufficient intervening event to provide an independent basis for an arrest and/or the admissibility of evidence uncovered during a search incident to that arrest.

> (1) "a contrary rule would virtually immunize a defendant from prosecution for all crimes he might commit that have a sufficient causal connection to the police misconduct[,]" *Bailey*, 691 F.2d at 1017-18; (2) the exclusionary rule does not extend so far as to require suppression when the discovery of the evidence can be traced to the separate offense, *see*, *e.g.*, *Waupekenay*, 973 F.2d at 1538; and (3)

> to hold otherwise would encourage persons to resist the police and create potentially violent and dangerous confrontations. *Id.* Challenges to even unconstitutional police searches must be made in the courts, not on the street.

United States v. Crump, 62 F. Supp. 2d 560, 568 (D. Conn. 1999).

Like in *Sprinkle*, when Defendant "drew and fired his gun at [Deputy Cranford], he committed a new crime that was distinct from any crime he might have been suspected of at the time of the initial stop." *Sprinkle*, 106 F.3d at 619. Deputy Cranford had probable cause to arrest Defendant "because the new crime purged the taint of the prior illegal stop[,] [a]nd the gun, which was in plain view at the scene of the new crime, could be legitimately seized." *Id.* at 619-20.

Although Defendant's commission of a separate and distinct criminal offense is alone sufficient as an "intervening circumstance" to purge the taint of the presumed illegal stop, we note the third factor set forth in *Strieff* also favors attenuation. "The exclusionary rule exists to deter police misconduct. The third factor of the attenuation doctrine reflects that rationale by favoring exclusion only when the police misconduct is most in need of deterrence—that is, when it is purposeful or flagrant." *Strieff*, __ U.S. at __, 195 L. Ed. 2d at 409.

Here, Deputy Cranford explained that he and other officers knew Rockhill Road to be a high crime area; while patrolling the area he turned onto Rockhill Road and saw a vehicle parked partially onto the roadway; the vehicle drove away as Deputy Cranford approached; Defendant "walk[ed] away from the vehicle;" Deputy Cranford believed the car drove off and Defendant started to walk away in reaction to his presence; and he decided to investigate "to make sure everything was okay" due to the "area we were in."

Like in *Strieff*, there was no indication that the stop of Defendant "was part of any systemic or recurrent police misconduct." *Id.* at __, 195 L. Ed. 2d 410. Even if the initial stop was unjustified and unsupported by reasonable suspicion, it does not "rise to a purposeful or flagrant violation of [Defendant's] Fourth Amendment rights." *Id.* at __, 195 L. Ed. 2d at 410. The trial court's ultimate conclusion to allow admission of the recovered, stolen, and loaded weapon was proper, and more so under plain error review, where Defendant failed to object to the admission of, or testimony concerning, the handgun. Defendant has failed to carry his burden to exclude this evidence under plain error review or the reverse the jury's conviction.

V. Conclusion

The evidence of the stolen handgun was admissible because the presumably unlawful stop was sufficiently attenuated by Defendant's intervening commission of a separate and distinct criminal offense of concealing and pointing a stolen and loaded gun at Deputy Cranford and pulling the trigger. These events "broke the causal chain between the [presumed] unconstitutional stop and the discovery of evidence." *Id.*

This issue is properly before us on plain error review of the trial court's "ultimate ruling" and conclusion to deny Defendant's motion to suppress. *See Bone*, 354 N.C. at 8, 550 S.E.2d at 486 (stating this Court determines "admissibility and whether the *ultimate ruling* was supported by the evidence" (emphasis supplied)). Furthermore, as was true in *Strieff*, "there is no evidence that [the] stop reflected flagrantly unlawful police misconduct." *Id.*

The trial court properly denied Defendant's motion to suppress. Defendant has failed in his burden to show error, much less plain error, in the trial court's ultimate ruling to allow the testimony concerning and the weapon itself to be admitted. *It is so ordered.*

NO PLAIN ERROR.

Judge DILLON concurs with separate opinion.

Chief Judge McGEE dissents with separate opinion.

DILLON, Judge, concurring.

I concur but write separately to address the dissent's issue with the State's failure to preserve its appellate argument.

Defendant was convicted of possessing a firearm which was discovered during a stop. At the suppression hearing below, the State's *sole* argument was that the stop itself was lawful, and, therefore, the firearm was admissible.

During the suppression hearing, the State also offered evidence, which the trial court found credible, that during the stop Defendant pulled the concealed firearm, pointed it at the officer and pulled the trigger. I agree with the majority that this intervening event makes the gun admissible. Though the State failed to make this "winning" argument at the suppression hearing, the trial court denied Defendant's motion.

The dissent is based, in large part, on a view that the State, as the appell*ee*, should be prohibited just like Defendant, as the appell*ant*, from making any legal argument on appeal that it failed to make at the suppression hearing. Indeed, it is axiomatic that an appell*ant* cannot "swap horses" by making a new argument on appeal that was not made before the trial court in order to get a "better mount." *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934).

Rule 10 of our appellate rules allows an appellee to propose "alternative bas[e]s in law for supporting the judgment" in addition to the basis relied upon by the trial court. However, Rule 10 states that such alternative bases that the appellee desires to raise on appeal must have been "properly preserved[.]" N.C. R. App. P. 10(c).

So based on Rule 10 one could argue that the State, as the appellee, should be limited, just like Defendant-appellant, to the arguments it made at the suppression hearing. Had the State lost, the State (as the appell*ant*) would be allowed on appeal to make *only* the losing argument that it made before the trial court. And, therefore, the State should not be allowed to make the winning argument in this case simply because it won at the trial court based on a losing argument. That is, the State did not "properly preserve" (as required by Rule 10) the winning argument. *See Higgins v. Simmons*, 324 N.C. 100, 103, 376 S.E.2d 449, 452 (1989) ("Because a contention not made in the court below may not be raised for the first time on appeal, the . . . contention [by the party seeking to raise that issue on appeal] was not *properly* presented to the Court of Appeals for review[.]")

However, one could argue that an appellate court may consider *any* basis which supports the trial court's correct result, even if the basis was not relied upon by the trial court or argued by the parties. This view is based on Supreme Court's jurisprudence suggesting that our role as an appellate court is simply to determine whether the trial court *got it right* based on its findings, even if the reasoning may be faulty. *See*, *e.g.*, *State v. Bone*, 354 N.C. 1, 8, 550 S.E.2d at 482, 486 (2001) ("The crucial inquiry for this Court is admissibility and whether the ultimate ruling was supported by the evidence.") And here, the State *did present* evidence, which the trial court *did find* credible, to support the winning argument, namely the trial court found that Defendant attempted to shoot the officer. Based on this argument, we should simply affirm the order of the trial court.

But presuming that Rule 10 does prevent the State from arguing (and our Court from considering) the "winning" argument, I concur with

the majority's invocation of Rule 2 to consider the winning argument. I believe that this matter involves "exceptional circumstance [and] significant issues of importance in the public interest" and in my discretion, I conclude that the invocation of Rule 2 is necessary "to prevent injustice." *State v. Campbell*, 2017 N.C. LEXIS 400, *6-7 (June 9, 2017). It is a matter of public interest that private citizens illegally carrying concealed weapons not be excused from assaulting an officer simply because the officer may have erred in determining that reasonable suspicion existed to justify a stop, where the officer was not otherwise assaultive in his behavior. I note that Defendant is not prejudiced by the State's failure to make the winning argument at the suppression hearing. Indeed, the State put on evidence at the suppression hearing that Defendant assaulted the officer during the stop, and Defendant had the opportunity to rebut the State's evidence regarding Defendant's assaultive behavior. And there is no winning argument which Defendant's counsel could have made to justify the exclusion of the firearm where it was found that Defendant used it to assault the officer.

Therefore, I concur.

McGEE, Chief Judge, dissenting.

Defendant asks this Court to reverse the trial court's denial of his motion to suppress. Defendant argues Deputy Cranford did not have reasonable suspicion to stop him when the deputy observed him walking on the side of the road in Wilmington, North Carolina. Rather than address the sole issue presented by Defendant in this appeal, the majority and the concurrence choose to reach, and ultimately credit, a novel legal theory of admissibility advanced by the State that was never raised or considered in the trial court.

If the State's argument had been preserved, I would agree with the majority – with some reservations, outlined below – that Deputy Cranford's stop of Defendant was sufficiently attenuated from the discovery of the firearm under the Supreme Court of the United States' holding in *Utah v. Strieff*, ___ U.S. ___, 195 L. Ed. 2d 400 (2016). However, the State failed to preserve its attenuation argument, and I respectfully dissent from the majority's decision to reach and credit that argument.

The rule the majority crafts is inconsistent with normal rules of preservation. This Court regularly refuses to consider arguments presented by a criminal defendant for the first time on appeal, reasoning that the argument has been waived by the defendant's failure to first make the argument to the trial court. There is no reason why this rule should

operate differently for the State and, consistent with binding precedent, I would hold the State's failure to raise its attenuation argument in the trial court warrants dismissal of that argument here. Deputy Cranford's stop of Defendant was unconstitutional, and I would therefore reverse the trial court's denial of Defendant's motion to suppress and vacate his conviction.

I. Reasonable Suspicion to Stop Defendant

I first address whether there was a sufficient basis for Deputy Cranford to stop Defendant. The majority does not consider whether Deputy Cranford's conduct was unconstitutional, and instead proceeded directly to a discussion of whether the unconstitutional stop, if it existed, was attenuated from the discovery of the evidence the Defendant moved to suppress. However, consideration of the constitutionality of the stop is useful, since a determination that the stop was lawful would conclude our inquiry in this case. Also, even if the stop was unlawful, being able to identify precisely what conduct of Deputy Cranford was unjustified is valuable in the *Strieff* attenuation analysis.

The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures. *See* U.S. Const. Amend. IV. The United States Supreme Court has held that "[a]n investigatory stop is permissible under the Fourth Amendment if supported by reasonable suspicion." *Ornelas v. United States*, 517 U.S. 690, 693, 134 L. Ed. 2d 911, 917 (1996) (citing *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968)). Reasonable suspicion is "a particularized and objective basis for suspecting the particular person stopped" has violated the law. *Navarette v. California*, 572 U.S. ___, ___, 188 L. Ed. 2d 680, 686 (2014).

As this Court has held,

> the legal evaluation of a police officer's reasonable suspicion determination must be grounded in a pragmatic approach. Reasonable suspicion is a nontechnical conception that deals with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. Our nation's highest court has acknowledged that the concept of reasonable suspicion is somewhat abstract and has deliberately avoided reducing it to a neat set of legal rules. As such, common sense and ordinary human experience must govern over rigid criteria.

State v. Mangum, ___ N.C. App. ___, ___, 795 S.E.2d 106, 118 (2016) (citations, quotation marks, and brackets omitted). In order to meet the

reasonable suspicion threshold, "[t]he officer, of course, must be able to articulate something more than an inchoate and unparticularized suspicion or hunch." *State v. Knudsen*, 229 N.C. App. 271, 284, 747 S.E.2d 641, 650 (2013) (quotation omitted). "An officer has reasonable suspicion if a reasonable, cautious officer, guided by his experience and training, would believe that criminal activity is afoot based on specific and articulable facts, as well as the rational inferences from those facts." *State v. Williams*, 366 N.C. 110, 116, 726 S.E.2d 161, 167 (2012). As a reviewing court, we "must consider the totality of the circumstances — the whole picture." *Id.*

In the present case, Deputy Cranford observed Defendant standing on the side of the road in an area known for high crime. Defendant was talking to an unknown person in a vehicle. Deputy Cranford testified that the vehicle was parked "partially in the road" with its brake lights engaged. Shortly after Deputy Cranford arrived in his police cruiser and stopped about twenty-five to fifty yards from the vehicle, the vehicle drove away at a normal speed and in a normal fashion. Deputy Cranford believed the driver of the vehicle "recognized [him] as a deputy" and drove off in an effort to avoid him. Deputy Cranford did not check the license plate of the vehicle, did not follow the vehicle, and did not know if the driver or any occupants of the vehicle were involved in any criminal activity. After the vehicle left, Defendant walked down the road with a cellphone in his hands.

Deputy Cranford testified he did not know if Defendant had exited the vehicle, that nothing about Defendant's appearance drew his attention, and that he did not know who Defendant was or what Defendant was doing. Deputy Cranford deemed the vehicle driving away as "suspicious" and testified it was his belief that Defendant's walking away "was in reaction to [Deputy Cranford's] presence as well[.]" On cross-examination, Deputy Cranford admitted that "no matter what [Defendant] did walking away from [the vehicle], [he] thought that was suspicious." Accordingly, Deputy Cranford drove past Defendant, turned around, and activated his blue lights to effectuate a stop. Deputy Cranford characterized Defendant as being "polite and cooperative" when he was first stopped. At the suppression hearing, the following exchange occurred between Deputy Cranford and the prosecutor:

> [Prosecutor:] So what were your particularized concerns? Why did you stop to talk to [Defendant]?
>
> [Deputy Cranford:] Due to the area that we were in and the reason when I got close the car pulled off. I saw

> [Defendant] walking away. I didn't know if he had gotten out of the [vehicle], if a – if he was lost, if a drug deal had just happened, or what was going on. So I wanted to get out and investigate and make sure everything was okay.

As the concurrence and I recognize, the totality of the circumstances of this case does not rise to the minimal level of objective justification required for a reasonable articulable suspicion under the Fourth Amendment. Deputy Cranford observed Defendant talking to someone in a vehicle that was haphazardly parked on the side of the road in a high crime area. According to Deputy Cranford's own testimony, he did not recognize Defendant, did not know if Defendant had been in the "suspicious" vehicle, and nothing about Defendant's actions or appearance drew Deputy Cranford's attention. The vehicle drove away at a normal speed and in a normal fashion, and Defendant merely walked down the road. Nevertheless, Deputy Cranford thought it "suspicious" that Defendant had spoken to someone in a vehicle. Rather than following the vehicle, Deputy Cranford chose to activate his blue lights and effectuate a stop of Defendant.

Deputy Cranford had, at most, an inchoate and unparticularized hunch that criminal activity was afoot. Therefore, Defendant's actions did not give rise to the minimal level of objective justification required by the Fourth Amendment. *See*, *e.g.*, *Knudsen*, 229 N.C. App. at 285, 747 S.E.2d at 651.

II. Merits of the Majority's Attenuation Analysis

As the majority correctly notes, evidence discovered as a result of an illegal search or seizure is generally excluded at trial. *See Wong Sun v. United States*, 371 U.S. 471, 487-88, 9 L. Ed. 2d 441, 455 (1963). Despite this general principle, there are several exceptions to the exclusionary rule, including the one at issue here: the attenuation doctrine. *See generally Utah v. Strieff*, ___ U.S. ___, ___, 195 L. Ed. 2d 400, 407 (2016). Whether an intervening event is sufficient to "break the causal chain between the unlawful stop and the discovery of" the evidence and is therefore "attenuated[,]" rests on three factors as noted by the majority: (1) "the temporal proximity between the unconstitutional conduct and the discovery of evidence to determine how closely the discovery of evidence followed the unconstitutional search;" (2) "the presence of intervening circumstances;" and (3) "the purpose and flagrancy of the official misconduct." *Strieff*, ___ U.S. at ___, 195 L. Ed. 2d at 408. Had the State preserved its attenuation argument notwithstanding its failure to raise it at trial, which I will discuss later, I would generally agree with

the majority that the facts of this case favor attenuation. However, I have the following reservations with the majority's application of *Strieff*'s three factors.

(A) Temporal Proximity Between the Stop and the Discovery of Evidence

The first step of *Strieff* analyzes the "temporal proximity between the unconstitutional conduct and the discovery of evidence to determine how closely the discovery of evidence followed the unconstitutional search." *Id.* The majority does not analyze this factor at all, but rather proceeds directly to the second factor in the analysis. I believe that an analysis of whether an illegal stop is sufficiently attenuated from the discovery of some evidence is properly conducted by considering all three factors the Supreme Court of the United States identified as bearing on whether attenuation is present.

The discovery of the firearm in the present case occurred in extremely close proximity in time to the unconstitutional stop. After being seized, Deputy Cranford spoke for some time with Defendant, contacted dispatch, searched for outstanding warrants, and then again spoke with Defendant. All of these actions were part of the unconstitutional stop, and were undertaken while the stop was ongoing. Therefore, the discovery of the firearm, which occurred when Defendant pulled the firearm from his waistband and attempted to discharge it, occurred seconds after the unconstitutional stop. I would find that this factor favors attenuation.

(B) Intervening Circumstances

The second factor to consider in an attenuation analysis is whether there were sufficient intervening circumstances between the unconstitutional conduct and the discovery of the evidence. *Strieff*, ___ U.S. at ___, 195 L. Ed. 2d at 408. Like the majority, I believe that Deputy Cranford's observation of a new criminal act perpetrated by Defendant during the course of the stop serves as an intervening circumstance that strongly favors attenuation. At the suppression hearing, as the majority notes, Deputy Cranford testified that during the stop he asked Defendant to lift up his shirt and Defendant responded by raising his shirt, pulling a firearm from his waistband, pointing the gun at Deputy Cranford, and pulling the trigger. According to Deputy Cranford's testimony, the gun did not go off when the trigger was pulled.[1]

1. The jury apparently did not credit Deputy Cranford's testimony on this point, finding Defendant not guilty of attempted first-degree murder. However, in reviewing a trial

Deputy Cranford's testimony that Defendant had committed the criminal act of attempted first-degree murder breaks the causal chain between the unconstitutional stop and the discovery of the evidence, and is entirely unconnected from the stop. However, I would not go so far as to say, as the majority does, that the "commission of a separate and distinct criminal offense is *alone* sufficient . . . to purge the taint of the . . . illegal stop[.]" (emphasis added). In the present case, it is sufficient to hold that the intervening criminal act perpetrated by Defendant strongly favors attenuation and, along with the third factor (discussed below), would attenuate Deputy Cranford's unconstitutional stop from the discovery of the firearm. I would leave a broader holding — that the commission of a separate and distinct criminal offense will *always* be decisive — to an appropriate future case.

(C) The Purpose and Flagrancy of the Official Misconduct

The final *Strieff* factor inquires into the purpose and flagrancy of the police misconduct. As the majority recognizes, "[t]he exclusionary rule exists to deter police conduct. The third factor of the attenuation doctrine reflects that rationale by favoring exclusion only when the police misconduct is most in need of deterrence – that is, when it is purposeful or flagrant." *Strieff*, ___ U.S. at ___, 95 L. Ed. 2d at 409 Like the majority, I would find that the third factor favors attenuation.

As the Supreme Court of the United States has held, there must be something more than a lack of reasonable suspicion in order for a finding of flagrancy to be appropriate. *See Strieff*, ___ U.S. at ___, 195 L. Ed. 2d at 410 ("For [a] violation to be flagrant, more severe police misconduct is required than the mere absence of proper cause for the seizure."). While Deputy Cranford's conduct in stopping Defendant was without reasonable suspicion, his errors and unconstitutional conduct do not rise to a "purposeful or flagrant violation of [Defendant's] Fourth Amendment rights," nor is there any indication on this record that the stop "was part of any systemic or recurrent police misconduct." *Id.*

III. Preservation of Attenuation Argument

Had the State raised and argued to the trial court its theory that Deputy Cranford's stop of Defendant was sufficiently attenuated from the discovery of the firearm, my disagreement with the majority would end here. However, the State failed to argue its attenuation argument in the trial court, and this Court should not address it in the first instance.

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court's ruling on a motion to suppress, we examine the evidence in the light most favorable to the State. *See State v. Hunter*, 208 N.C. App. 506, 509, 703 S.E.2d 776, 779 (2010).

At trial, Defendant moved to suppress the evidence found in the search, arguing that Deputy Cranford's stop violated his rights under the Fourth Amendment to the United States Constitution. At the hearing on Defendant's motion, the State presented evidence from Deputy Cranford and his superior officer. Thereafter, the State defended the constitutionality of the stop solely on the grounds that Deputy Cranford possessed reasonable suspicion to stop Defendant. The trial court ruled exclusively on that basis, and found that Deputy Cranford possessed reasonable suspicion to stop Defendant. The attenuation doctrine was never raised by the State and, as the majority concedes, the words "attenuation" and "intervening circumstance" were never spoken at the suppression hearing.

As the majority notes, the question for this Court when reviewing a trial court's ruling on a motion to suppress "is whether the ruling of the trial court was correct and not whether the reason given therefor [was] sound or tenable. The crucial inquiry for this Court is admissibility *and whether the ultimate ruling was supported by the evidence*." *State v. Bone*, 354 N.C. 1, 8, 550 S.E.2d 482, 486 (2001) (emphasis added). The majority reads the second clause, italicized above, from Bone's holding. When considering the admissibility of the evidence, we must consider whether the "ultimate ruling" of the trial court was supported by the evidence. The "ultimate ruling" of the trial court in the present case was that the motion to suppress should be denied because Deputy Cranford had reasonable suspicion to stop Defendant. As discussed above, this ruling was incorrect.

We should not suggest that the trial court's "ultimate ruling" denying Defendant's motion to suppress – because Deputy Cranford had reasonable suspicion to stop Defendant – also contained an unwritten, but implied, alternative ruling that, if Deputy Cranford's stop was unconstitutional, the unconstitutional stop was sufficiently attenuated from the discovery of the evidence so as to be admissible. The trial court never ruled on whether the unconstitutional stop was sufficiently attenuated from the discovery of the evidence, because attenuation was never raised by the State.

The majority suggests that the "occurrence of an intervening event" only "becomes an issue" if the trial court "finds the underlying illegality," and that an "intervening event" is not an "arguable issue" until the defendant "sustain[s] his burden of persuasion on the illegality of the police conduct." I disagree. The legality of Deputy Cranford's stop of Defendant and the admissibility of the firearm found on Defendant *was* at issue. In fact, it was the *only* issue being litigated in Defendant's motion to

suppress. The State argued, uninterrupted and at length, in opposition to Defendant's motion to suppress. Nothing limited the State from arguing an alternative position, such as attenuation, the position it now raises in this Court in the first instance. Litigants make alternative arguments in support of legal positions in our trial courts on a daily basis, and waive the arguments they fail to make. If the majority were correct, the State would only raise its "intervening event" theory[2] after the trial court had determined that the stop was not supported by reasonable suspicion. But at that point, it would have been too late – the trial court would have already ruled on and granted Defendant's motion to suppress.

The State had ample opportunity and compelling reason to raise its attenuation argument as an alternative to its argument that the stop was supported by a reasonable suspicion. Although *Strieff* had not yet been decided by the Supreme Court of the United States, *Strieff* did not change governing law; it only supplemented existing law by applying the factors set out in *Brown v. Illinois*, 422 U.S. 590, 45 L. Ed. 2d 416 (1975). The attenuation doctrine is firmly rooted in North Carolina law, and has been considered and applied in North Carolina Supreme Court cases decades old. *See, e.g.*, *State v. Allen*, 332 N.C. 123, 127-28, 418 S.E.2d 225, 228-29 (1992); *State v. Freeman*, 307 N.C. 357, 359-60, 298 S.E.2d 331, 332-33 (1983). If the State had wished to argue an alternative position, it was required to do so in the trial court in the first instance. The State clearly knows how to make such an alternative argument, as they did so in their brief to this Court in this case.

This Court confronted a similar situation in *State v. Gentile*, 237 N.C. App. 304, 766 S.E.2d 349 (2014). In *Gentile*, the trial court granted the defendant's motion to suppress evidence found in a search of his home, holding that when the officers noticed the smell of marijuana emanating from the residence, they "were not in a place in which they had a right to be." *Gentile*, 237 N.C. App. at 308, 766 S.E.2d at 352. On appeal, this Court agreed with the trial court that the officers were in a place they had "no legal right to be" when they smelled the marijuana, which was the basis for the search. *Id.* at 310, 766 S.E.2d at 353. After so holding, the trial court turned to the State's belated argument that

> even if the detectives' entry onto constitutionally protected areas of defendant's property was unlawful, the trial court

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2. I note that an "intervening event," or intervening circumstance, is only one of the three factors used to determine if the discovery of some evidence is sufficiently attenuated from unconstitutional conduct. *See Strieff*, ___ U.S. at ___, 195 L. Ed. 2d at 408. For ease of reading, I employ the nomenclature employed by the majority.

> erred by granting the motion to suppress because it failed to examine the remaining portions of the search warrant affidavit to determine if the warrant was still supported by probable cause, absent the odor of marijuana.

Id. Confronted with this argument, this Court held that the State had "failed to preserve this issue on appeal" because "the State never argued before the trial court that the motion to suppress should be denied because even if the detectives had no legal right to be on the driveway when they smelled the marijuana, the remaining portions of the search warrant were nevertheless sufficient to establish probable cause." *Id.* at 310, 766 S.E.2d at 353-54. Accordingly, this Court dismissed the State's alternative argument as unpreserved. *Id.*

The circumstances of the present case are no different from the ones confronted by this Court in *Gentile*. In the present case, as in *Gentile*, the State failed to argue to the trial court its alternative theory as to why Defendant's motion to suppress should be denied. Since "the State never argued before the trial court that the motion to suppress should be denied because" the discovery of the evidence was sufficiently attenuated from Deputy Cranford's unconstitutional conduct, the State "failed to preserve this issue on appeal." *Id.* at 310, 766 S.E.2d at 353. This Court is bound by *Gentile*'s reasoning. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989).

The majority suggests that *Gentile* is "easily distinguishable" from the present case because in *Gentile* "the State sought to overturn the trial court's ruling, which granted the defendant's motion to suppress," while in this case the State seeks to defend the trial court's denial of Defendant's motion to suppress. Respectfully, I disagree with the majority's attempt to distinguish *Gentile*, and note it creates a needlessly complicated and unfair rule of preservation. Under the majority's theory, in *Gentile*, all the State would have had to do to be able to "swap horses" would have been to convince the trial court that their incorrect theory – the police were in a place in which they had a lawful right to be when they smelled the marijuana – was in fact correct. In that circumstance, the State would have been free to "swap" that theory for any other theory on appeal – including the one we refused to consider because it was not properly preserved – while the defendant would have been relegated to those theories it preserved by arguing them to the trial court. In other words, whether a litigant is bound by the arguments it makes in the trial court depends only upon whether the arguments were accepted by the trial court, regardless of whether the trial court was correct. If the State loses a motion to suppress – i.e. a defendant's motion to suppress is

granted – then the State is forever wedded to whatever theory it presented at trial. If, however, the defendant's motion to suppress is denied – on an incorrect or otherwise untenable theory – the State may thereafter argue any legal theory it wishes in order to preserve its favorable ruling. This is, in my view, an untenable theory of preservation.

This Court has held, time and again, that when a "defendant presents a *different theory* [on appeal] to support his motion to dismiss than that he presented at trial, this assignment of error is waived." *State v. Euceda-Valle*, 182 N.C. App. 268, 272, 641 S.E.2d 858, 862 (2007) (emphasis added) (citation omitted); *see also State v. Chapman*, ___ N.C. App. ___, 781 S.E.2d 320, 330 (2016) ("Because [the defendant] *has failed to properly preserve the specific argument* she now seeks to make on appeal regarding the basis upon which her motion to dismiss should have been granted, we decline to reach the merits of her argument." (emphasis added) (citations omitted)). It appears arbitrary to declare some arguments preserved and others unpreserved, not by whether those arguments were raised at trial, but rather simply by virtue of who obtained a favorable ruling by the trial court, regardless of whether that ruling was correct.

Ironically, in the present case the majority would agree that the State could not raise its attenuation argument in this Court, if only the trial court had gotten the law *right*. If the trial court had correctly determined Officer Cranford's stop of Defendant violated the Fourth Amendment, Defendant would be able to defend that ruling under any theory he wished on appeal, while the State would be confined to that theory raised in the trial court. Since the State inexplicably did not raise the attenuation doctrine in the trial court, it would be barred from doing so in this Court in the first instance.

The North Carolina Rules of Appellate Procedure were designed to further "fundamental fairness and the predictable operation of the courts[.]" *State v. Hart*, 361 N.C. 309, 317, 644 S.E.2d 201, 206 (2007). On appeal to this Court, Defendant focused the arguments in his principal brief exclusively on whether Deputy Cranford had reasonable suspicion to seize him under the Fourth Amendment. Defendant did so for good reason: the State's argument urging the trial court to deny his motion to suppress, and the trial court's ultimate ruling on that motion to suppress, were exclusively focused on whether reasonable suspicion existed for the stop. After Defendant filed his brief in this Court, though, the ground shifted beneath his feet; the State filed a brief waiving any argument that the stop was supported by reasonable suspicion and moved forward exclusively on the theory that the presence or absence of reasonable

suspicion did not matter because the stop was attenuated from the discovery of the evidence.

Upon receiving the State's brief, Defendant was forced to litigate that new issue, never before considered or passed upon within the context of the present case, in a reply brief. To avoid being blindsided, should a defendant now make arguments on appeal, and then proceed to preemptively research and brief any alternative bases the State may conceivably argue to defend the trial court's ruling? Perhaps not, lest a defendant give the State any ideas about new theories of admissibility. Preservation and the appellate rules are designed to prevent this circumstance.

Our Supreme Court has held that "the law does not permit parties to swap horses between courts in order to get a better mount [on appeal]." *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934); *see also State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) ("This Court has long held that where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the Supreme Court." (citation omitted)). The majority suggests this rule only applies "to instances where the party. . . carrying the burden on appeal to show error in the lower court's ruling on appeal, and relies upon a theory not presented before the lower court." But the Supreme Court in *Weil* did not equivocate: it held that a *party* – not just an appellant, but a *party* – may not "swap horses" between courts to gain a better mount on appeal. *Weil*, 207 N.C. at 10, 175 S.E. at 838. Applying this rule to both appellants and appellees is sensible, as it ensures fairness and requires litigants to present legal arguments they believe to be meritorious to the trial court before presenting them to an appellate court.

In faithfully following our Supreme Court's precedent, along with that precedent's necessary implications, our Supreme Court's holdings in *Wiel* and *Sharpe* decide this case in Defendant's favor. It is undisputed that the State never argued its attenuation theory in the trial court. The State proceeded only on the theory that Deputy Cranford's stop of Defendant was permissible because reasonable suspicion was present, and in denying Defendant's motion to suppress the trial court only ruled on that basis. This precludes the State from raising its attenuation argument on appeal in the first instance.

This Court regularly dismisses arguments first advanced by defendants on appeal in criminal cases, reasoning that those arguments have been waived due to the defendants' failure to raise them in the trial

court. *See, e.g.*, *State v. Mastor*, ___ N.C. App. ___, ___, 777 S.E.2d 516, 521 (2015) (dismissing a defendant's argument where the defendant did not "raise or argue" the objection in the trial court, reasoning that the defendant "failed to preserve [the] issue for appellate review"). That rule should operate no differently for the State.[3] Attenuation is a theory of admissibility wholly independent from whether reasonable suspicion existed for a stop. I would hold that if the State wishes to argue alternative legal theories of admissibility, the onus is on the State to make those arguments to the trial court. Because Deputy Cranford's stop of Defendant was unconstitutional and the State failed to preserve its attenuation argument, I would reverse the trial court's denial of Defendant's motion to suppress and vacate his conviction. I dissent from the majority's decision to reach the State's belated attenuation argument.

Invocation of N.C.R. App. P. Rule 2

I also dissent from the majority's decision to "rule to invoke Rule 2 [of the North Carolina Rules of Appellate Procedure] in this case[.]" The majority concludes that, even if the State's argument regarding attenuation was not preserved, this case is a proper one for this Court to dispense with the rules of appellate procedure by invoking N.C.R. App. P. 2. I disagree. As our Supreme Court has repeatedly stated: "Rule 2 relates to the residual power of our appellate courts to consider, in exceptional circumstances, significant issues of importance in the public interest or to prevent injustice which appears manifest to the Court and only in such instances." *State v. Hart*, 361 N.C. 309, 315-16, 644 S.E.2d 201, 205 (2007) (citation omitted). "This assessment – whether a particular case is one of the rare 'instances' appropriate for Rule 2 review – must necessarily be made in light of the specific circumstances of individual cases and parties, such as whether substantial rights of an appellant are affected." *State v. Campbell*, ___ N.C. ___, ___, ___ S.E.2d ___, ___, 2017 N.C. LEXIS 400, at *7 (2017) (citations omitted).

The present case does not implicate "significant issues of importance in the public interest." Defendant in this case was convicted of a single offense, possession of a stolen firearm, which is punishable as a class H felony. *See* N.C. Gen. Stat. § 14-71.1 (2015). I do not see the merit in the majority's apparent assertion that *any* shooting or attempted shooting

3. Though not dispositive, the United States Court of Appeals for the Tenth Circuit has similarly held that attenuation arguments not raised in the trial court are waived on appeal. *See United States v. Hernandez*, 847 F.3d 1257, 1261-62 (10th Cir. 2017) (holding the government waived its attenuation argument by not making that argument to the district court).

of a police officer – the only fact the majority propounds as a reason for invoking Rule 2 – is a *de facto* reason to dispense with the rules of appellate procedure. Such a rule would absolve the State of its need to follow normal preservation rules in any case that allegedly involved the shooting (or, as here, an alleged attempted shooting) of an officer, and would come close to the creation of an "automatic right to review via Rule 2" for police shooting cases, a type of rule our Supreme Court very recently rejected. *See Campbell*, ___ N.C. at ___, ___ S.E.2d at ___, 2017 N.C. LEXIS 400, at *7 ("In simple terms, precedent cannot create an automatic right to review via Rule 2. Instead, whether an appellant has demonstrated that his matter is the rare case meriting suspension of our appellate rules is always a discretionary determination to be made on a case-by-case basis."). The present case, in my view, also fails to implicate any manifest injustice. Rather, the State would only be forced to proceed on appeal on those legal theories that it raised in the trial court.

IV. Conclusion

Due to a lack of reasonable suspicion, Deputy Cranford's stop of Defendant violated Defendant's right to be free from unreasonable searches and seizures under the Fourth Amendment. The State does not contest this fact, and on appeal only defends the stop by arguing that the discovery of the evidence was sufficiently attenuated from Deputy Cranford's unconstitutional conduct. Had attenuation been raised and preserved by the State in the trial court, I agree with the majority that the discovery of the firearm would have been sufficiently attenuated from Deputy Cranford's unconstitutional stop of Defendant.

But the State failed to raise its attenuation argument before the trial court, and cannot raise it here for the first time. I dissent from the majority's and the concurrence's decision to address the State's belated attenuation argument. The preservation rule the majority crafts is untenable, and by faithfully applying precedent from this Court and our Supreme Court, I would dismiss the State's belated argument, reverse the trial court's denial of Defendant's motion to suppress, and vacate Defendant's conviction. I further dissent from the majority's and the concurrence's alternative decision to invoke N.C.R. App. P. 2.

STATE OF NORTH CAROLINA
v.
CHRISTOPHER MICHAEL JOHNSON

No. COA16-734

Filed 18 July 2017

Probation and Parole—probation revocation—lack of jurisdiction—lack of notice of probation violations—Justice Reinvestment Act—absconding

The Court of Appeals granted defendant's writ of certiorari and concluded that the trial court lacked jurisdiction to revoke defendant's probation where defendant did not waive his right to notice of his alleged probation violations, and the State failed to allege a revocation-eligible violation. Defendant committed the offense of taking indecent liberties with a child prior to the Justice Reinvestment Act's effective date, and therefore, the absconding condition did not apply to defendant.

Appeal by defendant, by writ of certiorari, from judgment entered 14 March 2016 by Judge Milton Fitch in Currituck County Superior Court. Heard in the Court of Appeals 25 January 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General W. Thomas Royer, for the State.

Peter Wood, for defendant-appellant.

CALABRIA, Judge.

Christopher Michael Johnson ("defendant") appeals, by writ of certiorari, from a judgment revoking his probation and activating his suspended sentence. After careful review, we conclude that the trial court lacked jurisdiction to revoke defendant's probation based on the violations alleged. Accordingly, we vacate the trial court's judgment and remand for further proceedings.

I. Background

On 16 August 2013, defendant entered an *Alford* plea to two counts of taking indecent liberties with a child. *See generally North Carolina v. Alford*, 400 U.S. 25, 27 L. Ed. 2d 162 (1970). These offenses occurred on or about 4 October 2011. According to the plea arrangement, defendant

was to "receive an active sentence on one charge, and a probationary type sentence on the second count."[1] For the second count, the trial court sentenced defendant to 16 to 20 months in the custody of the North Carolina Division of Adult Correction but suspended his sentence and placed him on 36 months of supervised probation.

On 5 February 2016, defendant's probation officer ("Officer Gibbs") filed a report alleging that defendant had willfully violated the following conditions of his probation:

> 1. "Report as directed by the Court, Commission or the supervising officer to the officer at reasonable times and places . . . " in that
>
> OFFENDER WAS ARRESTED IN VIRGINIA AND FAILED TO REPORT TO THIS OFFICE WITHIN 72 HOURS AFTER ARREST. RELEASE DATE ACCORDING TO JAIL WAS 1/21/16
>
> 2. Condition of Probation "The defendant shall pay to the Clerk of Superior Court the 'Total Amount Due' as directed by the Court or probation officer" in that
>
> OFFENDER WAS ORDERED TO PAY COURT INDEBTEDNESS BY JUDGE IN SUPERIOR COURT AND AT THIS TIME HE HAS PAID $70.48 AND IS IN ARREARS $454.52
>
> 3. Condition of Probation "The defendant shall pay to the Clerk of Superior Court the monthly supervision fee as set by law" in that
>
> OFFENDER WAS ORDERED TO PAY SUPERVISION FEES AND AS OF THIS DATE HE HAS PAID [$]104.52 AND IS IN ARREARS [$]815.48. WAS SUPPOSED TO PAY $40 A MONTH
>
> 4. Condition of Probation "Remain within the jurisdiction of the Court unless granted written permission to leave by the Court or the probation officer" in that
>
> OFFENDER WAS TOLD NOT TO LEAVE THE STATE OF NORTH CAROLINA BY THIS OFFICER UNLESS HE HAD PERMISSION AND ON 1/16/16 AN OFFICER FROM VA BEACH POLICE DEPARTMENT INFORMED ME THAT

1. The instant appeal only pertains to file number 12 CRS 646. Neither the appellate record nor the parties' briefs contain further information about the active sentence that defendant purportedly received in file number 12 CRS 645.

> HE WAS FOUND ASLEEP IN VIRGINIA AND ARRESTED FOR TRESPASSING. ALSO ON 8/8/15 HE WAS CAOUGHT [sic] STAYING AT A PLACE CALLED DERBY RUN IN VIRGINIA. BOTH NOT IN THE STATE OF NC AND BOTH TIMES WITHOUT PERMISSION.
>
> 5. Other Violation
>
> OFFENDER WAS TOLD THAT HE HAD TO GO BACK TO SEX OFFENDER TREATMENT STARTING ON 1/13/16 BUT HE FAILED TO REPORT FOR THAT TREATMENT.

On 16 February 2016, Officer Gibbs filed an addendum alleging the following additional willful violations of defendant's probation:

> 1. "Report as directed by the Court, Commission or the supervising officer to the officer at reasonable times and places . . . " in that
>
> OFFENDER MISSED HIS SCHEDULED OFFICE VISIT WITH HIS OFFICER ON 2/4/16 AND THIS IS A REGULAR CONDITION OF PROBATION. HE DID NOT CALL TO LET ME KNOW HE WOULD NOT BE HERE.
>
> 2. Condition of Probation "Remain within the jurisdiction of the Court unless granted written permission to leave by the Court or the probation officer" in that
>
> ON OR ABOUT 1/21/16 OFFENDER WAS RELEASED FROM CUSTODY IN VA BEACH ACCORDING TO THEIR RECORDS AND HE HAS FAILED TO MAKE HIS WHEREABOUTS KNOWN TO THIS OFFICE. I CALLED HIS NUMBER AND CHECKED HIS RESIDENCE ON 2/5/16 & 2/11/16. I WAS TOLD HE HAS NOT BEEN THERE IN A WHILE. HE IS NOT IN THE LOCAL HOSPITAL OR JAIL AND HE MISSED HIS LAST APPT WITH ME. I AM NOW DECLARING HIM AN ABSCONDER.

According to the violation reports filed by Officer Gibbs, defendant had not previously served any periods of confinement in response to violations ("CRV") pursuant to N.C. Gen. Stat. § 15A-1344(d2) (2015).

A probation violation hearing was held in Currituck County Superior Court on 14 March 2016. Defendant admitted the violations, "but not the willfulness," and explained to the court that he was "not intending to abscond." Defendant requested that he be allowed to remain on probation so that he could continue to work and proceed with sex

offender treatment. Officer Gibbs testified that he deemed defendant to be an absconder after "30 days without any contact" following defendant's arrest in Virginia. At the conclusion of the hearing, the trial court found defendant "in willful violation of his probation, revoke[d] him, and invoke[d] his active sentence." The court incorporated both of the violation reports filed by Officer Gibbs into its written judgment. The court also found, in pertinent part: that defendant had violated each of the conditions alleged "willfully and without valid excuse"; that "[e]ach violation is, in and of itself, a sufficient basis upon which th[e] Court should revoke probation and activate the suspended sentence"; and that "[t]he Court may revoke defendant's probation . . . for the willful violation of the condition(s) that he . . . not commit any criminal offense, G.S. 15A-1343(b)(1), or abscond from supervision, G.S. 15A-1343(b)(3a) . . . ."

Three days later, on 17 March 2016, defendant reappeared before the trial court requesting reconsideration of its decision to revoke his probation. The court denied his motion. Defendant entered oral notice of appeal.

II. Petition for Writ of Certiorari

On 29 August 2016, defendant petitioned this Court to issue its writ of certiorari ("PWC") to review the trial court's judgment revoking his probation and activating his suspended sentence. *See generally* N.C.R. App. P. 21(a)(1). He acknowledges that a criminal defendant's oral notice of appeal is only effective when given "*at trial*," N.C.R. App. P. 4(a)(1) (emphasis added), and it is "unclear" whether the events of 17 March 2016 were a continuation of the probation violation hearing or a new proceeding. Accordingly, defendant explains that he filed his PWC out of "an abundance of caution to ensure that [his] right to appellate review is not lost due to technical defect in his notice of appeal." Since the State did not file a response and we have discretion pursuant to N.C.R. App. P. 21(a)(1), we conclude that defendant's PWC should be granted.

III. Revocation of Defendant's Probation

On appeal, defendant's sole argument is that the trial court erroneously failed to exercise its statutorily mandated discretion in revoking his probation, based on the following statement at the hearing:

> THE COURT: Anything you want to tell me? He's admitted his violations, his PO officer pointed out the addendum. The addendum says abscond. Either he is or he is not. If he is the statute calls for revocation.

However, we do not reach defendant's argument, since the record reveals that the trial court lacked jurisdiction to revoke defendant's probation based on the violations alleged.

As an initial matter, neither the parties nor the trial court raised the issue of jurisdiction, and typically, we only address questions that are properly before us. *See, e.g.*, *State v. Johnston*, 173 N.C. App. 334, 338, 618 S.E.2d 807, 809 (2005) (stating that "it is not the role of the appellate courts . . . to create an appeal for an appellant" (citation, quotation marks, and brackets omitted)). "Nevertheless, subject matter jurisdiction may not be waived, and this Court has not only the power, but the duty to address the trial court's subject matter jurisdiction on its own motion or *ex mero motu*." *State v. Kornegay*, 228 N.C. App. 320, 321, 745 S.E.2d 880, 881 (2013) (citation and quotation marks omitted). We have explained that in cases such as probation revocations, where the trial court's

> jurisdiction is statutory and the Legislature requires the [c]ourt to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the [c]ourt to certain limitations, an act of the [c]ourt beyond these limits is in excess of its jurisdiction. If the court was without authority, its judgment is void and of no effect.

Id. at 321-22, 745 S.E.2d at 882 (citation omitted). "To establish jurisdiction over specific allegations in a probation revocation hearing, the defendant either must waive notice or be given proper notice of the revocation hearing, *including the specific grounds on which his probation might be revoked*." *Id.* at 324, 745 S.E.2d at 883 (emphasis added).

In the instant case, defendant allegedly violated various conditions of his probation in January and February of 2016. Therefore, the Justice Reinvestment Act of 2011 ("JRA") applies. *See State v. Nolen*, 228 N.C. App. 203, 204-05, 743 S.E.2d 729, 730 (2013) (noting that the JRA controls probation "violations occurring on or after 1 December 2011").

"The enactment of the JRA brought two significant changes to North Carolina's probation system." *Id.* at 205, 743 S.E.2d at 730. First, the JRA imposed stringent limits on trial courts' revocation authority. *See id.* "[I]t is no longer true that *any* violation of a valid condition of probation is sufficient to revoke [a] defendant's probation." *Kornegay*, 228 N.C. App. at 323, 745 S.E.2d at 882 (emphasis added) (citation and internal quotation marks and brackets omitted). Instead, pursuant to the JRA, trial courts are only authorized to revoke probation where the defendant: "(1) commits a new crime in violation of N.C. Gen. Stat. § 15A-1343(b)(1);

(2) absconds supervision in violation of N.C. Gen. Stat. § 15A-1343(b)(3a); or (3) violates any condition of probation after serving two prior periods of CRV under N.C. Gen. Stat. § 15A-1344(d2)." *Nolen*, 228 N.C. App. at 205, 743 S.E.2d at 730 (citing N.C. Gen. Stat. § 15A-1344(a)). "For all other probation violations, the JRA authorizes courts to alter the terms of probation pursuant to N.C. Gen. Stat. § 15A-1344(a) or impose a CRV in accordance with N.C. Gen. Stat. § 15A-1344(d2), but not to revoke probation." *Id.*

Second, the JRA "introduced the term 'abscond' into our probation statutes for the first time," *State v. Hunnicutt*, 226 N.C. App. 348, 355, 740 S.E.2d 906, 911 (2013), and established the requirement that a defendant must "[n]ot abscond by willfully avoiding supervision or by willfully making the defendant's whereabouts unknown to the supervising probation officer," pursuant to N.C. Gen. Stat. § 15A-1343(b)(3a). Prior to the JRA, courts used the term "abscond" informally to describe violations of N.C. Gen. Stat. §§ 15A-1343(b)(2)-(3), which respectively require a probationer to, *inter alia*, "[r]emain within the jurisdiction of the court unless granted written permission to leave" and "[r]eport as directed . . . to the [probation] officer at reasonable times and places and in a reasonable manner . . . ." *See Hunnicutt*, 226 N.C. App. at 355, 740 S.E.2d at 911 (citations omitted). However, these terms are no longer interchangeable. The JRA eliminated informal absconding as a basis for revocation. *See State v. Williams*, __ N.C. App. __, __, 776 S.E.2d 741, 745 (2015) (explaining that the State's use of the phrase "absconding supervision" to describe the defendant's actions "cannot convert violations of N.C. Gen. Stat. §§ 15A-1343(b)(2) and (3) into a violation of N.C. Gen. Stat. § 15A-1343(b)(3a)"). Today, courts may only revoke probation for absconding based on violations of N.C. Gen. Stat. § 15A-1343(b)(3a). *Id.* at __, 776 S.E.2d at 745-46.

Although N.C. Gen. Stat. §§ 15A-1343(b)(3a) and 15A-1344(a) were both enacted as part of the JRA, the provisions have different—and sometimes conflicting—effective dates. Initially, the JRA made both changes

> effective for probation violations occurring on or after 1 December 2011. *See* 2011 N.C. Sess. Laws 192, sec. 4.(d). The effective date clause was later amended, however, to make the new absconding condition applicable only to *offenses* committed on or after 1 December 2011, while the limited revoking authority remained effective for probation violations occurring on or after 1 December 2011. *See* 2011 N.C. Sess. Laws 412, sec. 2.5.

Nolen, 228 N.C. App. at 205, 743 S.E.2d at 731 (citation and quotation marks omitted). Consequently, a defendant who committed the offense underlying his probation *before* 1 December 2011 but who violated the conditions of his probation *on or after* that date cannot have his probation revoked for absconding. *See id.* at 206, 743 S.E.2d at 731. This irregularity in the statutes is colloquially referred to as a "donut hole."

We recently considered the "absconding donut hole" in *State v. Hancock*, __ N.C. App. __, 789 S.E.2d 522 (2016), *disc. review denied*, __ N.C. __, 795 S.E.2d 218 (2017). In that case, the defendant committed the offense of possession with intent to sell or deliver cocaine on 18 January 2011 and was placed on supervised probation. *Id.* at __, 789 S.E.2d at 523. On 8 February and 27 March 2013, the defendant's supervising officer filed reports alleging that he had willfully violated his probation. *Id.* On appeal, we determined that because the "defendant committed his underlying offense prior to 1 December 2011, he was not subject to the JRA's 'absconding' condition of probation enacted in N.C. Gen. Stat. § 15A-1343(b)(3a)." *Id.* at __, 789 S.E.2d at 524. Moreover, because the absconding condition did not apply to him, we held that the trial court did not have the authority to revoke the defendant's probation on that basis. *Id.* at __, 789 S.E.2d at 525. Ultimately, however, we affirmed the trial court's revocation of his probation based on the defendant's commission of a new criminal offense, in violation of N.C. Gen. Stat. § 15A-1343(b)(1). *Id.* at __, 789 S.E.2d at 526. Although "the mere fact that he was charged with certain criminal offenses [wa]s insufficient to support a finding that he committed them[,]" we concluded that the trial court made an adequate "independent determination that [the] defendant committed the three offenses he was charged with . . . *as alleged in paragraphs ten and eleven of the 27 March 2013 violation report*." *Id.* (emphasis added).

Probation proceedings are "often regarded as informal or summary." *State v. Murchison*, 367 N.C. 461, 464, 758 S.E.2d 356, 358 (2014). Nevertheless, as *Hancock* demonstrates, the JRA's notice requirements can have significant jurisdictional implications in revocation cases. *See* __ N.C. App. at __, 789 S.E.2d at 526. "Absent adequate notice that a revocation-eligible violation is being alleged, the trial court lacks jurisdiction to revoke a defendant's probation, unless the defendant waives the right to notice." *State v. Moore*, __ N.C. App. __, __, 795 S.E.2d 598, 599 (2016), *appeal docketed*, No. 22A17, __ N.C. __, __ S.E.2d __ (filed Jan. 13, 2017).

"Our Court has never explicitly held that certain 'magic' words must be used" in order to confer the trial court with jurisdiction. *Id.*; *see also*

id. at __, 795 S.E.2d at 600 (concluding "that where the notice fails to allege specifically which condition was violated but where the allegations in the notice could only point to a revocation-eligible violation, the notice is adequate"); *State v. Lee*, 232 N.C. App. 256, 259, 753 S.E.2d 721, 723 (2014) (holding that the trial court properly exercised jurisdiction where "the violation report specifically alleged that [the] defendant violated the condition of probation that he commit no criminal offense in that he had several new pending charges which were specifically identified"). However, we have consistently held that the trial court lacked jurisdiction to revoke probation where the underlying violation reports failed to notify the probationer that the State intended to pursue revocation-eligible violations. *See State v. Jordan*, 240 N.C. App. 90, 772 S.E.2d 13 (2015) (unpublished); *Kornegay*, 228 N.C. App at 324, 745 S.E.2d at 883 (vacating the court's judgment because the "defendant did not waive notice, and the trial court revoked [the] defendant's probation for violation of a condition not included in the State's violation reports"); *State v. Tindall*, 227 N.C. App. 183, 187, 742 S.E.2d 272, 275 (2013) (holding that the trial court lacked jurisdiction to revoke probation where the supervising officer testified that the "defendant was 'arrested' but did not allege in the violation report that she violated her probation by committing a criminal offense").

This case is functionally indistinguishable from our prior decisions holding that the trial court lacked jurisdiction to revoke probation. Here, defendant did not waive his right to notice of his alleged violations, *Kornegay*, 228 N.C. App at 324, 745 S.E.2d at 883, and the trial court mistakenly found that each violation provided sufficient grounds for revocation. Regarding the absconding provision, N.C. Gen. Stat. § 15A-1343(b)(3a) only applies to offenses committed on or after 1 December 2011. *Hancock*, __ N.C. App. at __, 789 S.E.2d at 524; *Nolen*, 228 N.C. App. at 205, 743 S.E.2d at 731. According to the judgment in the instant case, defendant committed the offense of taking indecent liberties with a child on 4 October 2011, prior to the JRA's effective date. Therefore, the absconding condition did not apply to defendant. *Hancock*, __ N.C. App. at __, 789 S.E.2d at 524; *Nolen*, 228 N.C. App. at 206, 743 S.E.2d at 731. Accordingly, the trial court erred in revoking defendant's probation based on his purported violation of N.C. Gen. Stat. § 15A-1343(b)(3a). *Hancock*, __ N.C. App. at __, 789 S.E.2d at 525.

If this case were similar to *Hancock* regarding defendant's commission of a new offense, then as in *Hancock*, we would affirm the trial court's revocation of defendant's probation. *See id.* at __, 789 S.E.2d at 526. However, this case is distinguishable. Unlike *Hancock*, where the

officer alleged that the defendant's new criminal charges violated the "commit no criminal offense" condition of probation, *id.*, here, the State failed to notify defendant that his probation might be revoked based on his trespassing arrest. Officer Gibbs did not specifically allege that defendant's trespassing arrest constituted a "new criminal offense," in violation of N.C. Gen. Stat. § 15A-1343(b)(1). While it seems abundantly clear from the transcript that the trial court's decision to revoke defendant's probation was based on absconding, the written judgment could be construed to revoke his probation based on his commission of a new criminal offense. Finding 5(a) on the AOC-CR-607 standardized form judgment states: "[t]he Court may revoke defendant's probation . . . for the willful violation of the condition(s) that he . . . not commit any criminal offense, G.S. 15A-1343(b)(1), or abscond from supervision, G.S. 15A-1343(b)(3a) . . . ." (emphasis added). Insofar as the trial court found a violation of N.C. Gen. Stat. § 15A-1343(b)(1), we hold that the violation reports were insufficient to notify defendant that the State intended to revoke his probation based on his trespassing arrest in Virginia. *See Tindall*, 227 N.C. App. at 187, 742 S.E.2d at 275; *cf. Hancock*, __ N.C. App. at __, 789 S.E.2d at 525 (stating that "a trial court's ruling must be upheld if it is correct upon any theory of law" (citation and quotation marks omitted)).

IV. Conclusion

Since defendant did not waive his right to notice of his alleged probation violations, and the State failed to allege a revocation-eligible violation, the trial court lacked jurisdiction to revoke defendant's probation. *Kornegay*, 228 N.C. App. at 324, 745 S.E.2d at 883. "When the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to arrest judgment or vacate any order entered without authority." *Id.* at 323, 745 S.E.2d at 883 (citation and quotation marks omitted). Accordingly, we vacate the trial court's judgment revoking defendant's probation and remand for further proceedings.

VACATED AND REMANDED.

Chief Judge McGEE and Judge INMAN concur.

STATE OF NORTH CAROLINA, PLAINTIFF
v.
PIERRE JE BRON MOORE, DEFENDANT

No. COA16-999

Filed 18 July 2017

1. Criminal Law—overruling or reversing earlier order or ruling by another judge—motion to continue

The trial court did not err in a prosecution for fleeing to elude arrest, resisting an officer, driving without a driver's license, and failing to heed a law enforcement officer's blue light and siren, by denying defendant's motion to continue even though defendant alleged it improperly overruled or reversed an earlier order or ruling by another judge. Based on the facts of this case, an informal initial statement by the judge at the pretrial hearing that he was willing to continue the case, based on the withdrawal of trial counsel and appointment of new counsel, was later rejected by his explicit ruling that the case was not being continued and that any decision about a continuance would be made by the judge who presided over the trial.

2. Constitutional Law—due process—effective assistance of counsel—right to confrontation—denial of motion to continue

The trial court did not err in a prosecution for fleeing to elude arrest, resisting an officer, driving without a driver's license, and failing to heed a law enforcement officer's blue light and siren, by concluding the denial of defendant's motion to continue did not violate his rights to due process, effective assistance of counsel, and confrontation. Defendant failed to establish that prejudice should be presumed where the charges arose from a single incident of high speed driving and the only factual issue that was contested at trial was the identity of the driver. In addition, defendant assumed it was reasonable for trial counsel to expect the case to be continued and failed to explore the possibility that his counsel was ineffective by failing to prepare for trial on the scheduled date.

3. Evidence—video—foundation—no prejudicial error

The trial court did not commit prejudicial error in a prosecution for fleeing to elude arrest, resisting an officer, driving without a driver's license, and failing to heed a law enforcement officer's blue light and siren, by allowing the State to introduce into evidence a copy of a convenience store surveillance video taken on an officer's cell phone even though the State failed to offer a proper foundation

for introduction of the video. Defendant failed to meet his burden of showing that there was a reasonable possibility that the jury would have failed to convict defendant absent the video evidence where he essentially admitted to being the driver of the car.

4. Confessions and Incriminating Statements—motion to suppress —statements made to officer while transporting to law enforcement center—interrogation

The trial court did not err in a prosecution for fleeing to elude arrest, resisting an officer, driving without a driver's license, and failing to heed a law enforcement officer's blue light and siren, by denying defendant's motion to suppress statements that he made to an officer while being transported to a law enforcement center in response to a brief exchange between the officer and his supervisor over the police radio about the location of the pertinent vehicle. Defendant failed to show that he was subjected to the functional equivalent of an interrogation, and the United States Supreme Court has held that a brief exchange between two law enforcement officers was not the functional equivalent of an interrogation.

Appeal by defendant from judgment entered 20 April 2016 by Judge R. Allen Baddour, Jr. in Orange County Superior Court. Heard in the Court of Appeals 21 March 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Joseph E. Herrin, for the State.

Meghan Adelle Jones for defendant-appellant.

ZACHARY, Judge.

Pierre Je Bron Moore (defendant) appeals from the judgment entered upon his convictions of fleeing to elude arrest, resisting an officer, driving without a driver's license, failing to heed a law enforcement officer's blue light and siren, speeding, and reckless driving. On appeal, defendant argues that the trial court erred by denying his motion for a continuance, by allowing the State to introduce into evidence a copy of a convenience store surveillance video, and by denying his motion to suppress statements made by him. We conclude that the trial court did not err by denying defendant's motion for a continuance or his motion to suppress. We further conclude that the trial court erred by admitting the video, but that its admission was not prejudicial.

I. Factual and Procedural Background

On 6 July 2015, the Grand Jury of Orange County returned indictments charging defendant with the felony of fleeing to elude arrest and with the related misdemeanors of resisting an officer, reckless driving to endanger, driving without a license, speeding, and failing to heed a law enforcement officer's blue light and siren. Mr. George Doyle was initially appointed to represent defendant, but was permitted to withdraw on 9 March 2016, at which time defendant's trial counsel, Ms. Kellie Mannette, was appointed to represent him. The charges against defendant came on for trial before a jury at the 18 April 2016 criminal session of Superior Court for Orange County, the Honorable R. Allen Baddour, Jr. presiding. Defendant did not testify or present evidence at trial. The State's evidence tended to show, in relevant part, the following.

During the early morning hours of 21 May 2015, Carrboro Police Officer David Deshaies was on patrol on Jones Ferry Road, in Carrboro, North Carolina. As Officer Deshaies drove past a Kangaroo gas station and convenience store, he noticed a man getting out of the driver's side of a silver Nissan Altima. He recognized the man as defendant from other encounters during the previous two years, and noticed that defendant was wearing a white cloth on his head. A month earlier, Officer Deshaies had attempted to stop a similar car for speeding but the car fled and, because the officer was unable to identify the driver, no one was charged as a result of that incident. At that time, Officer Deshaies had noted that the Altima had a 30 day temporary tag. Upon seeing defendant getting out of a similar silver Nissan Altima on 21 May 2015, Officer Deshaies pulled into the parking lot of the convenience store and checked the license tag number. He learned that the car, which was owned by someone other than defendant, had been issued a license plate about ten days earlier.

Officer Deshaies suspected that the Altima was the same vehicle that he had tried to stop a month earlier. When he saw defendant and another man enter the convenience store, he contacted other officers, and they agreed to watch the vehicle when it left the store and to stop the car if the driver violated any traffic laws. Officer Deshaies then drove a short distance from the store. Because he was parked several hundred yards from the gas station, Officer Deshaies did not see who was driving when the car left the store's parking lot.

After the Altima left the parking lot, it drove past Officer Deshaies at a speed above the legal speed limit. The officer contacted the law enforcement center to inform the dispatch officer that he was going to stop the Nissan. When Officer Deshaies activated his blue light and siren, the

car accelerated rapidly away from him. Officer Deshaies followed the car for several miles, during which time he saw it run a red light and accelerate to speeds of over 110 miles per hour. Officer Deshaies chased the car for several minutes before his supervisor directed him to discontinue the attempt to stop the vehicle. Officer Deshaies then returned to the Kangaroo gas station and convenience store where he had first noticed the car. Officer Deshaies described defendant's appearance to the store's clerk, who told the officer that he knew a person who fit the description, and that he would recognize the person if he saw him again.

On 22 May 2015, Officer Deshaies returned to the Kangaroo store and asked the manager if he could review the store's video surveillance footage from the night before. Officer Deshaies was permitted to view the video footage. However, the manager of the store told Officer Deshaies that the ownership of the Kangaroo store was in the process of being transferred to a different company and that, as a result of corporate policies involved in the transfer of ownership, the manager of the Kangaroo store lacked the authority to make a copy of the video. Officer Deshaies then used the video camera in his cell phone to copy the video, and downloaded the video from his cell phone to a computer to make a digital copy. Officer Deshaies testified that the video was an accurate representation of the video that he reviewed at the store.

The trial court allowed the copy of the surveillance video to be played for the jury, over defendant's objection. The video depicts footage of the convenience store premises taken by four different cameras recording views of the parking lot and the interior of the store. The footage includes images of a man with a white cloth on his head getting out of the driver's side of a car. Officer Deshaies identified this man as defendant. Officer Deshaies testified that he had personally observed defendant get out of the car but that he had moved his patrol vehicle out of view of the store before defendant and the other man got back into the car and drove away. The video also showed defendant getting into the driver's side of the car before it left the parking lot.

The clerk testified that on 21 May 2015 he was employed at the Kangaroo gas station and convenience store on Jones Ferry Road, in Carrboro. Defendant had been a "regular customer" at the store and at around 1:00 a.m. on 21 May 2015, defendant and another man made a brief visit to the store. The clerk identified defendant in court and on the copy of the surveillance video.

Carrboro Police Officer Russell Suitt testified that he and defendant had attended high school together. Officer Suitt was not involved in the

car chase on 21 May 2015, but the next day he learned that there were outstanding warrants for defendant's arrest. That morning, Officer Suitt saw defendant walking on Homestead Road in Chapel Hill. Officer Suitt stopped defendant and informed him that there were warrants for his arrest. Defendant was arrested and placed in Officer Suitt's patrol vehicle without incident. As Officer Suitt was transporting defendant to the law enforcement center, another officer spoke to Officer Suitt over the police radio in the car, and asked Officer Suitt if he had information about the location of the vehicle that was involved in the incident the night before. Defendant spoke up from the back seat of the patrol vehicle and said that the car was in a secret location. Defendant also told Officer Suitt that he had sped away from the law enforcement officers the night before because he feared being charged with impaired driving.

On 20 April 2016, the jury returned verdicts finding defendant guilty of the charged offenses. The trial court arrested judgment on the charges of speeding and reckless driving, and consolidated the remaining charges for sentencing. The court sentenced defendant to a term of eight to nineteen months' imprisonment, to be served at the expiration of another sentence that defendant was then serving for an unrelated charge. Defendant noted a timely appeal to this Court.

II. Denial of Motion for Continuance

A. Standard of Review

On appeal, defendant argues that the trial court erred by denying his motion to continue the trial of this case, on the grounds that (1) the trial court lacked the authority to enter an order that overruled another superior court judge, and (2) the denial of defendant's continuance motion deprived him of his constitutional right to the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 23 of the North Carolina Constitution. N.C. Gen. Stat. § 15A-952(g) (2015) addresses a trial court's determination of whether to allow a continuance and provides that "the judge shall consider at least the following factors in determining whether to grant a continuance:"

> (1) Whether the failure to grant a continuance would be likely to result in a miscarriage of justice; [and]
>
> (2) Whether the case taken as a whole is so unusual and so complex, due to the number of defendants or the nature of the prosecution or otherwise, that more time is needed for adequate preparation[.]

The general standard of review of a trial court's ruling on a continuance motion is well-established:

> It is, of course, axiomatic that a motion for a continuance is ordinarily addressed to the sound discretion of the trial judge whose ruling thereon is not subject to review absent a gross abuse. It is equally well established, however, that, when such a motion raises a constitutional issue, the trial court's action upon it involves a question of law which is fully reviewable by an examination of the particular circumstances of each case. Denial of a motion for a continuance, regardless of its nature, is, nevertheless, grounds for a new trial only upon a showing by defendant that the denial was erroneous and that [his] case was prejudiced thereby.

State v. Searles, 304 N.C. 149, 153, 282 S.E.2d 430, 433 (1981) (citations omitted).

B. Trial Court's Authority to Deny Defendant's Motion to Continue

[1] Defendant argues that the trial court's denial of his motion to continue constituted an improper overruling or reversal of an earlier order or ruling by another judge. Defendant is correct that:

> The well established rule in North Carolina is that no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action.

Calloway v. Motor Co., 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972). In this case, defendant asserts that a statement by the judge who presided over a pretrial hearing constituted a "ruling" or "decision" which could not be modified by another superior court judge. Upon careful consideration of the facts of this case, we conclude that this argument lacks merit.

Following defendant's arrest on 22 May 2015, Mr. George Doyle was appointed to represent defendant on the charges that are the subject of this appeal, and that were charged in Orange County Files Nos. 15 CRS 51309 and 51310. The record indicates that Mr. Doyle also represented defendant on what is described by the parties as an unspecified drug-related offense that was charged in Orange County File No. 14 CRS 52224. Defendant was later charged with first-degree murder in an unrelated case. On 9 March 2016, defendant appeared in superior court before the Honorable James E. Hardin, Jr. During this hearing, Mr. Doyle

moved to withdraw as counsel and asked that Ms. Kellie Mannette, who was defendant's counsel on the murder charge, be appointed to represent defendant on the less serious charges on which Mr. Doyle had been appointed to represent defendant. During discussion of this possibility, Judge Hardin made a comment indicating a willingness to continue the trial of the charges on which Mr. Doyle represented defendant. On appeal, defendant contends that this remark constituted a decision or ruling establishing that defendant's trial would be continued. We disagree, and conclude that this preliminary and informal remark was clearly disavowed by Judge Hardin's explicit ruling that the case was not being continued and that any decision about a continuance would be made by the judge who presided over the trial.

We have set out a significant portion of the transcript of the hearing in order to explain the reasoning behind our conclusion that Judge Hardin did not order or rule that the present case be continued. We are not holding that Judge Hardin issued an oral ruling or order that was not reduced to writing, but that the court *did not* order that the case was continued. At the outset of the hearing, the prosecutor informed the court of the issues for resolution:

> THE COURT: Yes, sir.
>
> MR. PROCTOR: . . . Thank you. This is Pierre Moore. The matter that appears on the docket is . . . first degree murder. Ms. Mannette was appointed in district court. This is technically his first appearance in superior court, so we need to address that. And then [the] State has filed notice for a Rule 24 [hearing], and I have an order continuing that to September 13th[.] . . .
>
> THE COURT: May I have that file?
>
> MR. PROCTOR: And I believe he has some other [criminal charges] that Mr. Doyle would like to address the counsel issue on.

Judge Hardin then questioned defendant and determined that he wished to be represented by his appointed counsel, Ms. Mannette, on the charge of first-degree murder. The next matter addressed by the court was the State's motion to continue a pretrial Rule 24 hearing in the murder case for six months, until September 2016:

> THE COURT: All right. [Defendant's representation by Ms. Mannette on the charge of first-degree murder is] allowed,

> Madam Clerk. Now, do I understand with respect to the Rule 24 hearing, you want to do that when?
>
> MR. PROCTOR: I would just like to continue that to September 13th of 2016. I do have an order that, I believe, would be consented to, if I may approach.
>
> THE COURT: Ms. Mannette?
>
> MS. MANNETTE: We do consent.
>
> . . .
>
> THE COURT: That's allowed, Madam Clerk. The Rule 24 hearing will be conducted on -- during the week of September the 13th.

The next matter for consideration was a defense motion pertaining to forensic testing of certain evidence. The prosecutor explained that "Ms. Mannette had filed and Your Honor had granted a preservation order that dealt with [forensic testing.]" The parties discussed the proposed methodology for testing the ballistics evidence and, because the issue was still under discussion, Judge Hardin concluded that there was no need to amend his previous order at that time:

> THE COURT: All right. Well, I don't see that I've got to alter the order at this point[.] . . . So once you all have made that decision, if you want to prepare an order, I'll be glad to consider it.
>
> MR. PROCTOR: Okay.
>
> THE COURT: But at this point, I don't think there's anything that needs to be addressed further.

Our Supreme Court has held that "a trial court has entered a judgment or order in a criminal case in the event that it announces its ruling in open court and the courtroom clerk makes a notation of its ruling in the minutes being kept for that session." *State v. Miller*, 368 N.C. 729, 738, 783 S.E.2d 194, 200 (2016) (citing *State v. Oates*, 366 N.C. 264, 732 S.E.2d 571 (2012)). Accordingly, after Judge Hardin ruled that Ms. Mannette would represent defendant on the charge of first-degree murder and again when he ruled that the Rule 24 hearing would be continued, he specifically directed "Madame Clerk" to record his ruling. After resolving the matters discussed above, the court addressed Mr. Doyle about the charges on which he had asked to be removed as counsel:

THE COURT: Okay. Now, with respect to the other pending charges of which Ms. Mannette does not represent the Defendant, I am aware that Mr. Doyle represents the Defendant in those items, but they are not related in any way to the homicide charge. Is that what you understand, Mr. Proctor?

MR. PROCTOR: That's my understanding and my recollection. . . . I believe those matters are set for trial April 18th, so just to make sure everyone's on the same page with posture of those charges.

THE COURT: But they have no relation to this homicide charge. That's what I want to make sure the record's clear about.

MR. PROCTOR: That's -- yes.

. . .

THE COURT: Now, Mr. Doyle, you'd indicated earlier in the week that you'd had some discussions with Ms. Mannette and that she was willing to undertake the representation of Defendant in these other pending matters. And once -- I miss recalling what the discussion was.

MR. DOYLE: That's correct, Your Honor. And I believe Your Honor has those files in front of you.

. . .

THE COURT: Okay.

MR. DOYLE: My basic argument to Your Honor is that, as you know, Mr. Moore faces perhaps the ultimate penalty under our law and, therefore, I am particularly sensitive and cognizant to protecting his rights. And, also, for judicial economy, I think it makes more sense for Ms. Mannette to just be the air traffic controller of everything going on in his life right now. So I would move to withdraw and ask that you appoint Ms. Mannette to those files, as appropriate.

MS. MANNETTE: . . . Your Honor, . . . just for the record, I've been speaking to Mr. Doyle about the posture of these cases. And my understanding is that they were heading towards a resolution on those cases. I will let the Court

> know that, if they are not able to come to a non-trial resolution, I certainly will not be prepared in a month to try those cases. I do want that on the record. I don't know that that's going to be an issue here, but I did want to put that on the record. I'll leave it in Your Honor's discretion, whether or not to grant this motion or we can continue to work together but on the separate cases.
>
> . . .
>
> THE COURT: . . . Mr. Proctor, now understanding what -- the more nuanced version of where we are postured . . . [d]o you want to be heard?
>
> MR. PROCTOR: My concern is -- I mean, and it's really -- I don't know how much standing the State has in regards to this -- is that they are set for trial. If they were in an administrative posture, I would -- I wouldn't voice any concern, essentially. But given that they're in trial posture, I don't know if we come [to] April 18th and the State's ready to proceed and Ms. Mannette's not, now --
>
> THE COURT: It's going to get continued. That's the bottom line.

Defendant's contention that Judge Hardin ruled that the trial of these charges would be continued is based entirely upon the court's comment that "[i]t's going to get continued. That's the bottom line." For several reasons, we reject this argument.

We note first that, unlike the instances discussed above, upon making this remark the court neither directed the clerk to make a notation nor stated that the case would be continued until a specific date. This is understandable, given that defense counsel stated that she did not expect to be ready for trial in a month, but did not make a motion for a continuance. As a result, the trial court was not presented with a specific question for resolution. Defense counsel's failure to make a motion for continuance is not a mere procedural technicality. Had defendant's counsel moved to continue the case, the court could have entertained opposing arguments on this question, during the course of which defendant's counsel would likely have been asked to explain why a month would not be sufficient time to prepare for trial. And, if the court had continued the case, the prosecutor would have had notice of the new trial date on which to secure the attendance of witnesses.

In addition, Judge Hardin's statement that "[i]t's going to get continued" was, at most, an indication that at some future time the trial of the charges upon which Mr. Doyle represented defendant would be continued. However, the record is clear that Judge Hardin did not enter a continuance order or announce at the hearing that the case was being continued at that time. To the extent that defendant intends to argue that Judge Hardin was "ruling" that in the future the trial court would be required to continue the case, defendant has not cited any authority suggesting that one superior court judge may order that another judge enter a particular ruling in the future, regardless of the circumstances that may exist at that time.

Moreover, a review of the transcript of the rest of the hearing makes it clear that Judge Hardin did not rule that the case would be continued, but specifically ordered that the charges would remain scheduled for April. After initially making the statement discussed above, the court questioned Mr. Doyle further about his request to withdraw as counsel. The court expressed concern about the possibility of further delay in the disposition of these charges:

> THE COURT: . . . I guess what I'm not completely clear about is, Mr. Doyle, you've been a lawyer a long time. You're a very experienced litigator.
>
> MR. DOYLE: Thank you, Your Honor. I'm afraid I've been a lawyer a long time.
>
> THE COURT: . . . So I'm trying to understand, given that this other set of cases that you represent him on are -- they've got some age on them now, they're ready to be tried -- why it's necessary that Ms. Mannette take a completely unrelated set of cases along with what she's already going to be handling, so.
>
> MR. DOYLE: I think, Your Honor, if he wasn't charged with first degree murder, that would make complete sense. But in light of the fact that I need to be so concerned about any admissions that I make on his behalf, we have had plea negotiations. . . . I hope I would not intentionally make any mistakes, but unintentional with the outcome on these other cases being so severe and it just doesn't -- you know, the State keeps telling us court-appointed lawyers we've got to find every way to save cost. And it would just seem more efficient from a cost-wise [sic] to have one attorney represent him on all matters.

> THE COURT: . . . [T]hat is a more hollow argument with me. Since you've already done the work, you're ready to try the case. It can be tried in April. And now Ms. Mannette has to get up to speed and spend hours on that second unrelated set of cases so that she's prepared to try it. I don't know that we're saving any cost there. So if that's the argument, I have some issue about it.
>
> . . .
>
> MR. DOYLE: Well, the cases are -- in terms, it's the first setting on the trial docket, Your Honor. I don't -- from my discussions with Mr. Nieman over these last months, I don't get the impression that they're anywhere towards the stop -- top of the trial calendar. As you know, I have a -- I have a trial starting on March the 28th, and I am sure that I would not be able to do a quick turnaround and try this case, as well as another case in Chatham County that you set for trial for April 11th. So for me to do three jury trials in a 30-day period, I'm not able to do that as a solo practitioner. So in that sense, I guess I'm moving to continue these cases off the trial calendar, if we want to discuss that.
>
> THE COURT: Mr. Proctor, was there any other input you wanted to provide?
>
> MR. PROCTOR: Not other than I would just tell Your Honor, when Mr. Nieman and myself, along with the elected District Attorney, Mr. Woodall, discussed the fact that Mr. Moore has pending cases, Mr. Woodall's directive was just proceed on them as you normally would. They're unrelated. They're set in trial posture. So we're not going to treat them any differently and not -- we're not going to just simply put them on the back burner and wait for the murder case to be resolved. So that would be the input from the State.
>
> (Emphasis added.)

Thus, when Mr. Doyle moved to continue the trial of the charges on which he represented defendant in the event that he remained as defendant's counsel, the prosecutor argued that the State intended to proceed with the trial of these charges and opposed continuing the case until resolution of defendant's homicide charge.

Judge Hardin then questioned defendant as to whether he wished for Ms. Mannette to represent him on the non-homicide charges, which the court referred to as the "unrelated drug charges":

> THE COURT: All right. Well, I've heard from all the lawyers now, but I hadn't heard from Mr. Moore as to what his choices are. Mr. Moore, please stand up.
>
> (The Defendant complied.)
>
> . . .
>
> THE COURT: So until I make a decision about which lawyer represents you on the unrelated drug cases, Mr. Doyle is your lawyer. So if I ask you something you don't understand, discuss it with him. So long and short of it is, I'm willing to consider what your requests are regarding the appointment of counsel. Mr. Doyle, in essence, is asking that he be relieved from representing you in the unrelated drug cases and that Ms. Mannette be appointed. She's also making that request because they believe that it's to your benefit. Are you making that request, as well?
>
> DEFENDANT: Yes.
>
> (Emphasis added).

After hearing from all parties, Judge Hardin entered his order with respect to appointment of counsel and expressly ruled that the trial of the non-homicide cases was not being continued:

> THE COURT: All right, Madam Clerk. In the Court's discretion, as it relates to cases 14 CRS 52224 and 15 CRS 51309 and 51310 -- in the Court's discretion, Mr. Doyle is relieved and is allowed to withdraw as counsel. Ms. Mannette is appointed as counsel and will handle these matters along with the homicide matter, to which she's already appointed.
>
> MR. DOYLE: I have a proposed order, if I may approach.
>
> THE COURT: Yes, sir.
>
> MR. DOYLE: Thank you.
>
> THE COURT: All right. As to the drug cases, they're still set in April. So if there's some issue we need to address further, I guess it can be done by whomever is -- will be the presiding judge at that session of court.

MS. MANNETTE: Okay.

THE COURT: Madam Clerk, Ms. Mannette's the attorney of record in all these matters.

MS. MANNETTE: Thank you, Judge.

(emphasis added).

We first note that during this hearing Judge Hardin referred generally to the charges on which Mr. Doyle was granted permission to withdraw as "the drug cases" in the plural. However, the cases at issue were charged in two court files charging the instant traffic offenses and a single court file charging what has been described as a drug-related case. Therefore, the court's reference to "cases" logically applies to all three of the court files, rather than to the single court file that charged a drug-related offense. Nonetheless, on appeal, defendant contends that in its order the court was intentionally making a distinction between the charge that the parties have described as drug-related and the other two files charging the traffic offenses that are at issue in this appeal. Defendant asserts that "[a]s to the offenses giving rise to this appeal, Judge Hardin stated: 'It's going to get continued. That's the bottom line.' " Defendant thus posits that the court specifically ruled that the traffic cases would be continued, but that the drug-related charge would not. We find no basis in the transcript for this contention.

Prior to granting Mr. Doyle's motion to withdraw and appointing Ms. Mannette to represent defendant on the charges from which Mr. Doyle had asked to withdraw, Judge Hardin questioned defendant and also heard from Ms. Mannette, Mr. Doyle, and the prosecutor. At no time did any of those present make *any* reference to the fact that there were two types of charges involved, or draw any distinction between them. Specifically, Mr. Doyle asked to withdraw as counsel for all pending charges, without stating that they involved different offenses. When Judge Hardin indicated his concern about this, Mr. Doyle "mov[ed] to continue these cases off the trial calendar" without distinguishing among them. Ms. Mannette spoke to the court generally about "these cases" and made no reference to there being two categories of charges. In response, Judge Hardin made the comment that "[i]t's going to get continued" without distinguishing between the traffic charges and the drug-related case. The prosecutor stated that "they are set for trial" on 18 April 2016, and did not indicate that the trial date referred only to some of the pending charges. The prosecutor also told the court that he had been directed to proceed with the "pending cases" without regard to the first-degree murder charge lodged against defendant.

We have carefully reviewed the transcript of this hearing and find *no* reference by any of the parties or the court making any distinction between the traffic charges and the drug-related offense. In fact, neither Mr. Doyle, Ms. Mannette, nor the prosecutor mentioned that the pending charges encompassed two categories of charges. As a result, the transcript fails to contain any basis upon which to find that any of those present intended that the traffic and drug charges be treated differently. Instead, all of the parties and the court treated the charges on which Mr. Doyle represented defendant as a unitary subject for resolution, and there is no dispute that all of the charges were set for trial in April 2016.

Moreover, Judge Hardin's reference to the non-homicide charges as "drug cases" was *not* limited to the court's order allowing Mr. Doyle to withdraw. When the court addressed defendant on the subject of representation by counsel on all of the non-homicide cases, he characterized these charges as the "unrelated drug cases." We conclude that Judge Hardin's reference to "the drug cases" being "set in April" was an imprecise or inaccurate reference to all of the charges upon which Mr. Doyle had previously represented defendant.

It is also significant that, in contrast to the court's earlier remark that "the bottom line" was that the case "was going to get continued," when Judge Hardin reached a final decision and entered an order, he directed the clerk to note his decision in the record. In his order, Judge Hardin specifically ruled that the cases were "still" set in April, indicating that he had decided *not* to continue them. The court also expressly stated that if other issues arose, which would include a future continuance motion, the resolution of those matters would be the responsibility of "the presiding judge at that session of court." We conclude that Judge Hardin did not enter an order or make a ruling that this case was continued; that the court expressly noted that the case was not continued and appropriately left future decisions in the hands of the trial judge; and that Judge Baddour did not overrule the order or ruling of another superior court judge by denying defendant's motion to continue.

Moreover, defense counsel was present at this hearing and acknowledged Judge Hardin's ruling that she was appointed to represent defendant but that the cases were "still set in April." Under these circumstances, it would be unreasonable for defense counsel either to treat the court's initial comment as a "ruling" or to proceed on the assumption that there was "an understanding" that the traffic charges would be continued. Defendant is not entitled to relief on the basis of this argument.

C. Defendant's Constitutional Right to Effective Assistance of Counsel

[2] On appeal, defendant argues that his "rights to due process, to the effective assistance of counsel, and to confrontation were violated." Defendant urges that prejudice from the denial of the continuance motion "should be presumed" and, quoting *State v. Rogers*, 352 N.C. 119, 125, 529 S.E.2d 671, 675 (2000), contends that "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is remote." We have considered defendant's arguments and conclude that the trial court did not err by denying defendant's motion to continue, and that the facts of this case do not present the type of highly unusual situation in which prejudice should be presumed.

The refusal to grant a continuance may, in certain factual circumstances, violate a defendant's constitutional rights. "The defendant's rights to the assistance of counsel and to confront witnesses are guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States and by sections 19 and 23 of Article I of the Constitution of North Carolina. Implicit in these constitutional provisions is the requirement that an accused have a reasonable time to investigate, prepare and present his defense." *State v. Tunstall*, 334 N.C. 320, 328, 432 S.E.2d 331, 336 (1993) (internal quotation omitted). "[T]he constitutional guarantees of assistance of counsel and confrontation of witnesses include the right of a defendant to have a reasonable time to investigate and prepare his case, but no precise limits are fixed in this context, and what constitutes a reasonable length of time for defense preparation must be determined upon the facts of each case." *Searles*, 304 N.C. at 153-54, 282 S.E.2d at 433 (citation omitted). The Supreme Court of North Carolina has explained:

> 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." "[A] motion for a continuance should be supported by an affidavit showing sufficient grounds for the continuance." "[A] postponement is proper if there is a belief that *material* evidence will come to light and such belief is reasonably grounded on known facts." . . . Continuances should not be granted unless the reasons therefor are fully established.

State v. McCullers, 341 N.C. 19, 31-32, 460 S.E.2d 163, 170 (1995) (quoting *State v. Covington*, 317 N.C. 127, 130, 343 S.E.2d 524, 526

(1986), *State v. Kuplen*, 316 N.C. 387, 403, 343 S.E.2d 793, 802 (1986), and *State v. Tolley*, 290 N.C. 349, 357, 226 S.E.2d 353, 362 (1976)) (emphasis in original).

Thus, as a general rule, in order to obtain relief based on a court's denial of his motion for a continuance, a defendant must demonstrate that the trial court erred by denying the continuance and also that the defendant was prejudiced by the denial. However, where the record shows as a matter of law that defense counsel did not have an adequate time within which to prepare for effective representation of the defendant, our appellate courts have not required the defendant to show prejudice. For example, in *Rogers*, the Court stated that:

> While a defendant ordinarily bears the burden of showing ineffective assistance of counsel, prejudice is presumed without inquiry into the actual conduct of the trial when the likelihood that any lawyer, even a fully competent one, could provide effective assistance is remote. A trial court's refusal to postpone a criminal trial rises to the level of a Sixth Amendment violation only when surrounding circumstances justify this presumption of ineffectiveness.

Rogers at 125, 529 S.E.2d at 675 (internal quotation omitted). Defendant argues that, as in *Rogers*, we should "presume" prejudice rather than examining the actual conduct of the trial. However, the facts of *Rogers* are easily distinguished from those of the present case. The opinion of our Supreme Court in *Rogers* addressed a situation in which the defense attorneys were appointed "to a case involving multiple incidents in multiple locations over a two-day period for which they had only thirty-four days to prepare" for the "bifurcated capital trial" of a "complex case involving . . . many witnesses[.]" The Court expressly based its holding upon "the unique factual circumstances" of the case. *Rogers*, 352 N.C. at 125-26, 529 S.E.2d at 675-76. The instant case does not present the "unique factual circumstances" that were present in *Rogers*.

Defendant argues that if we find that the trial court erred by denying his motion to continue, prejudice should be presumed. In support of this argument, defendant contends that (1) prior to trial, defense counsel failed to interview witnesses, review reports, or conduct research and thus was not prepared for trial, and that (2) defense counsel's failure to prepare for trial was based upon her "reasonable" reliance upon Judge Hardin's comment at the 9 March 2016 hearing. Defendant asserts that "[w]ithout inquiring into the conduct of the trial, based on the record established at the 9 March 2016 hearing, this Court should reverse the

judgment and remand for a new trial." However, in examining the surrounding circumstances we must determine whether defense counsel had adequate time to prepare, rather than whether counsel used the time wisely:

> The question in this context is whether defendant had "ample time to confer with counsel and to investigate, prepare and present his defense," not whether the trial counsel properly used the time given to adequately investigate and prepare - that question is considered under the normal test for ineffective assistance of counsel.

State v. King, 227 N.C. App. 390, 395, 742 S.E.2d 315, 318-19 (2013) (quoting *State v. Williams*, 355 N.C. 501, 540, 565 S.E.2d 609, 632 (2002)). In this case, defendant has not articulated any argument related to the factual circumstances of this case to explain why a month was not sufficient time to prepare for trial. Instead, defendant essentially concedes that his trial counsel failed to prepare for trial, but attempts to justify this by reference to the court's comment that "the bottom line" was that "[i]t's going to get continued."

As discussed in detail above, at the hearing on 9 March 2016 Judge Hardin did not continue the case or enter an order purporting to dictate that at some future date the trial court would be required to continue the case when it was called for trial. After initially making an informal comment suggesting an inclination to continue the trial of the various charges from which Mr. Doyle sought to withdraw as counsel, the court decided not to continue the case and entered an order clearly stating that the trial was still set for April 2016. In addition, the prosecutor made it clear at the March hearing that he would oppose a continuance. Thus, it was not reasonable for defense counsel to assume, on the basis of a remark that was not consistent with Judge Hardin's final ruling, that defense counsel would be granted a continuance on 18 April 2016. We conclude that defendant has failed to establish that the factual circumstances of the present case are such that prejudice should be presumed as a result of the denial of defendant's continuance motion.

We further conclude that the trial court did not err by denying defendant's motion to continue. When the case was called for trial on 18 April 2016, defense counsel orally moved for a continuance, explaining that she had hoped to resolve the charges without a trial, but had learned that morning that defendant would not accept the State's plea offer. Defense counsel acknowledged that she had received discovery a month earlier, on the day she was appointed. She added, however, that

there was a "lay witness" whom she had not interviewed, a suppression motion for which she had not conducted the necessary research, and other unspecified "motions in limine that need to be filed and argued." Defense counsel did not identify the witness or articulate any material factual issue upon which this witness might testify.

Defendant's counsel also told the trial court that she had agreed to represent defendant "with the understanding" that if the parties could not reach a non-trial disposition, she "would not be prepared to try the case[.]" As discussed above, the record belies any suggestion that the parties had reached an "understanding" that the case would be continued. Nor did defendant's counsel proffer an explanation, other than her reliance upon Judge Hardin's comment at the earlier hearing, for her failure to interview the witness, to conduct the necessary research, to file the appropriate motions in limine, or to submit a properly supported written motion for continuance.

N.C. Gen. Stat. § 15A-952(g)(2) directs a trial court to consider, in ruling on a motion for continuance, "[w]hether the case taken as a whole is so unusual and so complex . . . that more time is needed for adequate preparation[.]" In this case, defendant did not argue at the pretrial hearing that the trial of these charges was unusual or complex. The charges lodged against defendant all arose from a single incident of high speed driving and the only factual issue that was seriously contested at trial was the identity of the driver. We conclude that the trial court did not err by denying defendant's motion to continue.

Moreover, even assuming, *arguendo*, that it was error to deny defendant's motion to continue, defendant has failed to show any resultant prejudice. In his appellate brief, defendant does not identify specific factual issues that might have been resolved differently if his counsel been granted a continuance. Defendant contends, however, that "assuming *arguendo* that prejudice cannot be presumed, specific deficiencies show ineffective assistance of counsel." Thus, the prejudice that defendant has identified on appeal is his assertion that his counsel was ineffective at trial, based upon counsel's failure to prepare for trial. The standard for a claim of ineffective assistance of counsel (referred to by the acronym IAC) is well-established:

> To prevail in a claim for IAC, a defendant must show that his (1) counsel's performance was deficient, meaning it fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defense, meaning counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

State v. Smith, 230 N.C. App. 387, 390, 749 S.E.2d 507, 509 (2013) (applying the analysis of *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984)), *cert. denied*, 367 N.C. 532, 762 S.E.2d 221 (2014).

In this case, defendant notes that prior to trial defense counsel had not interviewed an unspecified witness or reviewed police reports, that counsel failed to submit a signed affidavit in conjunction with a suppression motion, and that counsel failed to support the suppression motion or the motion to exclude admission of the convenience store surveillance video with citation to legal authority. As discussed elsewhere in this opinion, we conclude that the trial court did not err by denying defendant's suppression motion. We also conclude that the admission of the video, although error, was not prejudicial, and defendant does not argue that a continuance would have allowed defendant to obtain evidence that would have been relevant to our prejudice analysis. Therefore, even if counsel was ineffective by failing to file an affidavit with the suppression motion or to support the pretrial motions with citation to legal authority, defendant cannot show prejudice, given that we have concluded that the trial court reached the correct result on the suppression motion and that defendant was not prejudiced by the admission of the video.

In regard to defense counsel's failure to interview a witness, defendant has not offered any argument pertaining to the significance of the unnamed witness or on whether counsel's performance "fell below an objective standard of reasonableness." *Id.* In addition, defendant's appellate arguments are premised upon his contention that it was reasonable for defense counsel to assume that the trial would be continued. As a result, defendant has not explored the possibility that his counsel was ineffective by failing to prepare for the possibility that the case would be tried on the scheduled date.

"As a general proposition, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal." *State v. Hernandez*, 227 N.C. App. 601, 609, 742 S.E.2d 825, 830 (2013) (internal quotation omitted). We conclude that at this juncture defendant's claim of ineffective assistance of counsel should be dismissed without prejudice to his right to raise it in a subsequent motion for appropriate relief. For the reasons discussed above, we conclude that defendant is not entitled to relief based upon the trial court's denial of his motion to continue.

III. Admission of Video

[3] The admission of photographic and video evidence is governed by N.C. Gen. Stat. § 8-97 (2015), which 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.

N.C. Gen. Stat. § 8-97 provides that a photograph may be introduced for either illustrative or substantive purposes. "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.' " *State v. Murray*, 229 N.C. App. 285, 288, 746 S.E.2d 452, 455 (2013) (quoting N.C. Gen. Stat. § 8C-1, Rule 901)).

"Video images may be introduced into evidence for illustrative purposes after a proper foundation is laid. N.C. Gen. Stat. § 8-97 (2015). The proponent for admission of a video lays this foundation with 'testimony that the motion picture or videotape fairly and accurately illustrates the events filmed (illustrative purposes).' " *State v. Fleming*, __ N.C. App. __, __, 786 S.E.2d 760, 764-65 (2016) (quoting *State v. Cannon*, 92 N.C. App. 246, 254, 374 S.E.2d 604, 608-09 (1988), *rev'd on other grounds*, 326 N.C. 37, 387 S.E.2d 450 (1990)).

In *State v. Snead*, 368 N.C. 811, 783 S.E.2d 733 (2016), our Supreme Court addressed the requirements for introduction of a video as substantive evidence:

> Rule 901(a) requires that evidence be authenticated by showing "that the matter in question is what its proponent claims." N.C.G.S. § 8C-1, Rule 901(a) (2015). . . . Recordings such as a tape from an automatic surveillance camera can be authenticated as the accurate product of an automated process under Rule 901(b)(9). . . . Evidence that the recording process is reliable and that the video introduced at trial is the same video that was produced by the recording process is sufficient to authenticate the video and lay a proper foundation for its admission as substantive evidence.

Snead, 368 N.C. at 814, 783 S.E.2d at 736 (internal quotation omitted). *Snead* held that the testimony offered at trial was sufficient to authenticate the video:

> . . . [The witness's] testimony was sufficient to authenticate the video under Rule 901. [The witness] established

> that the recording process was reliable by testifying that he was familiar with how Belk's video surveillance system worked, that the recording equipment was "industry standard," that the equipment was "in working order" on 1 February 2013, and that the videos produced by the surveillance system contain safeguards to prevent tampering. Moreover, [the witness] established that the video introduced at trial was the same video produced by the recording process by stating that the State's exhibit at trial contained exactly the same video that he saw on the digital video recorder. . . . [The witness's] testimony, therefore, satisfied Rule 901, and the trial court did not err in admitting the video into evidence.

Snead at 815-16, 783 S.E.2d at 737.

In the present case, the evidence concerning the admissibility of the video consisted of the following. Officer Deshaies testified that the day after the incident giving rise to these charges, he asked the manager of the Kangaroo convenience store for a copy of the surveillance video made by cameras at the store. The manager allowed Officer Deshaies to review the video, but was unable to copy it. Officer Deshaies used the video camera function on his cell phone to make a copy of the surveillance footage, which was copied onto a computer. At trial he testified that the copy of the cell phone video accurately showed the contents of the video that he had seen at the store. The store clerk also reviewed the video, but was not asked any questions about the creation of the original video or whether it accurately depicted the events that he observed on 21 May 2015.

A careful review of the transcript in this case reveals that no testimony was elicited at trial concerning the type of recording equipment used to make the video, its condition on 21 May 2015, or its general reliability. No witness was asked whether the video accurately depicted events that he had observed, and no testimony was offered on the subject. We conclude that the State failed to offer a proper foundation for introduction of the video as either illustrative or substantive evidence.

On appeal, the State contends that the clerk "testified that the events contained on the video copy made by Officer Deshaies were an accurate portrayal of what he had seen on the original videotape and had witnessed within the store." This assertion is inaccurate. The clerk testified that defendant was shown on the video, but was not asked whether the video accurately depicted events he observed on 21 May 2015, and did

not volunteer testimony of this nature. We hold that the trial court erred by admitting the video into evidence.

We next consider whether the introduction of the video was prejudicial. Defendant did not object to the admission of the video on constitutional grounds. Regarding prejudice from errors that do not arise under the state or federal constitution, N.C. Gen. Stat. § 15A-1443(a) states that:

> 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.

In this case, the primary issue for the jury to resolve was whether the State had shown beyond a reasonable doubt that defendant was the driver of the car that sped away from Officer Deshaies on 21 May 2015. In its appellate brief, the State argues that the video was admissible and does not address the issue of prejudice. Defendant argues that, absent the admission of the video there is a reasonable possibility that the jury would not have convicted him. We have considered the admission of the video in the context of the other evidence introduced at trial, and conclude that it was not prejudicial.

The evidence, other than the video, that pertained to the issue of whether defendant was the driver, consisted of the following. Officer Deshaies testified that when the car pulled into the convenience store, he saw defendant getting out of the car on the driver's side. This was direct evidence that defendant was driving the car a few minutes before it sped away from the store. In addition, as discussed in detail below, at the time of his arrest defendant essentially confessed to having been the driver, and told the arresting officer "that the only reason he ran from officers the night of 5/21/2015 was because he had been drinking and did not want to deal with the driving while impaired charges." This statement was a direct admission of the fact that he was driving the car the night before, given that a passenger in the car would not be charged with impaired driving. The credibility of the officer to whom defendant made this admission was not seriously challenged. No evidence was offered tending to show that a person other than defendant was driving. However, defendant has pointed out that defendant was not the owner of the car and that the jury asked to review all of the videos during its

deliberations, in support of his argument that admission of the video was prejudicial.

We have evaluated the extent to which the video may have played a role in the jury's decision to convict defendant, particularly given that defendant essentially confessed to being the driver of the car. We conclude that defendant has failed to meet his burden of showing that there is a reasonable possibility that the jury would have failed to convict defendant absent the video evidence.

IV. Denial of Suppression Motion

[4] Prior to trial, defendant moved to suppress the statements that he made to Officer Suitt while the officer was transporting him to the law enforcement center. The trial court conducted a hearing on defendant's suppression motion on the day that the trial began and denied defendant's motion. On appeal, defendant argues that his statements were made in response to police interrogation or its functional equivalent, in violation of his right under the Fifth Amendment to the United States Constitution to avoid self-incrimination. We disagree.

In *Miranda v. Arizona*, 384 U.S. 436, 444, 16 L. Ed. 2d 694, 707 (1966), the United States Supreme Court held that:

> [T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. . . . Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.

"The rule of *Miranda* requiring that suspects be informed of their constitutional rights before being questioned by the police only applies to custodial interrogation." *State v. Brooks*, 337 N.C. 132, 143, 446 S.E.2d 579, 586 (1994). *Miranda* also held, as relevant to the present case, that "[a]ny statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence." *Miranda*, 384 U.S. at 478, 16 L. Ed. 2d at 726.

In the present case, there is no dispute that when defendant made the inculpatory statements to Officer Suitt he was in custody and had not been apprised of his *Miranda* rights. Thus, the dispositive issue is whether defendant was subjected to interrogation. "The Supreme Court

has defined the term 'interrogation' as follows: 'Any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect.' " *State v. Brewington*, 352 N.C. 489, 503, 532 S.E.2d 496, 504 (2000) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301, 64 L. Ed. 2d 297, 308 (1980)).

In this case, defendant made inculpatory statements after being arrested and while being transported to the law enforcement center. These statements were made in response to a question from Officer Suitt's supervising officer over the police radio. At the hearing on defendant's suppression motion, Officer Suitt testified as follows:

> MR. PROCTOR: Okay. And what happened next [after defendant was secured in the patrol vehicle]?
>
> OFFICER SUITT: . . . [W]e were en route to the police department and Mr. Moore heard -- my lieutenant was asking about the vehicle, maybe see if we could locate the vehicle. He asked if Mr. Moore had said anything about where the vehicle was located. Well, obviously the speaker in my patrol car, anybody can hear that's inside the car. Mr. Moore stated that we wouldn't find the vehicle, it was possibly in a secret spot, as stated in -- in the report.
>
> MR. PROCTOR: Okay. And to be clear, was that in response to any question that was being asked of him?
>
> OFFICER SUITT: It was not. I did not ask him any questions. I believe it would be in response to my supervisor, lieutenant, asking the question over the radio to me "Did he say anything about where the car was located?" And his response was in response to that.
>
> MR. PROCTOR: Okay. What happened next?
>
> OFFICER SUITT: Still en route to the police department, Mr. Moore stated, as I put in the report, that the only reason that he ran from officers the night prior was because he didn't want to get the impaired driving charge, the DWI.
>
> MR. PROCTOR: Okay. Do you remember with any specificity what he said? You can use your report, if necessary.
>
> OFFICER SUITT: Yeah, just -- I'll read it straight from - - from the report. . . . "Mr. Moore went on to advise me he ran from . . . officers on 5/21/15 [] because he had been

> drinking and did not want to deal with the driving while impaired charge."
>
> MR. PROCTOR: Okay. And was that statement made in response to any questions that you posed to him?
>
> OFFICER SUITT: No, I did not ask any questions. And the reason I did not ask him any questions, I had not Mirandized him any -- in any way because I had no intentions on asking any questions.

Based upon this testimony, the trial court found that defendant's statements were "spontaneous utterances" that were "not made in response to questions posed to him by law enforcement" and that "defendant's statement in response to a radio communication by a law enforcement officer *to Suitt* cannot be interpreted to be an interrogation or questioning of defendant." (emphasis in original). The court concluded that "[d]efendant's statements were not coerced, and were not obtained in violation of his constitutional rights."

The thrust of defendant's appellate argument is that Officer Suitt should have known that the conversation between Officer Suitt and another officer would be reasonably likely to elicit an incriminating response. Defendant asserts that defendant had a reasonable "perception that he was expected to participate in the conversation" initiated over the police radio by Officer Suitt's superior officer. Defendant also notes that before Officer Suitt turned off the video recording in the patrol car, he asked defendant where he had been walking. There is no indication in the record that defendant answered this question. Moreover, defendant's inculpatory statements did not pertain to his walk on the morning of his arrest.

Defendant has not directed our attention to appellate jurisprudence in which the court held that a brief exchange between two law enforcement officers was the functional equivalent of interrogation, and we note that in the leading case on this issue, *Rhode Island v. Innis*, 446 U.S. 291, 64 L. Ed. 2d 297 (1980), the Supreme Court rejected a similar argument. In *Innis*, the defendant was arrested for a homicide. During the drive to the law enforcement center, the officers who had arrested defendant discussed the fact that the firearm used in the murder had not been located, and expressed concern about the possibility that a handicapped child might find the weapon and harm himself. Defendant interrupted the officers' conversation and offered to show them where the gun was located. On appeal, the defendant argued that the officers' discussion was the equivalent of an interrogation. The Supreme Court

first enunciated the standard for determining when a defendant is subjected to interrogation:

> We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect. . . . But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response.

Innis, 446 U.S. at 301, 64 L. Ed. 2d at 307-08. The Court then applied this standard to the facts of *Innis*, and held that the conversation conducted by the officers in the defendant's presence did not constitute the equivalent of an interrogation:

> [W]e conclude that the respondent was not "interrogated" within the meaning of *Miranda*. . . . [T]he conversation between [the officers] included no express questioning of the respondent. Rather, that conversation was, at least in form, nothing more than a dialogue between the two officers to which no response from the respondent was invited. Moreover, it cannot be fairly concluded that the respondent was subjected to the "functional equivalent" of questioning. It cannot be said, in short, that [the officers] should have known that their conversation was reasonably likely to elicit an incriminating response from the respondent.

Innis at 302, 64 L. Ed. 2d at 309. We find *Innis* to be functionally indistinguishable from the present case. Indeed, the officers' conversation in *Innis* was more likely to elicit a response from the defendant, given the emotional tone of the officers' concern for the safety of a child, than would the question asked over the police radio in the presence of this defendant in the present case.

We have also considered the holding of our Supreme Court in *State v. DeCastro*, 342 N.C. 667, 466 S.E.2d 653 (1996). In *DeCastro*, the defendant was arrested on charges of robbery and murder and was taken to

the law enforcement center, where an officer took possession of the defendant's clothing and personal effects. This officer asked another law enforcement officer who was present whether defendant could retain custody of money that was in his possession. Defendant overheard and volunteered that he "had some of my own money, too" a statement that supported the charge of robbery. *DeCastro*, 342 N.C. at 678, 466 S.E.2d at 658. On appeal, defendant argued that "the detective's question, made in defendant's presence while he was in police custody, could have been perceived by defendant as seeking a response" and was therefore "the functional equivalent of police interrogation in violation of his constitutional rights." *DeCastro* at 683, 466 S.E.2d at 661. Our Supreme Court rejected this argument, holding that defendant's statement "was not the result of interrogation in derogation of defendant's right to have an attorney present during questioning. The question by Detective Berube regarding whether defendant could keep the money from his pocket was not directed to defendant, but to Agent McDougall." *DeCastro* at 684, 446 S.E.2d at 661. We conclude that defendant has failed to show that he was subjected to the functional equivalent of an interrogation, and that the trial court did not err by denying his motion to suppress.

V. Conclusion

For the reasons discussed above, we conclude that the trial court did not err by denying defendant's motion to continue or his motion to suppress the statements he made to Officer Suitt, but that the trial court erred by admitting into evidence the cell phone copy of a surveillance video from the convenience store. We hold, however, that given the strength of the other evidence offered by the State, this error was not prejudicial to defendant.

NO ERROR IN PART, NO PREJUDICIAL ERROR IN PART.

Judges BRYANT and INMAN concur.

STATE OF NORTH CAROLINA
v.
ALFRED FRANKLIN WORLEY

No. COA16-941

Filed 18 July 2017

Search and Seizure—warrants to search rental cabin and truck—stolen goods—totality of circumstances—nexus of locations—probable cause

The trial court did not commit plain error in a case involving multiple counts of felony breaking and entering, larceny, and possession of stolen goods by denying defendant's motion to suppress evidence seized during the executions of warrants to search his rental cabin and truck for stolen goods where defendant contended there was an insufficient nexus between his rental cabin and the criminal activity at a horse trailer. The totality of circumstances revealed that despite no evidence directly linking the two places, the warrant affidavit established a sufficient nexus based on defendant's prior criminal record and familiarity of the property as a former employee. Thus, the magistrate was provided with a substantial basis to conclude that probable cause existed.

Appeal by defendant from order entered 21 April 2016 by Judge Mark E. Powell in Transylvania County Superior Court. Heard in the Court of Appeals 5 April 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Phillip Reynolds, for the State.

Stephen G. Driggers for defendant-appellant.

ELMORE, Judge.

Alfred Franklin Worley (defendant) was convicted by a jury of multiple counts of felony breaking and entering, larceny, and possession of stolen goods. He appeals from an order denying his motion to suppress evidence seized during the executions of warrants to search his rental cabin and truck for stolen goods.

Four days after a reported breaking and entering of a horse trailer and larceny of six identified items of horse tack, a deputy applied for and was issued warrants to search defendant's rental cabin and his truck for

the horse tack. The search of the rental cabin yielded the stolen horse tack and other incriminating evidence justifying a second search of the cabin. Defendant was later arrested.

Defendant moved to suppress the evidence seized during the searches of his cabin, arguing the warrants lacked probable cause because the deputy's affidavit underlying both search warrants established no nexus between defendant's rental cabin and the reported breaking and entering and larceny. The trial court concluded the affidavit established probable cause and entered an order denying defendant's suppression motion.

On appeal, defendant argues again the warrants to search his cabin for the missing horse tack lacked probable cause because the underlying affidavit failed to establish a nexus between the criminal activity and his rental cabin. Because we hold that under the totality of the circumstances, the accumulation of reasonable inferences drawn from information contained within the affidavit sufficiently linked the criminal activity to defendant's cabin, and thus demonstrated the magistrate had a substantial basis to conclude that probable cause existed to issue the warrants, we affirm the trial court's order.

I. Background

On 28 December 2014, Deputy Matthew C. Owen of the Transylvania County Sheriff's Office (TCSO) applied for warrants to search defendant's truck and rental cabin for identified items of horse tack reported missing after a breaking and entering of a horse trailer on 441 Sugar Loaf Road. Deputy Owen's supporting affidavit revealed the following information.

On 25 December 2014, deputies of the TCSO responded to a reported breaking and entering of a horse trailer located at 441 Sugar Loaf Road and discovered that horse tack worth approximately $1,135.00 was missing and last seen the previous morning. On 27 December 2014, Mrs. McCall, one of the property's owners, called the TCSO about the incident and reported that defendant was a likely suspect of the breaking and entering and larceny. She told Deputy Owen that defendant moved to Florida about one year ago, but she recently discovered he was back in town, and heard someone had seen defendant on Sugar Loaf Road. She reported that defendant was currently renting a cabin at a nearby resort, The Adventure Village and Lodgings (Adventure Village). She further stated that defendant had worked for the McCalls around their farm about one year ago and that, during that time, several tools and equipment went missing from their farm. Although the McCalls suspected defendant stole

these items, they were never able to prove it. Mrs. McCall also stated that immediately before defendant moved to Florida, someone had broken into her daughter's car and stolen approximately $1,050.00.

On 28 December 2014, Mr. McCall called the TCSO and reported to Deputy Owen that his son, Zach, had just observed defendant driving in a "very slow manner" down Sugar Loaf Road near the horse trailer. Mr. McCall stated that Zach drove toward defendant in an attempt to make contact with him, but defendant sped away and then turned into an apartment complex. Zach followed and when he turned into the complex, defendant sped away again, driving in a "very unsafe manner and at high speeds" through residential areas. Zach started to follow defendant again but stopped when the speed of pursuit became dangerous. Mr. McCall reported that Zach described defendant's truck as a grey GMC with an extended cab and temporary plates, and that they found the truck sitting "out of view" beside an office building at Adventure Village. Mr. McCall stated further that when defendant had worked on their farm, several items went missing, and that the larcenies stopped when defendant moved to Florida. Mr. McCall also reported that part of his fence had been knocked over when the horse trailer was broken into and entered, and that he observed a "fresh dent" on the grey GMC truck he believed belonged to defendant.

Deputy Owen subsequently confirmed with management at Adventure Village that defendant was currently renting Cabin #1 and was listed as the sole occupant on the lease. He discovered that defendant asked for a refund for his rental on 24 December 2014 so he could return to Florida. Deputy Owen also discovered a 1999 GMC Sierra Extended Cab Pickup Truck displaying temporary tags, registered to defendant, and parked "in an effort to be hidden behind the main office out of view behind a back hoe" at Adventure Village. When Deputy Owen examined the truck, he noticed a large and apparently recent dent on its driver's side, and he observed bullets on the driver's seat and floorboard. Deputy Owen checked defendant's criminal history and discovered that he had previously been convicted of first-degree burglary and felony larceny.

Additionally, in his affidavit, Deputy Owen recited his training and experience investigating approximately 100 breaking-and-entering cases and testified that, based on his experience, criminals who commit breaking-and-entering and burglary crimes "will often return to an area if there is more property which can be taken or to scope out other properties to burglarize." Deputy Owen stated further that, in his opinion, defendant's "actions today would lead a normal person to believe that he is involved . . . [by] running from the property owners and hiding his

vehicle from [the] site after doing so." He stated further that as a convicted felon, it was unlawful for defendant to possess firearms.

Supported by his affidavit, Deputy Owen applied for warrants to search Cabin #1 and the grey GMC truck for six identified items of horse tack and other fruits of the crimes, which the magistrate issued. During the execution of the first warrant at Cabin #1, Deputy Owen found and seized the horse tack sought, and other items of horse tack. He also observed and photographed other goods he suspected were stolen, including two trolling motors, several pairs of shoes, and a television. Supported by his first affidavit and these photographs, Deputy Owen applied for a second warrant to search Cabin #1, which the magistrate issued. Deputy Owen then executed the second search warrant and seized these additional items, which were later discovered to have been stolen from a barn adjacent to 441 Sugar Loaf Road and a residence located at 553 Sugar Loaf Road.

Defendant was arrested and indicted for several property-related offenses at the horse trailer and other nearby locations. After a two-day jury trial, defendant was convicted of multiple felonies arising from the stolen goods seized during the two searches at Cabin #1: larceny and possession of stolen goods with respect to the horse tack taken from the horse trailer at 441 Sugar Loaf Road; breaking and entering, larceny after breaking and entering, and possession of stolen goods with respect to the trolling motors taken from the barn adjacent to 441 Sugar Loaf Road; breaking and entering, larceny after breaking and entering, and possession of stolen goods with respect to the shoes and television taken from the residence at 553 Sugar Loaf Road; habitual breaking and entering; and possession of a firearm by a felon. The trial court consolidated the offenses into four judgments and sentenced defendant to fifty-six to ninety-eight months of incarceration.

Prior to trial, defendant filed a motion to suppress the evidence seized from the searches at Cabin #1, arguing the warrants lacked probable cause because Deputy Owen's affidavit established no "nexus between the alleged crimes and the location to be searched." At the suppression hearing, the trial court reviewed Deputy Owen's affidavit, concluded it established probable cause to issue the search warrants, and then entered an order denying defendant's suppression motion. Defendant appeals this suppression order.

II. Analysis

Defendant contends the trial court committed plain error by denying his motion to suppress evidence seized from his rental cabin because

the search warrants lacked probable cause. He argues the affidavit supporting both warrants to search his rental cabin lacked a sufficient nexus between Cabin #1 and the reported breaking and entering and larceny at the horse trailer on 441 Sugar Loaf Road. We disagree.

A. Standard of Review

As defendant concedes, although he moved to suppress this evidence before trial, because he failed to object to its admission at trial, he failed to preserve this error and is thus entitled only to plain error review of the suppression order. *See State v. Larkin*, 237 N.C. App. 335, 339, 764 S.E.2d 681, 685 (2014), *disc. rev. denied*, 368 N.C. 245, 768 S.E.2d 841 (2015). To establish plain error, a defendant "must first demonstrate that the trial court committed error, and next 'that absent the error, the jury probably would have reached a different result.' " *Id.* (quoting *State v. Haselden*, 357 N.C. 1, 13, 577 S.E.2d 594, 602, *cert. denied*, 540 U.S. 988 (2003)).

We review an order denying a motion to suppress to determine "whether the trial court's 'underlying findings of fact are supported by competent evidence . . . and whether those factual findings in turn support the [trial court's] ultimate conclusions of law.' " *State v. Allman*, ___ N.C. ___, ___, 794 S.E.2d 301, 304 (2016) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)). We review *de novo* a trial court's conclusion that a magistrate had probable cause to issue a search warrant. *See id.* at ___, 794 S.E.2d at 305.

In determining whether probable cause exists to issue a search warrant, "[a] magistrate 'must make a practical, common-sense decision' based on the totality of the circumstances, whether there is a 'fair probability' that [evidence] will be found in the place to be searched." *State v. McKinney*, 368 N.C. 161, 164, 775 S.E.2d 821, 824 (2015) (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)).

Reviewing courts accord " 'great deference' " to an issuing magistrate's probable-cause determination. *Allman*, ___ N.C. at ___, 794 S.E.2d at 303 (quoting *Gates*, 462 U.S. at 236). Our role " 'is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed.' " *State v. Arrington*, 311 N.C. 633, 638, 319 S.E.2d 254, 258 (1984) (quoting *Gates*, 462 U.S. at 238). We use a "totality of the circumstances test to determine whether probable cause exist[ed]." *Allman*, ___ N.C. at ___, 794 S.E.2d at 303 (citing *Arrington*, 311 N.C. at 643, 319 S.E.2d at 260–61).

B. Discussion

Defendant contends the warrants to search his rental cabin lacked probable cause because the supporting affidavit was "based on the suspicions of [Mr.] and [Mrs.] McCall but not on a nexus between the breaking and entering of the horse trailer at 441 Sugar Loaf Road and [defendant's] cabin." We disagree.

We review the sufficiency of a search warrant affidavit to ensure the facts and circumstances described and all reasonable inferences drawn therefrom supplied a magistrate " 'reasonable cause to believe that the search will reveal the presence of the [items] sought on the premises described in the [warrant] application,' and that those items 'will aid in the apprehension or conviction of the offender.' " *Allman*, ___ N.C. at ___, 794 S.E.2d at 303 (quoting *State v. Bright*, 301 N.C. 243, 249, 271 S.E.2d 368, 372 (1980)).

A supporting affidavit " 'must establish a nexus between the [evidence] sought and the place to be searched.' " *State v. Parson*, ___ N.C. App. ___, ___, 791 S.E.2d 528, 536 (2016) (quoting *State v. Oates*, 224 N.C. App. 634, 644, 736 S.E.2d 228, 235 (2012), *disc. rev. denied*, *appeal dismissed*, 366 N.C. 585, 740 S.E.2d 473 (2013)). Ideally, this nexus is established by direct evidence "showing that criminal activity actually occurred at the location to be searched or that the fruits of a crime that occurred elsewhere are observed at a certain place." *Id.* (quoting *Oates*, 224 N.C. App. at 644, 736 S.E.2d at 235). Yet absent evidence directly linking criminal activity to a particular place, this nexus may be inferred by the accumulation of reasonable inferences drawn from information contained within an affidavit. *See Allman*, ___ N.C. at ___, 794 S.E.2d at 305–06 (affirming probable-cause determination despite warrant affidavit not "directly link[ing] defendant's home with evidence of drug dealing" because nexus could be reasonably inferred from factual allegations and accumulated circumstantial evidence); *see also State v. Sinapi*, 359 N.C. 394, 399, 610 S.E.2d 362, 365 (2005) ("[A] magistrate is entitled to draw reasonable inferences from the material supplied to him by an applicant for a warrant." (citing *State v. Riggs*, 328 N.C. 213, 221, 400 S.E.2d 429, 434 (1991)).

As an initial matter, defendant correctly notes the affidavit contained no direct evidence that anyone had observed him break into the horse trailer, steal the horse tack, bring it to his cabin, or store the horse tack there. In the context of search warrants, " 'probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity.' " *State v. Benters*, 367 N.C. 660, 664–65, 766

S.E.2d 593, 598 (2014) (quoting *Riggs*, 328 N.C. at 219, 400 S.E.2d at 433). Here, Deputy Owen's affidavit established there was a reported breaking and entering and larceny and allegations about defendant that permitted the magistrate to conclude there was probable cause to believe that defendant was the offender under the circumstances.

The affidavit established that when the McCalls employed defendant to work around their farm, several tools and pieces of equipment went missing and were never recovered; that immediately before defendant moved to Florida, someone broke into the McCall's daughter's car and stole approximately $1,050.00; that defendant rented a cabin located within close proximity to the McCall's property around the same time as the reported breaking and entering and larceny; and that defendant had prior felony convictions for first-degree burglary and felony larceny. It was thus reasonable for the magistrate to infer that someone with such a criminal history that was familiar with the McCall's property and may have successfully stolen from them in the past, might return and attempt to steal from the McCall's property again.

Based on Mr. McCall's statements that when Zach saw defendant driving down Sugar Loaf Road and attempted to contact him, defendant sped quickly away and then turned into an apartment complex; that when Zach followed defendant into the complex, he again sped quickly away and Zach attempted to but was unable to follow defendant safely; and that the McCalls and Deputy Owen observed defendant's truck parked deliberately outside of plain view at Adventure Village, it was reasonable to infer that defendant might have attempted to evade Zach after stealing from the McCalls and to hide his truck after Zach saw him. Based on Mr. McCall's statement that a section of his fence had been knocked over when the breaking and entering occurred, and that Mr. McCall and Deputy Owen observed an apparently fresh dent on defendant's truck, it was reasonable to infer that defendant's truck knocked down the fencing during the commission of the crimes.

Based on Deputy Owen's statement that defendant sought a refund for his cabin on the same day of the reported incident, it was reasonable to infer that defendant may have been attempting to immediately leave town and return home with the fruits of his larceny. And based on Mrs. McCall's statements that someone told her defendant was seen on Sugar Loaf Road immediately before the incident; Mr. McCall's statements that Zach saw defendant driving slowly down Sugar Loaf Road three days after the incident; and that, based on Deputy Owen's extensive experience investigating breaking-and-entering cases, criminals often return to the area if there is more property to be taken or to

scope out other properties to burglarize, it was reasonable to infer further that defendant might have scoped out the McCalls property before the crimes and then returned to consider whether there was any more property he could steal. Under the totality of circumstances, we conclude the affidavit established a sufficient "probability or substantial chance" that defendant participated in the reported breaking and entering of the horse trailer and larceny of the horse tack.

Accordingly, having determined the affidavit established probable cause to believe defendant participated in the crimes, we must now determine whether it supplied the magistrate " 'reasonable cause to believe' " a search of defendant's cabin would yield the stolen horse tack, which would certainly " 'aid in the apprehension or conviction of the offender.' " *See Allman*, ___ N.C. at ___, 794 S.E.2d at 303 (quoting *Bright*, 301 N.C. at 249, 271 S.E.2d at 372).

Here, the crime being investigated was a confirmed breaking and entering and larceny reported to have occurred only four days earlier, and the items sought included detailed descriptions of missing horse tack, including two saddle pads, two saddles, and two bridles with bits. Although the affidavit never explicitly stated that defendant's rental cabin or his truck were the likely repository for the horse tack, it established that defendant permanently resided in Florida and was the sole occupant of a nearby cabin rented around the same time as the incident, and that a GMC truck parked outside Adventure Village was registered to defendant. The affidavit never explained the geographic relationship between the horse trailer and defendant's cabin, but it did explain their locations, permitting the magistrate to draw a reasonable inference from the close proximity of the larceny to defendant's cabin. Further, the affidavit did not allege that defendant kept any permanent residence, office, or storage facility in North Carolina, providing a reasonable inference that defendant's cabin or truck were the only two possible storage places for the stolen goods sought.

Because Deputy Owen alleged in his affidavit that he examined defendant's truck and observed in plain view bullets lying on the driver's seat, it was reasonable for the magistrate to infer that Deputy Owen did not observe any stolen horse tack when he peered through the truck's windows, and that he looked in the truck bed. It was reasonable to infer further that since certain larger items like the two saddles were unobserved, and could not reasonably be expected to be stored in any concealed compartment in the truck or on defendant's person, these items were likely to be stored in his rental cabin. *See State v. Whitley*, 58 N.C. App. 539, 544, 293 S.E.2d 838, 841 (1982) ("Since at least some of the

items the informant alleged defendant possessed are not such as could reasonably be expected to be stored on defendant's person, . . . the inference that the stolen goods were possessed at defendant's residence reasonably arises . . . .").

Based on the allegations and circumstances contained within the affidavit, it was reasonable for the magistrate to infer cumulatively that defendant, an out-of-state resident suspected of a reported breaking and entering and larceny from four days earlier, might keep the fruits of the larceny at his nearby rental cabin. "These are just the sort of commonsense inferences that a magistrate is permitted to make when determining whether probable cause exists." *Allman*, ___ N.C. at ___, 794 S.E.2d at 305. Accordingly, we conclude the affidavit established a sufficient nexus between the criminal activity and defendant's rental cabin, and thus provided the magistrate probable cause to issue the warrants to search Cabin #1 for the missing horse tack.

III. Conclusion

Under the totality of the circumstances, despite evidence not directly linking the criminal activity to the place to be searched, the warrant affidavit established through the accumulation of reasonable inferences a sufficient nexus between defendant's rental cabin and the reported criminal activity, and thus provided the magistrate a substantial basis to conclude that probable cause existed to search defendant's cabin for the missing horse tack. Therefore, we hold that the trial court properly denied defendant's motion to suppress and affirm its order.

AFFIRMED.

Judges INMAN and BERGER concur.

STATE OF NORTH CAROLINA
v.
JENNIFER LEIGH YOUNTS, DEFENDANT

No. COA16-213

Filed 18 July 2017

1. Evidence—expert testimony—driving while impaired—Horizontal Gaze Nystagmus test

The trial court did not err in a driving while impaired case by admitting expert testimony from an officer regarding the results of a Horizontal Gaze Nystagmus ("HGN") test where he was not required to first determine that HGN testing was a product of reliable principles and methods under N.C.G.S. § 8C-1, Rule 70 before testifying about it.

2. Motor Vehicles—driving while impaired—speculation on breathalyzer test result—appreciable impairment

The trial court did not err in a driving while impaired case by not intervening ex mero motu when the prosecutor speculated in the State's closing argument about what defendant's breathalyzer test result would have been an hour before she was actually tested where there was ample evidence that defendant was guilty based upon a theory of appreciable impairment independent of her blood alcohol concentration.

Appeal by Defendant from judgment entered 24 September 2015 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 22 August 2016.

Attorney General Joshua H. Stein, by Assistant Attorney General Ashleigh P. Dunston, for the State.

Joseph P. Lattimore for Defendant-Appellant.

INMAN, Judge.

Under Rule 702 of the North Carolina Rules of Evidence, a trial court does not err when it admits expert testimony regarding the results of a Horizontal Gaze Nystagmus ("HGN") test without first determining that HGN testing is a product of reliable principles and methods as required by subsection (a)(2).

Jennifer Leigh Younts ("Defendant") appeals from a judgement entered following a jury trial in which she was found guilty of driving while impaired. Defendant argues that the trial court erred by admitting testimony about the results of an HGN test, because the testifying officer did not lay the evidentiary foundation required for expert testimony. Defendant also argues that the trial court erred by not intervening *ex mero motu* when the prosecutor, in closing argument, speculated as to what Defendant's blood alcohol concentration would have been an hour before she was tested. After careful consideration, we hold: (1) that the trial court did not err by admitting HGN evidence without first making a determination as to its reliability and (2) that the trial court did not err in failing to intervene in the prosecutor's closing argument.

Factual and Procedural History

The State's evidence at trial tended to show the following:

On 21 October 2014 at around 6:20 p.m., Myron R. Coffey, of the North Carolina Highway Patrol ("Trooper Coffey") clocked Defendant traveling in a black car at seventy-six miles per hour in a fifty-five mile per hour zone on Interstate Highway 240 near Asheville. Trooper Coffey activated his blue lights and pulled behind Defendant's vehicle. Defendant pulled off to the side of the road onto an exit ramp approximately four-tenths of a mile down the highway.

As Trooper Coffey approached Defendant's vehicle, he noticed "a strong odor of alcohol coming out of the vehicle." Trooper Coffey also noticed Defendant had "red glassy eyes and slurred speech." He asked Defendant if she had had anything to drink that day; she responded affirmatively. Trooper Coffey then asked Defendant to step out of her vehicle to undergo several standardized field sobriety tests.

The first test Trooper Coffey administered was an HGN test. Based on Defendant's results from the HGN test, Trooper Coffey did not "feel like [Defendant's] impairment was anything other than alcohol[,]" and did not administer a Vertical Gaze Nystagmus test. Next, Trooper Coffey had Defendant perform the "walk and turn test." Trooper Coffey noted that Defendant could not keep her balance, could not walk a straight line, missed the heel to toe steps, used her arms incorrectly, did not take the proper number of steps, and could not keep her foot planted on the turn. Defendant then performed the "one-leg stand" test. She was unable to balance on one foot, switched feet mid-test, and almost fell over. Trooper Coffey was "looking for a total of four clues, and [Defendant] showed all four clues on [the one-leg stand] test."

Trooper Coffey administered one final test, a portable breath test, which was positive for the presence of alcohol. Trooper Coffey sought to repeat the portable breath test to ensure accuracy, but Defendant refused to cooperate. Trooper Coffey concluded that Defendant was impaired and placed her under arrest. At the Buncombe County Detention Facility, at approximately 6:42 p.m., Defendant consented to take the Intoxilyzer breath test. Defendant invoked her right to have a witness present; however, no witness appeared within thirty minutes, and Trooper Coffey administered the Intoxilyzer breath test at 7:18 p.m. The results of this breath test indicated a blood alcohol concentration of .06.

Following the Intoxilyzer test, Defendant was charged with driving while impaired. Following a trial in Buncombe County District Court on 18 August 2015, Defendant was convicted of driving while impaired and immediately filed a notice of appeal to superior court.

Pending trial *de novo* in superior court, Defendant filed a motion *in limine* to exclude, *inter alia*, expert testimony regarding the results of the HGN test. Defendant requested a *voir dire* hearing of Trooper Coffey to determine the admissibility of his HGN testimony. Following the impaneling of the jury but outside the jury's presence, the trial court allowed the *voir dire* of Trooper Coffey.

In the *voir dire* hearing, Trooper Coffey testified about his qualifications to administer the standardized field sobriety tests, including the HGN test. He stated he received 40 hours of training, and continued refresher courses every two years. Trooper Coffey explained the HGN test, how it is administered, and what he looks for throughout the test. He admitted he had not independently researched HGN testing and that he did not know the rate of error. He acknowledged that causes other than alcohol impairment can affect the results of an HGN test. The trial court initially allowed Defendant's motion to exclude Trooper Coffey's testimony about the HGN test results because the State had not presented testimony "regarding his administration of the test or how these methods were applied[.]"

The State requested a reexamination of Trooper Coffey in the *voir dire* hearing to lay the proper foundation. Following the additional testimony, the trial court denied Defendant's motion to exclude the HGN evidence, finding:

> [B]ased upon this trooper's observations, his proper training, experience, and education, skill, knowledge, and the fact that he was properly qualified, he has been certified

> in administering the horizontal gaze nystagmus test; and he administered—he has testified as to how he administered the test, and he administered the test according to his training in this particular instance and recorded those test results accurately and has testified to all of these . . . pursuant to 702(a) that this scientific, technical, or specialized knowledge will assist the trier of fact in understanding the evidence or determine the facts in issue in this case, the issue of impairment, exclusively the issue of impairment; and the witness is qualified as an expert by knowledge, skill, experience, training, or education and may testify thereto in the form of an opinion and being qualified under 702(a) of this chapter and the proper foundation having been laid as indicated by the Court.

Before the jury, in addition to testifying about his experience and training in administering HGN tests, Trooper Coffey testified about his qualifications and experience in administering other field sobriety tests, as well as the events surrounding Defendant's arrest.

The trial court instructed the jury that Defendant could be found guilty of impaired driving based either upon having an appreciable impairment or having a blood alcohol concentration equal to or greater than a statutory measure:

> The Defendant is under the influence of an impairing substance when the Defendant has taken or 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 the Defendant had consumed sufficient alcohol that at any relevant time after the driving, the Defendant had an alcohol concentration of .08 or more grams of alcohol per 210 liters of breath.

The jury returned a verdict finding Defendant guilty of driving while impaired. The trial court sentenced Defendant as a Level V offender to sixty days of imprisonment to be suspended conditioned upon the successful completion of twelve months of supervised probation, twenty-four hours of community service, alcohol abstinence while on probation, and payment of fines and costs. Defendant gave oral notice of appeal in open court.

Analysis

I. HGN Testing

[1] Defendant argues that the trial court misinterpreted Rule 702(a) of the North Carolina Rules of Evidence, its subsequent amendments, and the recent case precedent in denying Defendant's motion to exclude Trooper Coffey's testimony about the HGN test results. Specifically, Defendant asserts that the trial court failed to require Trooper Coffey to establish the reliability of the HGN test prior to admitting the testimony. We disagree.

A. Standard of Review

Because Defendant raises this issue within the framework of statutory construction, we review the issue *de novo*. *Cornett v. Watauga Surgical Group, P.A.*, 194 N.C. App. 490, 493, 669 S.E.2d 805, 807 (2008) ("Where the plaintiff 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*.") (citations omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (internal quotation marks and citations omitted).

B. Rule 702 Requirements

At the heart of this case is whether the recently amended Rule 702(a)[1] requires the State to lay a proper foundation regarding the reliability of an HGN test before an officer or other qualified expert is allowed to testify about the results of the particular test; we hold it does not.

The North Carolina Supreme Court first addressed the admissibility of HGN evidence in *State v. Helms*, and held that HGN testing "represents specialized knowledge that must be presented to the jury by a qualified expert." 348 N.C. 578, 581, 504 S.E.2d 293, 295 (1998). At the time, the North Carolina Rules of Evidence—Rule 702—dictated that "new scientific methods of proof [were] admissible at trial if the method [was] sufficiently reliable." *Id.* (quoting *State v. Pennington*, 327 N.C. 89, 98, 393 S.E.2d 847, 852 (1990)) (internal quotation marks omitted). In reference to this standard, the Supreme Court stated that "[i]n general, when no specific precedent exists, scientifically accepted reliability justifies

1. Rule 702(a) was amended effective 1 October 2011. Because Defendant was charged with an offense occurring on 21 October 2014, the amended Rule applies to this case.

admission of the testimony of qualified witnesses, and such reliability may be found either by judicial notice or from the testimony of scientists who are expert in the subject matter, or by a combination of the two." *State v. Bullard*, 312 N.C. 129, 148, 322 S.E.2d 370, 381 (1984) (citation omitted). Ultimately, the Court in *Helms* held that the trial court erred in admitting an officer's testimony regarding the results of an HGN test because there was no indication in the record of evidence admitted, or inquiry conducted, regarding the reliability of HGN testing. *Helms*, 348 N.C. at 582, 504 S.E.2d at 295.

Since *Helms*, Rule 702 has undergone several amendments relevant to our analysis today. In 2006, the General Assembly added subsection (a1) to Rule 702. 2006 N.C. Sess. Laws ch. 253, § 6. Rule 702(a1) provides in pertinent part:

> (a1) A witness, qualified under subsection (a) of this section and with proper foundation, may give expert testimony solely on the issue of impairment and not on the issue of specific alcohol concentration level relating to the following:
>
> > (1) The results of a Horizontal Gaze Nystagmus (HGN) Test when the test is administered by a person who has successfully completed training in HGN.

N.C. Gen. Stat. § 8C-1, Rule 702(a1) (2007). At the time the amendment took effect, subsection (a) provided:

> (a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

N.C. Gen. Stat. § 8C-1, Rule 702(a) (2007). Based on this standard for qualifying an expert, our Court interpreted the Rule 702(a1) amendment to have the effect of "obviating the need for the State to prove that the HGN testing method is sufficiently reliable." *State v. Smart*, 195 N.C. App. 752, 756, 674 S.E.2d 684, 686 (2009).

In 2011, however, the General Assembly altered the requirements of Rule 702(a) for the qualification of an expert as follows:

> (a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert

by knowledge, skill, experience, training, or education, may testify thereto in the form of an ~~opinion.~~ *opinion, or otherwise, if all of the following apply:*

(1) The testimony is based upon sufficient facts or data.

(2) The testimony is the product of reliable principles and methods.

(3) The witness has applied the principles and methods reliably to the facts of the case.

2011 N.C. Sess. Laws ch. 283, § 1.3 (emphasis added). In *State v. McGrady*, 368 N.C. 880, 884, 787 S.E.2d 1, 5 (2016), the Supreme Court confirmed that this most recent amendment of Rule 702 adopted the federal standard for expert witness testimony articulated in the *Daubert* line of cases.[2] "These three prongs [under Rule 702(a)] together constitute the reliability inquiry discussed in *Daubert*, *Joiner*, and *Kumho*. The primary focus of the inquiry is on the reliability of the witness's principles and methodology, not on the conclusions that they generate." *McGrady*, 368 N.C. at 890, 787 S.E.2d at 9 (internal quotation marks and citations omitted). "The precise nature of the reliability inquiry will vary from case to case depending on the nature of the proposed testimony. In each

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2. The North Carolina Supreme Court recognized in *McGrady* that *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 125 L.Ed.2d 469 (1993), and its progeny

> [a]rticulated five factors from a nonexhaustive list that can have a bearing on reliability: (1) "whether a theory or technique . . . can be (and has been) tested"; (2) "whether the theory or technique has been subjected to peer review and publication"; (3) the theory or technique's "known or potential rate of error"; (4) "the existence and maintenance of standards controlling the technique's operation"; and (5) whether the theory or technique has achieved "general acceptance" in its field. *Daubert*, 509 U.S. at 593-94, [125 L.E.2d at 482-83]. When a trial court considers testimony based on "technical or other specialized knowledge," N.C. R. Evid. 702(a), it should likewise focus on the reliability of that testimony, *Kumho* [*Tire Co., Ltd. v. Carmichael*], 526 U.S. [137,] 147-49, [143 L.Ed.2d 238, 249-51 (1999)]. The trial court should consider the factors articulated in *Daubert* when "they are reasonable measures of the reliability of expert testimony." *Id.* at 152, [143 L.Ed.2d at 252]. Those factors are part of a "flexible" inquiry, *Daubert*, 509 U.S. at 594, [143 L.Ed.2d at 483-84], so they do not form "a definitive checklist or test," *id.* at 593, [143 L.Ed.2d at 482]. And the trial court is free to consider other factors that may help assess reliability given "the nature of the issue, the expert's particular expertise, and the subject of his testimony." *Kumho*, 526 U.S. at 150, [143 L.Ed.2d 251-52].

McGrady, 368 N.C. at 890-91, 787 S.E.2d at 9-10.

case the trial court has discretion in determining how to address the three prongs of the reliability test." *Id.* (citation omitted).

The issue before us is whether *Smart*'s conclusion that Rule 702(a1) obviated the need to prove HGN testing's reliability is still good law following our State's adoption of the federal reliability test under *Daubert*. This issue has been recognized in previous cases, but has not been squarely resolved. *State v. Godwin*, __ N.C. App. __, __, 786 S.E.2d 34, 38 (2016), *aff'd in part and rev'd in part by*, __ N.C. __, __ S.E.2d __ (2017) ("While some may even question whether Smart survives the amendment to Rule 702(a), that issue is not the one presently before us.").

In its recent decision in *Godwin*, the Supreme Court construed subsections (a) and (a1) together and reasoned that the General Assembly sought to "allow testimony from an individual who has successfully completed training in HGN and meets the criteria set forth in Rule 702(a) . . . ." *Id.* at __, __ S.E.2d at __ (internal quotation marks and citations omitted). Although the trial court in *Godwin* made no finding on the record that the testifying officer qualified as an expert, the Supreme Court held that "the trial court implicitly found that [an officer] was qualified to give expert testimony [on the results of an HGN test,]" *id.* at __, __ S.E.2d at __, because the record contained "sufficient evidence upon which the trial court could have based an explicit finding that the witness was an expert," *id.* at __, __ S.E.2d at __. This evidence was in the form of the officer's testimony about his "knowledge, skill, experience, training, [and] education[,]" and the trial court's establishment that "[the officer's] testimony met the three-pronged test of reliability pursuant to the amended rule . . . ." *Id.* at __, __ S.E.2d at __. The Supreme Court further reasoned that

> [t]he trial court conducted its own voir dire of [the officer], which elicited testimony that the HGN test he administered to defendant on the day in question was given in accordance with the standards set by the [National Highway Traffic Safety Administration], and that those standards were derived from the results of a specific scientific study. Additionally, the trial court's voir dire confirmed that the principles and methods utilized in the HGN test were found to be reliable indicators of impairment, and that [the officer] applied those principles and methods to [the] defendant in this case.

Id. at __, __ S.E.2d at __. The Supreme Court relied on the above inquiry to distinguish *Godwin* from the Court's ruling in *Helms*:

> [A]lthough the officer in *Helms* testified that he had taken a forty hour training course in the use of the HGN test, the State presented no evidence regarding—and the court conducted no inquiry into—the reliability of the HGN test. We also noted in *Helms* that nothing in the record of the case indicated that the trial court took judicial notice of the reliability of the HGN test. . . . *This scenario plainly contrasts with the present case in which the trial court made a finding of reliability of the HGN test and an implicit finding that [the officer] was qualified as an expert.*

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

Here, much like in *Helms*, defense counsel objected to the HGN evidence at trial because the State failed to present evidence of—and the trial court conducted no inquiry into—the reliability of the HGN test. The only testimony relating to the reliability of the HGN test was presented on cross-examination:

> DEFENSE COUNSEL: Are you published in HGN?
>
> OFFICER: What do you mean published?
>
> DEFENSE COUNSEL: Have you published any kind of research or studies or anything like that? Are you familiar with any?
>
> OFFICER: I haven't done any independent search.
>
> DEFENSE COUNSEL: Have you – are you familiar with any publications that have been subjected to peer review?
>
> OFFICER: No.
>
> DEFENSE COUNSEL: You mentioned – what causes HGN?
>
> OFFICER: There's certain types of nystagmus. But the type I'm looking for is horizontal gaze nystagmus. And basically the only thing that will cause that is the impairment of alcohol.
>
> . . .
>
> OFFICER: [Reading from the NHTSA training manual] Although this type of nystagmus is most accurate for determining alcohol impairment, its presence may also be – I'm sorry, its presence may also indicate use of certain other drugs.

DEFENSE COUNSEL: So alcohol is not the only thing that causes horizontal gaze nystagmus; correct?

OFFICER: Correct.

. . .

STATE's COUNSEL: And based on your observations of the Defendant, what is the significance of the six out of six clues?

OFFICER: There was a few studies done, I believe in the 1980's that stated that if you show six out of six clues, that your impairment of alcohol is above a .08. the percentage – actually, if you're showing four out of six, you're an 08. Six out of six clues, your concentration could be higher.

. . .

DEFENSE COUNSEL: What's the potential rate of error for HGN test?

OFFICER: Like I said, I'm not sure what the rate of error would be.

DEFENSE COUNSEL: Have you actually read like the studies you're talking about in the 80's?

OFFICER: When I received the training, they went over the studies, but I don't have the exact percentages. I don't have that written down.

DEFENSE COUNSEL: I know that they went over this. I've actually done it myself, the NITSA [sic] training, and they refer to the studies as well; but have you read them, yourself, or did you just do the NISTA [sic] training?

OFFICER: I have read them during the training.

DEFENSE COUNSEL: What are the names of the studies?

OFFICER: I'm sorry?

DEFENSE COUNSEL: What are the names of those studies?

OFFICER: I'm not sure.

This evidence standing alone is insufficient to establish, in accordance with the statutory criteria, the HGN test as a reliable indicator of impairment.

Furthermore, a close examination of the trial court's decision demonstrates that, while the trial court made determinations as to the whether the testimony was "based upon sufficient facts or data[,]" N.C. Gen. Stat. § 8C-1, Rule 702(a)(1), and whether Trooper Coffey "applied the principles and methods reliably to the facts of the case[,]" N.C. Gen. Stat. § 8C-1, Rule 702(a)(3), it did not take judicial notice of—or hear evidence on—the reliability of the HGN test. Rather, the record reflects that trial court did not consider whether Trooper Coffey's testimony met the second prong of the reliability test—*i.e.* whether the "testimony is the product of reliable principles and methods[,]" N.C. Gen. Stat. § 8C-1, Rule 702(a)(2).

Although defense counsel emphasized the lack of testimony regarding the reliability of the HGN test, the trial court initially allowed Defendant's motion to exclude the testimony for a different reason, noting that "I don't think there's been any testimony at this time regarding [Trooper Coffey's] administration of the test or how these methods were applied[.]" Following additional testimony discussing Trooper Coffey's application of the principles and methods to the administration of the HGN test conducted on Defendant and arguments of counsel, the trial court found that

> [Trooper Coffey] is qualified as an expert by knowledge, skill, experience, training, or education and may testify thereto in the form of an opinion and being qualified under 702(a) of this chapter and the proper foundation having been laid as indicated by the Court.

The additional testimony did not, however, address the reliability of the HGN test, and a strict reading of Rule 702, without more, would suggest that the trial court erred by allowing Trooper Coffey's testimony without taking judicial notice of—or conducting an inquiry into—the reliability of the HGN test. However, we reach a different decision on this issue in light of *Godwin*.

The Supreme Court ultimately concluded in *Godwin* that "with the 2006 amendment to Rule 702, our General Assembly clearly signaled that the results of the HGN test are sufficiently reliable to be admitted into the courts of this State." *Godwin*, __ N.C. at __, __ S.E.2d at __. This holding is similar to this Court's holding in *Smart* that the 2006 amendment to Rule 702 "obviat[ed] the need for the State to prove that the HGN testing method is sufficiently reliable." *Smart*, 195 N.C. App. at 756, 674 S.E.2d at 686. Accordingly, it appears that the ruling of *Smart* has survived the General Assembly's 2011 amendment designating our State

a *Daubert* State. Because the *Godwin* decision applied the most recent amendments to Rule 702 and is consistent with previous decisions eliminating the need to prove HGN testimony "[a]s the product of reliable principles and methods[,]" N.C. Gen. Stat. § 8C-1, Rule 702(a)(2), we are compelled to hold that the trial court did not err by admitting Trooper Coffey's testimony without first making such a determination.

II. Speculation in Closing Argument

[2] Defendant next argues that the trial court erred by not intervening *ex mero motu* when the prosecutor speculated in the State's closing argument about what Defendant's breathalyzer test result would have been an hour before she was actually tested. In light of ample evidence and argument by the State that Defendant was guilty based upon a theory of appreciable impairment, independent of her blood alcohol concentration, we disagree.

"The standard of review for alleged errors in closing arguments 'depends on whether there was a timely objection made or overruled, or whether no objection was made and defendant contends that the trial court should have intervened *ex mero motu*.' " *State v. Chappelle*, 193 N.C. App. 313, 325, 667 S.E.2d 327, 334 (2008) (quoting *State v. Walters*, 357 N.C. 68, 101, 588 S.E.2d 344, 364 (2003)). "Where no objection was made, this Court reviews the remarks for gross impropriety." *Id.* at 325, 667 S.E.2d at 334 (citations omitted).

In determining whether there was a gross impropriety, the remarks must be such that "they rendered the trial and conviction fundamentally unfair." *State v. Allen*, 360 N.C. 297, 306-07, 626 S.E.2d 271, 280 (2006). "[T]his Court considers the context in which the remarks were made, as well as their brevity relative to the closing argument as a whole[.]" *State v. Taylor*, 362 N.C. 514, 536, 669 S.E.2d 239, 259 (2008) (internal quotation marks and citations omitted).

In closing argument, the prosecutor stated: "The Defendant blew a .06 one hour after driving. Blew a .06. What was she an hour before that? If you had that giant instrument in the trunk of his car, what would it have been[] an hour before that?" Defendant contends this statement amounted to grossly improper speculation in violation of N.C. Gen. Stat. § 15A-1230(a). Our review of the record reveals that, when viewed in context, the prosecutor's statement does not constitute a "gross impropriety." The prosecutor urged the jury to disregard Defendant's blood alcohol concentration, and instead focus on Defendant's failure to successfully complete Trooper Coffey's standardized field sobriety tests. The prosecutor emphasized to jurors that they could find Defendant

guilty without regard to her blood alcohol concentration. Accordingly, we hold that the prosecutor's statements were not so grossly improper that the trial court erred by failing to intervene *ex mero motu*.

Conclusion

Under the newly amended Rule 702(a), a trial court need not inquire about the reliability of HGN evidence before admitting an officer or other qualified expert to testify about the results of a particular HGN test. Additionally, the trial court did not err by failing to intervene *ex mero motu* in the prosecutor's closing argument.

NO ERROR.

Judges BRYANT and STROUD concur.

KRISTIE LEA WILLIAMS, Plaintiff
v.
JAMES MARION CHANEY, Defendant

No. COA16-834

Filed 18 July 2017

Child Custody and Support—child custody modification—substantial change in circumstances—additional counseling

The trial court erred in a child custody case by concluding there was a substantial change in circumstances justifying a modification of a custody order that limited the mother's visitation rights and required additional family counseling. Numerous prior counseling efforts over most of the years of the sixteen-year-old child's life failed by causing severe stress to the child. Additional reunification counseling would re-traumatize him.

Appeal by defendant from order entered 31 May 2016 by Judge Larry J. Wilson in District Court, Lincoln County. Heard in the Court of Appeals 6 February 2017.

No brief filed on behalf of plaintiff-appellee.

James M. Chaney, Jr., pro se.

STROUD, Judge.

Blake[1] is now almost 16 years old, and this custody battle has lasted most of his life. The primary issue on appeal is whether the trial court should have ordered continuation of reunification counseling efforts, where the trial court found that prior reunification efforts have caused him "intense psychological stress" and that more reunification counseling would "re-traumatize" the child. We remand for entry of an order denying any modification to the prior custody order since no other result is supported by the trial court's unchallenged findings of fact.

Defendant James Marion Chaney ("Father") appeals from the trial court's order modifying an earlier permanent child custody order entered 10 October 2013. On appeal, Father argues that the trial court erred by concluding there was a substantial change in circumstances justifying a modification of the custody order because the findings of fact do not support this conclusion. Because the trial court's ultimate modifications to the custody order are not supported by the court's findings, we vacate and remand to the trial court for entry of a new order.

Facts

This appeal arises in a long and highly contentious custody battle with four prior appeals.[2] We will briefly summarize the background of this case and then primarily focus on the facts necessary to address the sole issue raised in the present appeal. Father and plaintiff Kristie Lea Williams ("Mother") were formerly married and are now divorced. They had one child during the course of the marriage, Blake, born in August 2001. Mother was given primary physical legal custody of Blake on 11 June 2002 in a Consent Order for Permanent Custody and Visitation, with Father having secondary physical custody.

The trial court entered an Order for Temporary Modification of Child Custody in January 2006 after Father filed a motion to modify, in which the court noted examples of Mother's inappropriate behavior in Blake's presence. The trial court concluded that a substantial change

1. We use a pseudonym to protect the identity of the minor child.

2. *Williams v. Chaney*, 212 N.C. App. 694, 718 S.E.2d 737, 2011 WL 2448950, 2011 N.C. App. LEXIS 1246 (2011) (unpublished); *Williams v. Chaney*, 213 N.C. App. 425, 714 S.E.2d 275, 2011 WL 2848846, 2011 N.C. App. LEXIS 1543 (2011) (unpublished); *Williams v. Chaney*, __ N.C. App. __, 782 S.E.2d 122, 2016 WL 409901, 2016 N.C. App. LEXIS 124 (2016) (unpublished); *Williams v. Chaney*, __ N.C. App. __, 792 S.E.2d 207 (2016).

of circumstances had occurred justifying modification of the custody order, granted Father temporary physical and legal custody of Blake, and appointed a parenting coordinator. On 3 December 2007, the trial court entered an order for permanent child custody which noted that the parties consented to Father having primary physical custody of Blake. Mother was granted secondary custody, and the order set forth a specific custodial schedule.

In 2009 and 2010, both parties filed several motions and the trial court entered several orders, culminating in another order modifying the custodial schedule entered on 18 August 2010; this order was affirmed in a prior appeal. *See Williams*, 213 N.C. App. 425, 714 S.E.2d 275, 2011 WL 2848846, 2011 N.C. App. LEXIS 1543.

The series of events leading up to this appeal actually started all the way back in January 2011, when the trial court entered the order which suspended Mother's visitation entirely after finding that she had been evasive about her address. Mother's visitation was suspended until she appeared before the trial court and presented satisfactory evidence of her living situation and her compliance with prior orders to obtain counseling. Specifically, Mother could seek to have her visitation rights reinstated if she provided satisfactory information to the trial court regarding her residence address, living conditions, persons who lived with her, and documentation that she was receiving psychological counseling as ordered in 2010. Mother did not see Blake at all from November 2010 until 2013 other than at one counseling session.

On 30 January 2013, after Mother requested a "Status Hearing," the trial court entered a permanent child custody order concluding that there had been a substantial change in circumstances since prior custody orders entered in 2010. This order was intended to assist in restoring Mother's relationship with Blake, since she had been absent from his life since 2010. The trial court found that

> visitation and modification of custody is in the best interests of the minor child in order for the child to establish and maintain a relationship with his mother however, the circumstances require a more limited visitation schedule in order to provide stability and predictability for the minor child in his primary home with his father.

The court granted Mother limited but gradually increasing visitation with Blake under a specific schedule that was laid out in the order and required counseling for Mother and Blake.

Mother filed a "Motion for Contempt, Motion to Review and Enforce Order, and Motion for Attorney's Fees" on 17 April 2013. In her motion, Mother argued that Father had "failed to adhere to the terms of the Court's Order" on numerous occasions and she asked for the trial court to hold Father in contempt. Mother also asked the trial court to review the visitation provisions in the 30 January 2013 order and "if necessary pronounce clarification, guidance and direction to the counselor as to the appropriate role of the counselor in the reunification process." On 23 April 2013, Father filed his own motion to modify custody, asserting that Mother had acted inappropriately in front of the minor child on multiple occasions. He asked that the trial court modify visitation in accordance with the recommendations of the child's counselor and that the court allow Blake to decide if he wanted to visit with Mother.

A series of at least five temporary and supplemental orders followed in response to the parties' competing motions for modification filed in April 2013. Aside from addressing various motions for contempt and other issues not directly relevant to this appeal, these orders generally addressed issues regarding the ongoing reunification counseling efforts and parenting coordinators. But on 10 October 2013, the trial court entered the order which this Court's prior opinion determined was the most recent permanent order subject to modification. Some of the findings of fact from this long and detailed order are instructive regarding the reunification efforts:

> 40. Although the court is disappointed Mr. Feasel [the child's counselor] refuses to work with the mother toward reunification, the court respects his professional opinion regarding the counseling provided for the child individually and the parties in the joint counseling sessions. The court understands his recommendations were made considering the child's mental health.
>
> 41. The mother was ordered to obtain counseling in paragraph 2R of the August 17, 2010 Order of the court. She was ordered again to comply with the order as a means to reinstate her visitation in the Order Suspending Visitation entered on December 17, 2010.
>
> 42. There have been two assigned parent coordinators throughout the history of this case. Judge Foster made findings about the most recent parent coordinators concerns in her order dated August 17, 2010. Findings #40 and #41 refer to the mother's need for "counseling or therapy.

This is necessary in order for the mother to gain a better perspective on handling her emotions."

43. Following the entry of Judge Foster's court order in January 2013, where the court relied on the opinion of Counselor Connie Zmijewski, the mother sought some individual counseling from the same therapist. Ms. Zmijewski was also qualified as an expert in family counseling. She testified she has counseled the mother about her visits with the child and regarding parenting issues. Ms. Zmijewski encouraged the mother to meet with reunification counselor. She counseled the mother approximately six times. This counseling was prior to [Blake's] reluctance to attend overnight visitation and prior to the mother's efforts to involve law enforcement to obtain physical custody of the child.

44. The parties have been regularly engaged in litigation since this case was transferred from Mecklenburg County. The current Lincoln County file consists of ten separate files and is approximately 14" thick. This court has observed the behavior of the Plaintiff/Mother since 2009 over the course of at least four contested hearings, of which three of those hearings lasted over three days.

45. The court is concerned that the mother has some type of personality disorder preventing her from participating in meaningful therapy to address her behavior and act in the best interest of the child. The court is concerned the mother does not have the capacity to accept any responsibility for the present quality of the relationship between herself and her son, as well as the capacity to acknowledge or respect her son's opinions and beliefs.

46. There has been a substantial change in circumstances from the entry of the prior order in that the child "exhibits emotions that mimic Post Traumatic Stress Disorder". (Defendant's Exhibit #2) The child has experienced panic attacks, nausea, fear and dread during the days prior to his scheduled visitation.

The court found that Mother had failed to comply with the terms of the court's prior orders and ordered that Mother complete a psychological evaluation. The trial court also suspended Mother's visitation privileges with Blake except that she was allowed to talk to him by telephone

twice a week on Monday and Thursday evenings and to attend one extracurricular activity a week of her choosing.

On 19 November 2013, after receiving the report from Mother's psychological evaluation, the trial court entered a supplemental order which noted that Mother was not diagnosed with any mental or personality disorders. The November 2013 order concluded that it would be in Blake's best interest for Mother and Father to participate in a "Child and Family Treatment Team" meeting with two therapists who have a relationship with the family. The trial court ordered that all parties participate in therapy for a minimum of four months and then the court would "review the progress of the therapeutic treatment upon notice of either party." The trial court entered an additional order in Febraury 2014 amending the 19 November 2013 supplemental order to substitute a counselor for the Child and Family Treatment Team meeting. On 10 September 2014, the trial court entered another order following a hearing in May 2014 regarding the appointment of a replacement counselor, allowing Mother to select a substitute counselor as her individual counselor.

In February 2015, Mother filed a notice of hearing to "review" the trial court's 19 November 2013 order as well as an order filed 10 September 2014 that was initially entered on 20 May 2014 "regarding restoration of the mother/child relationship[.]" After a hearing in March 2015, the trial court entered an order on 18 May 2015 suspending Mother's visitation with Blake except for the two telephone calls a week and one extracurricular activity a week. Mother appealed, and this Court vacated the May 2015 order because it did not include any findings of fact to support a permanent modification of custody or any conclusion that substantial changes in circumstances had occurred and remanded the matter to the trial court for entry of a new order. *See Williams*, __ N.C. App. __, 782 S.E.2d 122, 2016 WL 409901, 2016 N.C. App. LEXIS 124.

Following this Court's opinion, without hearing any additional evidence, the trial court entered a new order on 31 May 2016. The court made the following relevant findings:

> 10. Following the entry of the Permanent Order of January 30, 2013, the child began visiting his mother in January and February, 2013. He expressed his concern with some behaviors of his mother during the first few visits which were concerning to the Court. In March, 2013, as the visits were to progress to overnight, the minor child started complaining about stomach pain or nausea several days before the visits and he would not visit, or the

child just flat refused to go with [Mother], expressing fear. During this time Justin Feasel, the child's therapist, was meeting with the child to address these issues.

11. Mr. Feasel testified that mother contacted him via email on two occasions asking what he recommended for her to do to help improve her relationship with her son. Mr. Feasel recommended to the mother that she needed to go slow with the reunification process.

12. Rather than following Mr. Feasel's recommendations the mother continued to force the child to visit. The mother's actions continued to impede her relationship with the minor child.

13. Mr. Feasel testified and the Court finds persuasive that since March, 2013 the minor child has experienced fear, anxiety, shaking, an inability to sleep, nausea and anger regarding reunification with his mother.

14. On March 15, 2013, Mr. Feasel wrote a letter recommending that the child's visitation with his mother be limited to day visits.

15. Mr. Feasel had two joint sessions with [Blake] and his mother to address the child's concerns about visitation with his mother. During these sessions the minor child felt that his mother questioned and interrogated him. The child was expecting an apology from his mother; however, [Mother] provided explanations and these explanations were not how the child had perceived the events.

16. During these sessions with the child the mother showed an inability or an unwillingness to accept responsibility, and this inability or unwillingness is an impediment to her child forgiving her.

17. On April 17, 2013, [Mother] filed a motion for contempt alleging the father interfered with the visitation and stating the father should ensure the child exercise the court ordered visitation. The father filed his motion to modify custody on April 23, 2013, requesting relief from the visitation Order based on the counselor's recommendations included in the March 15, 2013 letter.

18. It was during this time the parties exchanged emails about visitation. The father took the child for the exchange; however the child refused to get into his mother's car.

19. On June 23, 2013 the Mother contacted the Lincoln County Sheriff Department to request assistance to enforce the visitation included in the Order. This incident upset the child to the point he was left shaking, crying, and afraid he would be taken from his father.

20. On July 28, 2013, the mother contacted [the] Mecklenburg County Sheriff Department for assistance at the exchange. This incident traumatized the minor child.

21. This Court has previously found that the mother's demeanor and her statements have left her unable or unwilling to consider the child's feelings and emotions and she is preoccupied with blaming the father, the counselor, and at times the child.

22. The mother refuses to admit that any of her behaviors have contributed to the status of her relationship with the child.

23. Cyd McGee, family counselor, is an Intensive Family Preservation specialist. She was authorized by the Court to provide therapeutic services to [Mother] and minor child in an attempt to reunify and begin visitation. Ms. McGee met with [Mother] and the minor child for three sessions in the Fall of 2014.

24. Ms. McGee testified and opined and the Court finds persuasive that [Blake] is a child who has been traumatized and did not want to participate in the family sessions.

25. Ms. McGee testified and opined and the Court finds persuasive that [Blake] felt he had been mistreated by his mother. Specifically, [Blake] recalled the following events that led to his beliefs of being mistreated:

a. His mother had thrown a water bottle at him;

b. During visits with his mother, [Mother] would talk in a negative light about his father . . . in front of the minor child; and

c. During visits with his mother, [Mother's] daughter would make negative comments about [Blake's] father.

26. Ms. McGee testified and opined and the Court finds persuasive that the mother during these counseling sessions was unable to emotionally acknowledge her son's feelings and at times would become defensive. The mother was disconnected from the child's feelings, and she did not respond emotionally, physically, or on any level when the child was expressing his feelings.

27. Ms. McGee testified that throughout the counseling sessions between the mother and the child she observed the child trembling, shaking, developing headaches, and crying. Ms. McGee further testified that it was not in the child's best interest to continue with this reunification process as it was re-traumatizing the child.

28. Ms. McGee testified and opined and the Court finds persuasive that [Blake] is a typical 13 year old teenager who is well-spoken and has stated that he does not want to do this, that he feels forced to continue with the reunification process and that the mother is unable to provide for [Blake's] emotional needs.

29. Ms. McGee concluded that any further counseling sessions would re-traumatize the child.

30. Charlotte Roberts testified as [Mother's] counselor that the mother has been consistent with her therapy, the purpose of which was to improve communication with her son. However, [Mother] did not meet with Ms. Roberts during the months of September and October, 2014, which was during the time the family counseling sessions were taking place.

31. Ms. Roberts testified that at no time has the mother divulged or shared information regarding how the family sessions were going. This is concerning to the Court in light of the testimony of Ms. McGee that the reunification process was failing.

32. According to Mr. Feasel, the reunification process with Ms. McGee in the Fall of 2014 caused [Blake] further intense psychological stress.

> 33. Mr. Feasel testified that [Blake's] reactions and fears were sincerely held, and not easily overcome.
>
> 34. Mr. Feasel testified that he would refuse to be part of any further reunification counseling sessions between [Mother] and minor child because of the harm he feared it would cause the minor child. The effects of the joint sessions as described by Ms. McGee support Mr. Feasel's conclusions. Mr. Feasel has been counseling [Blake] for several years, and the Court finds his opinion as to reunification to be well-grounded.
>
> 35. Since the January 30, 2013, Order the parties have made two failed attempts of reunification. The child's negative emotional, physical and psychological reactions to his mother since the entry of that Order have been fully vetted and explored by his counselor and are well-grounded. He is a happy and healthy 13-year-old child who is thriving in his life, but for the mother-child relationship.
>
> 36. [Mother] is responsible for the fractured relationship between herself and the minor child due to her actions with and around the minor child.
>
> 37. There is no evidence before the court that limited telephone contact with his mother or her attendance at his activities have been harmful to the minor child; and therefore the Court finds it is in the child's best interest to have limited telephone contact and to permit the mother's attendance at extracurricular activities as set forth below.

The trial court concluded:

> 2. There has been a substantial change of circumstances affecting the welfare of the minor child since the entry of the January 30, 2013 Order which have affected the best interest and general welfare of the minor child, and it is now in the best interests of the minor child to modify visitation.

The court then ordered the same limited visitation as had been in place since 10 October 2013 -- two telephone calls and one extracurricular activity per week -- but added a requirement that Father, within 30 days of the entry of the order, must select a licensed psychologist or counselor to counsel with Blake, Mother, and as appropriate, both of them, "to explore the issue of resuming visitation between Mother and child,

even on a limited basis." Father timely appealed the 31 May 2016 order to this Court.

Discussion

Father's sole argument on appeal is that the trial court erred by concluding that a change in circumstances had occurred justifying a modification of custody and then modifying the order in a way that was not supported by the trial court's findings of fact. Specifically, Father argues:

> [T]he trial court erred by ordering [Father] to select a licensed counselor to counsel with the minor child, the mother, and as deemed appropriate, with the mother and the child, to explore the issue of resuming visitation between mother and child because the trial court failed to base its conclusions of law upon sufficient findings of fact.

Under N.C. Gen. Stat. § 50-13.7(a) (2015), an order for child custody "may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested[.]" The North Carolina Supreme Court has explained in detail how appellate courts review modification of custody orders:

> 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 a substantial change of circumstances affecting the welfare of the child warrants 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 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 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.
>
> . . . .
>
> 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.

Shipman v. Shipman, 357 N.C. 471, 473-75, 586 S.E.2d 250, 253-54 (2003) (citations and quotation marks omitted).

Father does not dispute any of the trial court's findings of fact in this case, but rather argues that the findings fail to support the conclusions of law. "Because plaintiff has not challenged any of the trial court's findings of fact, they are binding on appeal, and we must consider only whether

the findings of fact supported the conclusions of law." *Pass v. Beck*, 210 N.C. App. 192, 197, 708 S.E.2d 87, 91 (2011) (citations omitted).

We will first note that one of the challenging parts of this case is simply determining which order is the "prior order" which is being modified, since the court is required to find a substantial change of circumstances from that particular date and order until the time of the new order. Since so many motions were filed and so many orders and "supplemental orders" were entered, it is difficult to trace back to the starting point. Both parties filed motions for modification of custody in April 2013. The 10 October 2013 order contained extensive findings of fact, including the required findings of fact and conclusions of law to support modification of the custodial schedule. We also recognize that this Court's prior opinion held that the 10 October 2013 order was the last permanent order subject to modification:

> On remand, the trial court should enter findings based on the preponderance of the evidence and conclusions of law supported by its findings. If the trial court modifies the custody order of 10 October 2013 or its associated supplemental order of 19 November 2013, its findings must support an ultimate finding that there has been a substantial change of circumstances that affects the welfare of the child.

Williams, __ N.C. App. __, 782 S.E.2d 122, 2016 WL 409901 at *6, 2016 N.C. App. LEXIS 124 at *15.

Our record does not include any motion for modification of custody filed after the 10 October 2013 order, but it appears that this chain of orders relates back to the April 2013 motions.[3] In February 2015, Mother did file a request for "review" of the prior orders regarding addressing restoration of her relationship with the child, and this could generously be construed as a motion for modification of custody. In any event, both this panel and the trial court are bound by this Court's prior opinion, so we will address the modification order on appeal based upon the October and November 2013 orders. *See*, *e.g.*, *Lueallen v. Lueallen*, __ N.C. App. __, __, 790 S.E.2d 690, 696 (2016) (concluding order that was arguably temporary could nevertheless be addressed where "another panel of this Court ha[d] previously ordered the relevant provisions of the . . . order

3. We also note that neither party was represented by counsel in either this appeal or the last. Only Father filed a brief in this appeal. We are not entirely confident that either the current record on appeal or the record for the last appeal is complete, but as best we can tell based upon the arguments of Father, it is sufficient to address the issue raised in this appeal.

stayed" and holding that since this Court is "bound by that ruling, we will address Mother's appeal. In addition if we were to dismiss Mother's appeal, it would only add to the delay in establishing a final custodial schedule, much to [the minor child's] detriment." (Citation omitted)).

We agree with Father that the trial court's conclusions of law -- and in particular the modification which requires even more counseling and reunification efforts -- are not supported by the court's findings of fact or conclusions of law. We are perplexed by how the trial court ultimately reached the end result of requiring *additional* counseling after finding that prior efforts had failed and additional reunification counseling would "re-traumatize" him. The court's findings, which are not challenged on appeal, uniformly show that Mother has not made improvements in years of prior counseling attempts and that Mother and Blake's relationship has deteriorated even further due to Mother's attitude, behavior, and general unwillingness to accept responsibility for the state of her relationship with her son. Most relevant to the requirement of additional counseling, the trial court found that "any further counseling sessions would re-traumatize the child"; that "the reunification process with Ms. McGee in the Fall of 2014 caused [Blake] further intense psychological stress"; that "the minor child has experienced fear, anxiety, shaking, an inability to sleep, nausea and anger regarding reunification with his mother"; and that "Ms. McGee testified and opined and the Court finds persuasive that [Blake] is a child who has been traumatized and did not want to participate in the family sessions." Despite these findings that the reunification attempts had traumatized the child and that further counseling would re-traumatize him, the trial court ordered *more* counseling aimed at reunification. The only changes in circumstances since the October 2013 and November 2013 orders which were found by the trial court were negative changes -- failed efforts at counseling, the child's increased anxiety, and mother's continued failure to improve her behavior. The trial court then concluded that circumstances had changed substantially to support modifying the custody order and that modification would be in the "best interests of the minor child[,]" but, inexplicably, the only substantive modification from the prior order was to add in a requirement that Father find a new counselor for the child and Mother so that the issue of revisiting Mother's visitation privileges with the child could be evaluated further. Specifically, the trial court ordered, in relevant part, that:

> 3. [Father] shall, within 30 days of the entry of this Order, select a licensed Counselor/Psychologist to counsel with the minor child, with the Mother, and, as deemed

> appropriate, with Mother and minor child, to explore the issue of resuming visitation between Mother and child, even on a limited basis.
>
> 4. Any joint sessions, or other direct contact between Mother and minor child, shall be as directed by the licensed Counselor/Psychologist, as he/she determines such contact to be not detrimental to the mental and emotional well-being of the minor child.
>
> 5. Any failure of the Plaintiff/Mother to cooperate with, or promptly pay for the services of, the licensed Counselor/Psychologist, will be taken into consideration by the Court in future proceedings, and could subject her to the contempt powers of the Court.
>
> 6. [Father] shall take the steps reasonably necessary to choose the counselor, provide the contact information to [Mother's] Attorney, and to ensure the minor child's attendance and participation in scheduled sessions. Any failure of the Defendant/Father to comply with these directives will be taken into consideration by the Court in future proceedings, and could subject him to the contempt powers of the Court.

These requirements seem to conflict with everything else in the court's order up to this point.

The trial court may have misinterpreted this Court's prior opinion as directing the court to conclude that a substantial change had occurred supporting modification *in Mother's favor*, but that is not what our prior opinion stated. Our previous opinion simply held:

> In sum, the trial court's custody order must be vacated because (1) the trial court failed to make conclusions of law; (2) the order modified custody without first finding that there had been a substantial change of circumstances, and (3) the order denied [Mother] any visitation with the child without the findings required to support such an order. . . .
>
> . . . . On remand, the trial court should enter findings based on the preponderance of the evidence and conclusions of law supported by its findings. If the trial court modifies the custody order of 10 October 2013 or its associated supplemental order of 19 November 2013,

> its findings must support an ultimate finding that there has been a substantial change of circumstances that affects the welfare of the child. If the trial court denies [Mother] reasonable visitation its evidentiary findings should support an ultimate finding that [Mother] is either unfit to visit with the child or that visitation with [Mother] is not in the child's best interest.

Williams, __ N.C. App. __, 782 S.E.2d 122, 2016 WL 409901, at *6, 2016 N.C. App. LEXIS 124, at *14-15. In other words, the trial court was free to make additional findings of fact and depending upon those facts, to do any of the following on remand: (1) conclude that there had been no substantial change of circumstances which would justify modifying Mother's limited contact as set forth in the October 2013 order in *any* way, either by increasing it or decreasing it; (2) conclude that there had been a substantial change of circumstances which justifies modification of custody, but enter an order decreasing Mother's contact with the child, if this would be in the child's best interest; or (3) modify custody in some other way, depending upon the new findings of fact and upon conclusions of law to support modification and demonstrating that the particular modification ordered would be in the child's best interest.

Instead, on remand, the trial court made the findings of fact as discussed above and the following conclusion of law:

> 2. There has been a substantial change of circumstances affecting the welfare of the minor child since the entry of the January 30, 2013 Order which have affected the best interest and general welfare of the minor child, and it is now in the best interests of the minor child to modify visitation.

Based upon the trial court's findings, we are unable to discern any changes of circumstances since the October and November 2013 orders which would justify increasing Mother's contact with Blake in any way. The findings of fact also do not show how another attempt at counseling and reunification could possibly be in the child's best interest. Based upon the trial court's finding that there was no showing that the telephone contact and once-weekly attendance of an extracurricular event had been harmful to the child, it would seem logical that the trial court would have simply concluded that there was no reason to modify the prior order.

Since the findings of fact are not challenged on appeal and since only one conclusion of law can logically follow from these findings, we

vacate only the trial court's conclusion of law and decretal provisions noted above of the 31 May 2016 order. The findings of fact are affirmed. On remand, the trial court shall enter an order with the same findings of fact as in the order on appeal and a conclusion of law that there has been no showing of a substantial change in circumstances which would justify modification of Mother's limited visitation as set forth in the 10 October 2013 order, nor would any modification be in Blake's best interests. *See*, *e.g.*, *Pulliam v. Smith*, 348 N.C. 616, 619, 501 S.E.2d 898, 899 (1998) ("The welfare of the child has always been the polar star which guides the courts in awarding custody."). There is no factual or legal basis to order more reunification counseling.

Conclusion

Accordingly, we hold that the trial court's second conclusion of law is not supported by its findings and that the requirement of additional counseling in particular is not supported by either the findings of fact or the conclusion of law. We therefore vacate *only* the second conclusion of law and decretal provisions 3, 4, 5, and 6 of the order on appeal. The findings of fact in the 31 May 2016 order were not challenged on appeal and we affirm these findings. We remand this matter for entry of an order which incorporates these same findings of fact and denies modification of the 10 October 2013 order, as described above.

The 2013 order was entered a long time ago, and much has happened and many orders have been entered since 2013. To assist the parties in understanding which order provisions the parties need to follow after this remand, the trial court's new order on remand should also simply note that Mother already completed the psychological evaluation as ordered in the 10 October 2013 order; and that the supplemental provisions of the 19 November 2013 order regarding the Child and Family Treatment Team and counseling have also been completed. Since there has been no substantial change of circumstances justifying modification of the October 2013 order, Mother's visitation upon remand shall be exactly the same as set forth in the 10 October 2013 order in decretal provision 1, subsections (a) and (b); these are the very same provisions as set forth in decretal sections 1 and 2 of the order on appeal, and we have not vacated these two decretal provisions since they are unchanged from the 10 October 2013 order.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Chief Judge McGEE and Judge TYSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 18 JULY 2017)

BAKER v. N.C. PSYCHOLOGY BD. No. 16-1175	Durham (16CVS3036)	Reversed in Part and Remanded
BENEDITH v. WAKE FOREST BAPTIST MED. CTR. No. 17-284	Forsyth (16CVS6864)	Affirmed
COLUMBUS CTY. DEP'T OF SOC. SERVS. v. NORTON No. 16-735	Columbus (10CVD152)	Dismissed
HOGUE v. BROWN & PATTEN, PA No. 17-103	Haywood (15CVS905)	Affirmed
HUTCHISON v. N.C. DEP'T OF JUSTICE No. 16-1082	Office of Admin. Hearings (16OSP6725)	Affirmed
IN RE A.C.W. No. 16-1289	Randolph (16JA45)	Reversed and Remanded
IN RE A.H. No. 17-118	Iredell (15JT184-185)	Affirmed
IN RE A.P.R. No. 17-111	Guilford (15JT27)	Affirmed
IN RE A.U. No. 16-1284	Franklin (15JT1)	Affirmed
IN RE H.S. No. 16-1241	Bladen (15JA06)	Affirmed
IN RE I.N.S. No. 17-31	Montgomery (14JT11) (14JT12) (14JT42)	Affirmed
IN RE J.D.H. No. 16-1286	Gaston (14JT105-107)	Affirmed
IN RE J.Y. No. 17-42	Orange (13JT5) (15JT3)	Affirmed
IN RE MEETZE No. 16-796	Wilson (16E65)	Affirmed

IN RE S.W. No. 16-1235	Forsyth (16J45)	Affirmed
IN RE T.Z.J. No. 17-73	Wake (16JB490)	Vacated
MASSENGILL v. BAILEY No. 16-1084	Johnston (13CVS923)	No Error
NEW v. NEW No. 16-1167	Cabarrus (15CVD3132)	Reversed and Remanded
STATE v. ALSTON No. 16-1185	Orange (12CRS52087) (12CRS53311) (13CRS50096) (15CRS267)	Affirmed and Remanded for Correction of Clerical Error
STATE v. BAILEY No. 16-1192	Beaufort (14CRS50275) (14CRS50278)	No Error
STATE v. BAILEY No. 16-962	Orange (15CRS50387)	No Error
STATE v. BLEVINS No. 16-589	Cleveland (13CRS55701)	Affirmed
STATE v. BOLDER No. 16-814	Cabarrus (14CRS52082)	No Error
STATE v. CARTER No. 16-946	Clay (15CRS21) (15CRS7)	Vacated in part, reversed in part and remanded for resentencing.
STATE v. ELLIS No. 16-1220	Forsyth (14CRS59279) (14CRS59281-82) (14CRS59284)	No Error
STATE v. GRICE No. 16-1274	Pender (15CRS1109) (15CRS1379) (16CRS155)	Affirmed
STATE v. HOOKER No. 16-1308	Alamance (13CRS57353-55) (13CRS57713)	Affirmed
STATE v. MOODY No. 17-11	Wake (15CRS219845)	Dismissed

STATE v. NORMAN No. 16-1232	Mecklenburg (14CRS234650)	No Error
STATE v. SANCHEZ No. 17-98	Brunswick (12CRS51740)	Affirmed and Remanded for Correction of Clerical Error
THOMAS & CRADDOCK SALES, INC. v. GIFT BAG LADY, INC. No. 16-936	Mecklenburg (15CVS12638)	Affirmed
ZOLP v. CORDELL No. 16-895	Buncombe (16CVS548)	Dismissed

CHEATHAM v. TOWN OF TAYLORTOWN

[254 N.C. App. 613 (2017)]

ADAM T. CHEATHAM, SR., PLAINTIFF
v.
TOWN OF TAYLORTOWN, NORTH CAROLINA,
A MUNICIPAL CORPORATION, DEFENDANT

No. COA16-1057

Filed 1 August 2017

1. Cities and Towns—condemnation—subject matter jurisdiction—ordinance—minimum housing standards—failure to exhaust administrative remedies

The trial court did not err in a condemnation case, arising from the investigation of a complaint of sewage standing around the well on plaintiff's property, by allowing defendant town's motion to dismiss based on lack of subject matter jurisdiction for the town's enforcement actions made pursuant to its Minimum Housing Ordinance enacted under N.C.G.S. §§ 160A-441 through 160A-450. Plaintiff property owner failed to exhaust administrative remedies before seeking judicial review.

2. Cities and Towns—condemnation—subject matter jurisdiction—claims prior to enactment of ordinance—minimum housing standards

The trial court erred in a condemnation case, arising from the investigation of a complaint of sewage standing around the well on plaintiff's property, by allowing defendant town's motion to dismiss based on lack of subject matter jurisdiction for plaintiff's claims arising prior to or outside the enforcement of the town's Minimum Housing Ordinance. The trial court improperly determined that all of plaintiff's claims arose from actions taken pursuant to the ordinance.

Appeal by Adam T. Cheatham, Sr. from an order allowing defendant's motion to dismiss entered 18 April 2016 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals 3 May 2017.

Adam T. Cheatham, Sr., pro se.

The Law Offices of William C. Morgan, Jr., PLLC, by William Morgan, for defendant-appellee.

MURPHY, Judge.

Adam T. Cheatham, Sr. ("Cheatham") appeals from the trial court's order allowing Town of Taylortown's ("Taylortown") motion to dismiss for lack of subject matter jurisdiction. On appeal, he contends that the trial court erred by granting the motion to dismiss for lack of subject matter jurisdiction because Taylortown's attempts to enforce its minimum housing standards: (1) violated his property rights; (2) obstructed justice; and (3) deprived him of procedural due process. We disagree that the trial court erred to the extent Cheatham's claims arise from enforcement actions made pursuant to Taylortown's Minimum Housing Ordinance ("the Ordinance") because Cheatham failed to exhaust his administrative remedies as to these claims before filing his complaint. However, we agree with Cheatham that the dismissal was not proper as to his claims that arose prior to the adoption of the Ordinance. The trial court incorrectly determined all of Cheatham's claims arose from actions taken pursuant to the Ordinance. We reverse and remand for the trial court to reconsider whether subject matter jurisdiction exists as to Cheatham's claims accruing prior to the Ordinance's adoption.

Background

Sometime in early 2014, Taylortown affixed a "condemned" sign to the home at 128 Burch Drive in Taylortown ("the Property") after finding it to be in deplorable condition. The owner of the Property, Cheatham, claims he removed the sign in March 2014. It is unclear whether this occurred before or after 4 April 2014, when Moore County Building Inspections investigated a complaint that sewage was standing around the Property's well. At the time of the investigation, the Property was unoccupied. As a result of the investigation, the Moore County Health Department's Environmental Section reported that the standing water around the well "appears to be run off water and not sewage." It recommended that the well be abandoned if public water was available, or, if public water was not available, the well be tested before used for human consumption.

On 27 May 2014, Cheatham attended a town meeting to request an explanation as to the condemnation of the Property. That same day, he submitted a letter documenting this request. In response, Taylortown sent him a letter, dated 30 May 2014, notifying Cheatham that his house had been inspected, and, due to the condition of the house and the land, a hearing would be scheduled. The letter further explained Cheatham would be informed of a hearing date by certified mail. Cheatham subsequently filed a lawsuit in Moore County Superior Court against Taylortown.[1] Well over a year after the condemned sign was posted and

1. The record is not clear as to the date Cheatham filed this first suit.

Cheatham was notified that a hearing would be scheduled, Cheatham took a voluntary dismissal in his first case against Taylortown.[2]

After sending the 30 May 2014 letter, Taylortown made no effort to schedule a hearing or condemn the Property. On 19 June 2015, Taylortown adopted the Ordinance pursuant to N.C.G.S. §§ 160A-441 through 160A-450 (2015). Cheatham filed a new complaint on 21 March 2016, which is now before us on appeal.

On 22 March 2016, before Cheatham served Taylortown with the summons and complaint, Taylortown investigated the Property pursuant to the authority and procedures in the Ordinance. On 25 March 2016, once Taylortown received the summons and complaint, it filed a motion to dismiss for lack of subject matter jurisdiction under North Carolina Rule of Civil Procedure 12(b)(1) based on Cheatham's failure to exhaust administrative remedies and under 12(b)(6) for failure to state a claim. In response, Cheatham filed a motion to deny the motion to dismiss, attaching 15 exhibits, including 6 letters that Cheatham maintains he sent to Taylortown about the Property from June 2014 up until after the motion to dismiss was filed in April 2016.

Judge Webb heard Taylortown's motion to dismiss on 11 April 2016. During the hearing, Cheatham "request[ed] that [Taylortown] stop continuing to be reckless, malicious and unlawful condemning the property for a second time, and stop the retaliation against [him] by condemning the property for a second time." Judge Webb granted Taylortown's motion, and ordered the dismissal of the action under Rule 12(b)(1), finding "[Cheatham's] claims arise out of [Taylortown's] attempts to enforce its Minimum Housing Ordinance and that [Cheatham] has fail[ed] to exhaust his administrative remedies, as provided in N.C.G.S. § 160A-446."[3] Cheatham timely appealed the trial court's order.

Analysis

[1] Cheatham argues that the motion to dismiss for lack of subject matter jurisdiction should have been denied because Taylortown's attempts to enforce its minimum housing standards: (1) violate the "Bundle of Rights" given to all property owners under the law of the land, describing these rights as the owner's right to enter, use, sell, lease, or give away the land as he chooses; (2) obstruct justice; and (3) violate procedural due process.

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2. Subsequent to the dismissal, Cheatham made a motion to set aside his voluntary dismissal, which the trial court denied on 10 December 2015.

3. Having dismissed the case in accordance with Rule 12(b)(1), the trial court did not reach Taylortown's 12(b)(6) motion.

We disagree to the extent Taylortown's enforcement efforts were made pursuant to the Ordinance. Cheatham's suit was properly dismissed for failure to exhaust administrative remedies as to any efforts made after 19 June 2015 – the effective date of the Ordinance. However, the trial court incorrectly determined that all of Cheatham's claims arose out of Taylortown's attempts to enforce the Ordinance, which is factually incorrect as Taylortown adopted the Ordinance after alleged wrongs in the complaint took place.

North Carolina Rule of Civil Procedure 12(b)(1) "permits a party to contest, by motion, the jurisdiction of the trial court over the subject matter in controversy." *Trivette v. Yount*, 217 N.C. App. 477, 482, 720 S.E.2d 732, 735 (2011). Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction are reviewed by our court de novo, and matters outside the pleadings may be considered. *Id.* at 482, 720 S.E.2d at 735 (citation omitted).

The legislature enacted N.C.G.S § 160A-441 et seq. to ensure "that minimum housing standards would be achieved in the cities and counties of this State." *Harrell v. City of Winston-Salem*, 22 N.C. App. 386, 391, 206 S.E.2d 802, 806 (1974). To do so, section 160A-441 "confers upon cities and counties the power to exercise their police powers by adopting and enforcing ordinances ordering a property owner to repair, close, or demolish dwellings that are determined to be unfit for human habitation and therefore dangerous and injurious to the health and safety of the public." *Newton v. City of Winston-Salem*, 92 N.C. App. 446, 449, 374 S.E.2d 488, 490 (1988). Such city ordinances must contain procedures to provide owners with notice, a hearing, and a reasonable opportunity to bring deficient dwellings into conformity with the code. N.C.G.S. § 160A-443. N.C.G.S. § 160-446 delineates the remedies available in N.C.G.S. § 160A-441 et seq.

Taylortown adopted the Ordinance pursuant to N.C.G.S. §§ 160A-441 through 160A-450, setting out the necessary procedures for the city to follow in minimum housing cases. The procedure set out in the Ordinance and N.C.G.S. §§ 160A-441 through 160A-450 cannot be circumvented; plaintiffs must exhaust the administrative remedies available provided by statute "before recourse may be had to the courts." *Justice for Animals, Inc. v. Robeson Cty.*, 164 N.C. App. 366, 369, 595 S.E.2d 773, 775 (2004) (quotation omitted); *Harrell*, 22 N.C. App. at 391-92, 206 S.E.2d at 806 (citations omitted). If administrative remedies specifically provided by statute are not exhausted before alternative recourse is sought through the courts, "the court lacks subject matter jurisdiction and the action must be dismissed." *Justice for Animals, Inc.*, 164 N.C. App. at 369, 595 S.E.2d at 775 (citation omitted).

Under the Ordinance, Cheatham did not exhaust his administrative remedies before seeking judicial review as required by statute. The proper course of action for a person aggrieved under the Ordinance would be to present the case at a minimum housing hearing pursuant to N.C.G.S. § 160A-441 et seq., and then, if he remained unsatisfied, to appeal that decision to the Board as permitted by statute. N.C.G.S. § 160A-446. If his appeal to the Board was unsuccessful, he would then have the ability to seek review in Superior Court by proceedings in the nature of certiorari. *Id.* § 160A-446(e).

Instead of following this procedure, Cheatham ignored N.C.G.S. § 160A-441 et seq. and the Ordinance, attempting to collaterally attack the minimum housing standards enforcement proceedings through this independent action. Thus, as he failed to follow statutory procedure, to the extent his claims arose after 19 June 2015 out of Taylortown's attempts to enforce the Ordinance, it was proper for the trial court to dismiss this action for lack of subject matter jurisdiction. *See Axler v. City of Wilmington*, 25 N.C. App. 110, 111, 212 S.E.2d 510, 511-12 (1975) (dismissing the action because the plaintiff failed to exhaust the administrative remedies available in N.C.G.S. § 160A-446).

[2] However, Cheatham's claims arising prior to the Ordinance's enactment on 19 June 2015 do not arise out of Taylortown's attempts to enforce the Ordinance. Thus, the trial court's determination that Cheatham's "claims arise out of [Taylortown's] attempts to enforce its Minimum Housing Ordinance" is in error. We remand for the trial court to reconsider whether Cheatham's claims arising on or prior to 19 June 2015 may be subject to dismissal under either Rule 12(b)(1) or 12(b)(6) of the North Carolina Rules of Civil Procedure.

Conclusion

For the reasons stated above, the trial court correctly dismissed Cheatham's case for lack of subject matter jurisdiction to the extent the claims involve enforcement actions made after 19 June 2015 pursuant to the Ordinance. However, the trial court incorrectly determined that all of Cheatham's claims were made pursuant to the Ordinance. We remand for further consideration as to enforcement actions occurring on or prior to 19 June 2015, the effective date of the Ordinance.

AFFIRMED IN PART; REMANDED FOR FURTHER CONSIDERATION IN PART.

Judges CALABRIA and DIETZ concur.

FRIDAY INVESTMENTS, LLC, as Successor in Interest to Tisano Realty, Inc., Plaintiff
v.
BALLY TOTAL FITNESS OF THE MID-ATLANTIC, INC. f/k/a Bally Total Fitness of the Southeast, Inc. f/k/a Holiday Health Clubs of the Southeast, Inc., as Successor in Interest to Bally Fitness Corporation; and BALLY TOTAL FITNESS HOLDING CORPORATION, Defendants

No. COA16-950

Filed 1 August 2017

1. Appeal and Error—interlocutory orders and appeals—multiple defendants—multiple claims remaining—Rule 54(b) certification

Plaintiff's appeal from the trial court's interlocutory order granting summary judgment in favor of defendant corporate guarantor on a breach of contract and other claims, arising from the default on a lease of commercial premises, was entitled to immediate appellate review. The order was final regarding some but not all claims against this defendant, and the trial court properly certified the order for immediate appellate review under Rule 54(b).

2. Guaranty—separate contract from lease agreement—summary judgment—consolidation provisions—bankruptcy discharge

The trial court erred in a breach of contract case, arising from the default on a lease of commercial premises, by granting summary judgment in favor of defendant corporate guarantor. The lease and guaranty are two separate and distinct contracts under North Carolina law, and there was a genuine issue of material fact regarding whether the guaranty was "required to be maintained" under the consolidation provisions or was discharged during a 2008-2009 bankruptcy.

Judge ELMORE dissenting.

Appeal by plaintiff from order entered 9 March 2016 by Judge Forrest D. Bridges in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 March 2017.

Horack, Talley, Pharr & Lowndes, P.A., by Keith B. Nichols, and Chadbourne & Parke, LLP, by Samuel S. Kohn, pro hac vice, for plaintiff-appellant.

Burt & Cordes, PLLC, by Stacy C. Cordes, and Knox, Knox, Brotherton & Godfrey, by Lisa Godfrey, for defendant-appellees.

TYSON, Judge.

Friday Investments, LLC, ("Plaintiff") appeals from the trial court's order granting summary judgment in favor of Defendant, Bally Total Fitness Holding Corporation ("Bally Holding"). Genuine issues of material fact exist regarding whether the Guaranty was "required to be maintained" or was discharged in the 2008-2009 Bankruptcy. We reverse the trial court's order granting summary judgment in favor of Bally Holding and remand.

I. Factual Background

This case arises from a lease of commercial premises between Plaintiff, as landlord and successor-in-interest to the original landlord, and Bally of the Mid-Atlantic, as tenant and successor-in-interest to the original tenant. Bally Holding had guaranteed the obligations of the original tenant and of the successors-in-interest thereto. When Bally of the Mid-Atlantic defaulted on its monthly rent obligations, Plaintiff sued to recover damages jointly and severally from Bally of the Mid-Atlantic and Bally Holding.

A. Lease and Guaranty

On or about 14 February 2000, Tower Place Joint Venture, as landlord, and Bally Total Fitness Corporation, as tenant, entered into a written Lease Agreement (the "Lease") for commercial premises located within the Tower Place Festival Shopping Center in Charlotte. As an inducement to Tower Place Joint Venture to enter into the Lease with Bally Total Fitness Corporation, Bally Holding guaranteed the obligations of Bally Total Fitness Corporation. The Guaranty Agreement (the "Guaranty") was executed on or about 10 February 2000. In accordance with the recitals contained in the Lease, the Guaranty is attached to the Lease as "Exhibit C."

Bally Total Fitness Corporation later assigned its interest in the Lease to its subsidiary, Holiday Health Clubs of the Southeast, Inc.

B. 2007 Bankruptcy Proceedings

On 31 July 2007, Bally Holding and its subsidiaries (collectively, the "Bally Companies") filed a petition for Chapter 11 bankruptcy in U.S. Bankruptcy Court (the "2007 Bankruptcy").

In anticipation of the initial bankruptcy, Tisano Realty, Inc., as successor-in-interest to the original landlord Tower Place Joint Venture, and Bally Total Fitness of the Southeast, Inc. ("Bally of the Southeast") f/k/a

Holiday Health Clubs of the Southeast, Inc., as the tenant and successor-in-interest to Bally Total Fitness Corporation, executed an amendment to the Lease (the "First Amendment").

The First Amendment provides for reduced base rent schedules, which would apply in the event of tenant's filing a Chapter 11 bankruptcy petition. The First Amendment also stipulates: "Except as amended hereby, the Lease shall remain in full force and effect; and, as amended hereby, the Lease is affirmed, confirmed and ratified." On 17 September 2007, the bankruptcy court confirmed the Bally Companies' Plan of Reorganization.

C. 2008-2009 Bankruptcy Proceedings

On 3 December 2008, the Bally Companies, including Bally of the Southeast, filed a second petition for Chapter 11 bankruptcy in U.S. Bankruptcy Court for the Southern District of New York (the "2008-2009 Bankruptcy"). The cases were jointly administered pursuant to Rule 1015(b) of the Federal Rules of Bankruptcy Procedure.

On 25 June 2009, after the petition had been filed, Tisano Realty, Inc. and Bally of the Southeast executed another amendment to the Lease (the "Second Amendment"). The Second Amendment contains site plan modifications, signage revisions, and monthly base rent adjustments. Except as modified in the Second Amendment, the Lease and the terms thereof not expressly amended were to continue "in full force and effect."

During the 2008-2009 Bankruptcy proceedings, the Bally Companies jointly moved to assume certain unexpired real property leases pursuant to 11 U.S.C. § 365. By order entered 29 June 2009, the bankruptcy court granted the motion and authorized the Bally Companies to assume the unexpired leases identified in the Assumed Lease Schedule attached to the order (the "Assumption Order"). The Lease before us was included among those listed in the Assumed Lease Schedule.

The Bally Companies also submitted a Joint Plan of Reorganization of the Debtors Under Chapter 11 of the Bankruptcy Code. The Joint Plan of Reorganization was amended during the proceedings (as amended, the "Plan"). Seeking confirmation of the Plan, William G. Fanelli, the acting chief financial officer of the Bally Companies, submitted to the bankruptcy court a declaration in support of confirmation (the "Fanelli Declaration"). The Fanelli Declaration provides an outline of the proposed reorganization and the feasibility thereof. It also offers reasons to consolidate the Bally Companies for distribution purposes, including the following:

> 11. Article IV of the Plan provides that the Plan shall "serve as, and shall be deemed to be, a motion for entry of an order consolidating the [Debtors'] Estates" *solely* for distribution purposes. The Plan explicitly limits the scope and purpose of such consolidation to implementation of the Plan, providing that the consolidation sought shall *not* affect: (i) the legal and corporate structure of the Reorganized Debtors; (ii) guarantees that are required to be maintained post-Effective Date[.] (alteration and emphasis original).
>
> 12. The Debtors propose consolidation of the Consolidated Debtors solely to facilitate distributions under the Plan. The Debtors do not seek to improperly enhance or impair the recoveries of any creditors by way of the consolidation. Indeed, the Debtors are not aware of any creditor actually affected by the consolidation contemplated under the Plan.

The bankruptcy court confirmed the Plan by order entered 19 August 2009 (the "Confirmation Order"). At issue in this case are two sections of the Confirmation Order and the Plan (together, the "Consolidation Provisions"): Paragraph 3 of the Confirmation Order, which reflects Article IV of the Plan, and Paragraph 15 of the Confirmation Order, which reflects Article X of the Plan.

Paragraph 3 of the Confirmation Order approves the consolidation contemplated in Article IV of the Plan. Paragraph 3 provides in pertinent part:

> 3. Consolidation of the Debtors.
>
> (a) As no objections to such consolidation have been filed or served by any party, pursuant to Article IV of the Plan the consolidation of the consolidated Debtors solely for the purpose of implementing the Plan, including for purposes of voting, confirmation and distributions to be made under the Plan is hereby approved. Solely for purposes of implementing the Plan, including without limitation the making of Distributions thereunder, and for no other purposes . . . and (vi) all guarantees of the Debtors of the obligations of any other Debtors shall be deemed eliminated so that any Claim against any Debtor and any guarantee thereof executed by any other Debtor and any joint or

> several liability of any of the Debtors shall be deemed to be one obligation of the consolidated Debtors.
>
> (b) Such consolidation (other than for the purpose of implementing the Plan) shall not affect . . . (ii) guarantees that are required to be maintained post-Effective Date (a) in connection with executory contracts or unexpired leases that were entered into during the Chapter 11 Cases or that have been, or will hereunder be, assumed[.]

Article IV of the Plan provides in pertinent part:

> Solely in connection with Distributions to be made to the holders of Allowed Claims, the Plan is predicated upon, and it is a condition precedent to confirmation of the Plan, that the Court provide in the Confirmation Order for the consolidation of the Debtors' Estates into a single Estate for purposes of this Plan and the Distributions hereunder. . . .
>
> Pursuant to the Confirmation Order . . . (ii) the obligations of each Debtor will be deemed to be the obligation of the consolidated Debtors solely for purposes of this Plan and Distributions hereunder . . . , and (vi) all guarantees of the Debtors of the obligations of any other Debtors shall be deemed eliminated so that any Claim against any Debtor and any guarantee thereof executed by any other Debtor and any joint or several liability of any of the Debtors shall be deemed to be one obligation of the consolidated Debtors.
>
> Notwithstanding the foregoing, such consolidation shall not affect . . . (ii) guarantees that are required to be maintained post-Effective Date (a) in connection with executory contracts or unexpired leases that were entered into during the Chapter 11 Cases or that have been, or will hereunder be, assumed[.]

Paragraph 15 of the Confirmation Order approves the provisions contained in Article X of the Plan, which addresses the assumption and rejection of executory contracts and unexpired leases. Paragraph 15 provides in pertinent part:

> 15. Executory Contracts and Unexpired Leases.
>
> (a) The executory contract and unexpired lease provisions of Article X of the Plan are specifically approved in all

> respects, are incorporated herein in their entirety and are so ordered. The Debtors are authorized to assume, assign and/or reject executory contracts or unexpired leases in accordance with Article X of the Plan. In the event of an inconsistency between the Plan and any executory contract or unexpired lease assumed under the Plan, the provisions of the Plan shall govern.
>
> (b) Pursuant to Article X of the Plan, the Debtors shall be deemed to assume each executory contract and unexpired lease that (i) was not previously assumed, assumed and assigned or rejected by an order of the Court, (ii) was not rejected pursuant to Exhibit A of the Plan, (iii) did not terminate or expire pursuant to its own terms[.]

Article X of the Plan provides in pertinent part:

> To the extent not (i) assumed in the Chapter 11 Cases prior to the Confirmation Date, (ii) rejected in the Chapter 11 Cases prior to the Confirmation Date, or (iii) specifically rejected pursuant to this Plan, each executory contract and unexpired lease that exists between Debtor and any Person is specifically assumed by the Debtor that is a party to such executory contract or unexpired lease as of, and subject to the occurrence of, the Effective Date pursuant to the Plan.

As previously noted, the Bally Companies specifically assumed the Lease before us pursuant to section 365 of the Bankruptcy Code.

D. The Estoppel Certificate

On 29 September 2009, Bally of the Southeast merged into Bally Total Fitness of the Mid-Atlantic, Inc. ("Bally of the Mid-Atlantic"), as tenant under the Lease. In March 2011, Plaintiff purchased the property from Tisano Realty, Inc., becoming the successor-in-interest to the original and subsequent landlords with respect to the Lease.

Before the purchase, Ronald Siegel, an officer of Bally of the Mid-Atlantic, executed an estoppel certificate at Plaintiff's request. Siegel certified the Lease was "in full force and effect" and "guaranteed by Bally Total Fitness Holding Corporation, a Delaware corporation, Guaranty dated February 14, 2000." By its terms, Siegel also acknowledged that the estoppel certificate was made "as an inducement to the Buyer to accept assignment of the Lease from the Landlord and with full knowledge that the Buyer is relying upon the truth thereof."

Siegel returned the signed estoppel certificate to Plaintiff with marked revisions and deletions to several provisions in the document. The last page of the certificate contained the following annotation:

> This Estoppel Letter is being delivered to you on the express condition that the undersigned shall have no liability for any matters set forth herein and that *the only use or purpose of this Estoppel Letter will be to prevent the undersigned from making any statement or claim contrary to any factual matters set forth herein, except to the extent any such contrary matter is otherwise known to you prior to the time of delivery of this Estoppel Letter*. . . . (emphasis supplied).

While Siegel was also an officer of Bally Holding, no changes were made to the Guaranty provision in the certificate.

E. Superior Court Proceedings

On 9 May 2014, Plaintiff filed a complaint and alleged Bally of the Mid-Atlantic had breached the Lease, and Bally Holding had breached the Guaranty, by failing to timely pay monthly rent installments and other past due charges. Plaintiff restated its breach of contract claim against Defendants in its first amended complaint and alleged alternative claims for common law fraud, fraud in the inducement, negligent misrepresentation, and unfair and deceptive trade practices.

Plaintiff moved for summary judgment against Defendants on its breach of contract claim. Bally of the Mid-Atlantic opposed Plaintiff's motion and argued its affirmative defenses raised genuine issues of material fact for trial. Bally Holding also opposed Plaintiff's motion and moved for summary judgment on the grounds that its liability on the Guaranty, if any, was discharged in bankruptcy.

By order entered 29 April 2015, the trial court granted partial summary judgment in favor of Plaintiff, concluding that Bally of the Mid-Atlantic had breached the terms of the Lease. The court reserved for trial the issue of what damages, if any, Plaintiff was entitled to recover from Bally of the Mid-Atlantic. The court allowed the parties to submit additional briefs prior to ruling on whether Bally Holding was liable on the Guaranty.

By order entered 9 March 2016, the court granted summary judgment in favor of Bally Holding on Plaintiff's breach of contract claim. The court characterized the Lease and Guaranty as separate agreements, and

concluded the Lease had been assumed in the 2008-2009 Bankruptcy, but the Guaranty had been discharged by the terms of the Plan, as follows:

> 2. Section 365 of the Bankruptcy Code allows a Debtor to assume or reject executory contracts and leases within certain time constraints and under certain conditions. As noted by the Plaintiff, Bankruptcy Courts have ruled that assumption of a lease or contract generally requires assumption of the contract in its entirety, with both the burdens and the benefits. . . .
>
> 3. On the other hand, a guaranty is not usually viewed as an executory contract that can be assumed or rejected by a Bankruptcy debtor. . . .
>
> . . . .
>
> 5. Ultimately, in determining dischargeability of a debt, the court must first and foremost look to the provisions of the Debtor's confirmed Plan. In this instance, the Plan specifically provided that all Guaranties of the Debtor of the obligation of any other Debtor shall be deemed eliminated except to the extent that they are required to be maintained. There was no indication that this Guaranty was "required to be maintained."
>
> 6. Pursuant to Section 1141 of the Bankruptcy Code, the confirmation of a Chapter 11 Plan discharges the Debtor from any debt arising before the date of confirmation except as otherwise provided in the Plan or in the order confirming the Plan.
>
> 7. Pursuant to Section 524 of the Bankruptcy Code, a discharge operates as an injunction against any action to collect any discharged debt from the Debtor.
>
> 8. In this case, the confirmation of the Debtor's Plan and closing of the case operated to create such discharge and injunction unless there was some contrary provision in the Plan.
>
> . . . .
>
> 10. In light of the foregoing principles of law, this court concludes that, pursuant to provisions of the confirmed 2009 Chapter 11 Plan, the Guaranty of this lease by Bally

> Holding[] was discharged by the Confirmation of the 2009 Chapter 11 Plan and the closing of the Bankruptcy case.
>
> 11. Holding is not equitably estopped under North Carolina law from asserting that the indebtedness under the Guaranty was discharged by the confirmation of the 2009 Chapter 11 Plan.

The trial court certified the interlocutory order for immediate appeal pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure. Plaintiff timely appealed.

II. Jurisdiction

[1] This Court has jurisdiction over Plaintiff's appeal from the order granting summary judgment in favor of Bally Holding. When an action involves multiple parties or presents more than one claim for relief, the trial court "may enter a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment." N.C. Gen. Stat. § 1A-1, Rule 54(b) (2015); *see DKH Corp. v. Rankin-Patterson Oil Co.*, 348 N.C. 583, 585, 500 S.E.2d 666, 667-68 (1998).

Such judgment is subject to immediate appellate review even though it may not "determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950); *see* N.C. Gen. Stat. § 1A-1, Rule 54(b). If the trial court certifies an order for immediate appeal pursuant to Rule 54(b), "appellate review is mandatory." *Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999) (citation omitted). The court "may not, by certification, render its decree immediately appealable if it is not a final judgment." *Id.* (brackets, citations, and internal quotation marks omitted).

The trial court granted summary judgment for Bally Holding as to all claims raised against it in Plaintiff's original complaint and all claims in the first cause of action in Plaintiff's first amended complaint—i.e., Plaintiff's breach of contract claim. The court made no ruling on Plaintiff's alternative causes of action for common law fraud, fraud in the inducement, negligent misrepresentation, and unfair and deceptive trade practices. The order is final regarding one, but fewer than all claims raised by Plaintiff against Bally Holding. The trial court properly certified the order for immediate appellate review under Rule 54(b). We address Plaintiff's appeal on the merits.

III. Issues

[2] Plaintiff argues the trial court erred in granting summary judgment for Bally Holding because (1) the Lease and Guaranty are a single agreement, which was assumed in the 2008-2009 Bankruptcy; (2) even if the Lease and Guaranty are separate agreements, the Guaranty was not and could not have been discharged by the terms of the Consolidation Provisions; and (3) equitable estoppel bars Bally Holding's assertion that the Guaranty was discharged in the 2008-2009 Bankruptcy.

In the alternative, Plaintiff argues genuine issues of material fact exist, which made entry of summary judgment for Bally Holding inappropriate.

IV. Standard of Review

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2015).

"[A]n issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action." *Merritt, Flebotte, Wilson, Webb & Caruso, PLLC v. Hemmings*, 196 N.C. App. 600, 604, 676 S.E.2d 79, 83 (2009) (citations and internal quotation marks omitted). A trial court's order granting summary judgment is reviewed *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

V. Lease and Guaranty are Separate Contracts

North Carolina contract law controls the interpretation of the Lease and Guaranty, as required by the choice of law provision contained therein.

This Court has held that a guaranty is:

> "a contract, obligation or liability . . . whereby the promisor, or guarantor, undertakes to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person who is himself . . . liable to such payment or performance." *Trust Co. v. Clifton*, 203 N.C. 483, 485, 166 S.E. 334, 335 (1932). The guarantor "makes his own separate contract, . . . and is not bound to do what his principal has contracted to do, except in so far as he has bound himself by his separate contract[.]"

> *Hutchins v. Planters National Bank of Richmond*, 130 N.C. 285, 286, 41 S.E. 487, 487 (1902).

Tripps Rests. of N.C., Inc. v. Showtime Enters., Inc., 164 N.C. App. 389, 391, 595 S.E.2d 765, 767 (2004).

The strict independence of the two separate contracts is "not affected by the fact that both contracts are written on the same paper or instrument or are contemporaneously executed." 38 Am. Jur. 2d *Guaranty* § 4 (1999); *see Tripps Rests. of N.C.*, 164 NC. App. at 391, 595 S.E.2d at 767 ("[B]oth contracts (between creditor and primary obligor and between creditor and guaranty) may be contained in the same instrument." (citing 38 Am. Jur. 2d *Guaranty* § 4).

Although the Guaranty in this case was attached to the Lease as an exhibit, it remains a wholly independent and separate contract under North Carolina law. *See id.* Plaintiff's arguments to the contrary are overruled.

VI. Summary Judgment Analysis

The trial court found the Consolidation Provisions provided "all Guarantees of the Debtor of the obligation of any other Debtor shall be deemed eliminated except to the extent that they are required to be maintained" and that "[t]here was no indication that this Guaranty was 'required to be maintained.' " Pursuant to the Consolidation Provisions, the unexpired Lease at issue in this case was expressly assumed by the debtor-tenant and approved by the bankruptcy court during the Chapter 11 re-organization. However, the language of the Consolidation Provisions and the Second Amendment raises genuine issues of material fact regarding whether the Guaranty was "required to be maintained" or was discharged during the 2008-2009 Bankruptcy.

A. The Consolidation Provisions

Under well-established bankruptcy law, a Chapter 11 re-organization plan is basically a court-approved contract between the debtor and its creditors. *In re WorldCom, Inc.*, 352 B.R. 369, 377 (Bankr. S.D.N.Y. 2006). As a binding contract, a confirmed plan "must be interpreted in accordance with general contract law." *In re Bennett Funding Grp.*, 220 B.R. 743, 758 (Bankr. N.D.N.Y. 1997); *In re WorldCom*, 352 B.R. at 377 ("The Court must interpret the provisions of [a Chapter 11 Plan] . . . a task akin to interpreting a binding contract.").

The Consolidation Provisions are construed under New York contract law, which is similar to North Carolina law on this issue.

> Under New York law, when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms. When the terms of a written contract are ambiguous, however, a court may turn to evidence outside the four corners of the document to ascertain the intent of the parties. *When the language of a contract is ambiguous and there exists relevant extrinsic evidence of the parties' actual intent, summary judgment is precluded.* Whether or not a writing is ambiguous is a question of law to be resolved by the courts. If a contract is unambiguous on its face, its proper construction is a question of law.

In re Indesco Int'l, Inc., 451 B.R. 274, 282 (Bankr. S.D.N.Y. 2011) (emphasis supplied) (brackets, internal quotation marks, and footnotes omitted).

"Substantive consolidation treats separate legal entities as if they were merged into a single survivor left with all the cumulative assets and liabilities (save for inter-entity liabilities, which are erased). The result is that claims of creditors against separate debtors morph to claims against the consolidated survivor." *In re Genesis Health Ventures, Inc.*, 402 F.3d 416, 423 (3d Cir. 2005). Whereas, "[d]eemed consolidation has been characterized as 'a pretend consolidation[.]' " 3 Howard J. Steinberg, *Bankruptcy Litigation* § 15:52 (2d ed. 2007 & Supp. 2016) (citing *In re Owens Corning*, 419 F.3d 195, 216 (3d Cir. 2005)).

In a plan of reorganization, multiple debtors or entities may be "deemed consolidated" solely "for purposes of valuing and satisfying creditor claims, voting for or against the [p]lan, and making distributions for allowed claims[.]" *In re Owens Corning*, 419 F.3d at 202. A deemed consolidation streamlines the distribution process, but does not affect the legal structure of the debtors or the rights of claimholders. Steinberg, *supra*, § 15:52; *see In re Genesis Health Ventures*, 402 F.3d at 423-24. Notably, a deemed consolidation may only be used as a shield, and not as a sword. *In re Owens Corning*, 419 F.3d at 216.

Here, Paragraph 3 of the Confirmation Order provides:

> (a) As no objections to such consolidation have been filed or served by any party, pursuant to Article IV of the Plan the consolidation of the consolidated Debtors *solely for the purpose of implementing the Plan*, including for purposes of voting, confirmation and distributions to be made under the Plan is hereby approved. *Solely for purposes of implementing the Plan*, including without

> limitation the making of Distributions thereunder, and for no other purposes . . . and (vi) *all guarantees of the Debtors of the obligations of any other Debtors shall be deemed eliminated so that any Claim against any Debtor and any guarantee thereof executed by any other Debtor and any joint or several liability of any of the Debtors shall be deemed to be one obligation of the consolidated Debtors*. (emphasis supplied).

However, the Confirmation Order further provides:

> (b) Such consolidation (other than for the purpose of implementing the Plan) shall not affect . . . (ii) guarantees that are required to be maintained post-Effective Date (a) in connection with executory contracts or unexpired leases that were entered into during the Chapter 11 Cases or that have been, or will hereunder be, assumed[.]

William Fanelli, the acting chief financial officer of the debtors and debtors in possession, submitted a declaration in support of the proposed plan. The declaration stated:

> 11. . . . The Plan explicitly limits the scope and purpose of such consolidation to implementation of the Plan, providing that the consolidation sought shall not affect: *(i) the legal and corporate structure of the Reorganized Debtors; (ii) guarantees that are required to be maintained post-Effective Date*[.] (emphasis supplied).
>
> 12. The Debtors propose consolidation of the Consolidated Debtors solely to facilitate distributions under the Plan. The Debtors do not seek to improperly enhance or impair the recoveries of any creditors by way of the consolidation. Indeed, the Debtors are not aware of any creditor actually affected by the consolidation contemplated under the Plan.

Since the debtors were consolidated "solely for the purposes of implementing the Plan," it appears the Consolidation Provisions contemplate a "deemed consolidation." Furthermore, the language of the Consolidation Provisions and the Fanelli Declaration demonstrate not all guarantees were discharged during the 2008-2009 Bankruptcy.

Under the language of the Consolidation Provisions, a genuine issue of material fact exists regarding whether the Guaranty was discharged or whether it was "required to be maintained." *See In re Indesco Int'l*,

451 B.R. at 282 ("[W]hen the language of a contract is ambiguous and there exists relevant extrinsic evidence of the parties' actual intent, summary judgment is precluded.").

B. Second Amendment

Contrary to the trial court's holding, the Second Amendment to the Lease raises genuine issues of material fact regarding whether the Guaranty was "required to be maintained."

Defendants argue the Second Amendment demonstrates the Guaranty was not required to be maintained subsequent to the effective date of the Confirmation Plan. Defendants assert the Second Amendment was negotiated between Tisano and Bally of the Southeast, and did not include joinder of Bally Holding as a guarantor. Plaintiff argues under the language of the Guaranty, the Second Amendment did not relieve the obligations of Bally Holding as guarantor to the Lease.

The original Guaranty provided:

> FOR VALUE RECEIVED, and in consideration for, and as an inducement to Tower Place Joint Venture, as Landlord, to enter into a Lease dated as of February 14, 2000 (the "Lease"), for certain premises located within the property commonly known as Tower Place Festival Shopping Center . . . , with Bally Total Fitness Corporation, a Delaware corporation, as Tenant, *the undersigned guarantees the full performance and observance of all the covenants, conditions and agreements contained in the Lease to be performed and observed by Tenant, Tenant's successors and assigns* . . . .
>
> *The undersigned further covenants and agrees that this Guaranty shall remain and continue in full force and effect as to any renewal, modification, or extension of said Lease, provided that notice thereof is duly delivered to the Guarantor as provided in the Lease.* The undersigned further agrees that its liability under this Guaranty shall be primary, and that if any right or action shall accrue to Landlord under the Lease, Landlord may, at Landlord's option, proceed against the undersigned without having commenced an action against or having obtained any judgment against Tenant. . . .
>
> . . . .

> No subletting, assignment, or other transfer of the Lease, or any interest therein, other than as specifically provided herein or in the Lease, shall operate to extend or diminish the liability of the Guarantor under this Guaranty. Whatever reference is made to the liability of Tenant within the Lease, such reference shall be deemed likewise to refer to the Guarantor. *It is further agreed that all of the terms and provisions hereof shall inure to the benefit of the successors and assigns of Landlord, and shall be binding upon the successors and assigns of the undersigned.* (emphasis supplied).

Based upon this language, renewals, modifications, or extensions to the Lease would not affect or release the responsibilities of the guarantor, unless the guarantor did not receive proper notice. The Second Amendment further provides that any terms of the Lease not expressly modified or amended remained unaltered and in full force and effect. At minimum, this language demonstrates a genuine issue of material fact exists regarding whether the Guaranty survived the Second Amendment and, ultimately, whether the Guaranty was "required to be maintained" or was discharged during the 2008-2009 Bankruptcy.

VII. Conclusion

The Lease and Guaranty constitute two separate and distinct contracts under North Carolina law. *See Tripps Rests. of N.C.*, 164 NC. App. at 391, 595 S.E.2d at 767. Based upon our standard of review, summary judgment was inappropriate as genuine issues of material fact exist regarding whether the Guaranty was "required to be maintained" or was discharged during the 2008-2009 Bankruptcy.

The trial court erred by granting summary judgment for Bally Holding. We do not address and express no opinion on damages, including attorney fees, or on Plaintiff's other claims against Defendants.

The trial court's order granting summary judgment in favor of Bally Holding is reversed and this cause is remanded for further proceedings. *It is so ordered.*

REVERSED AND REMANDED.

Judge DIETZ concurs.

Judge ELMORE dissents with separate opinion.

ELMORE, Judge, dissenting.

It is a fundamental principle of bankruptcy law that a debtor-in-possession who assumes an executory contract "assumes the contract *cum onere*," *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 531–32, 104 S. Ct. 1188, 1199, 79 L. Ed. 2d 482, 499 (1984) (citation omitted), in its entirety "without any diminution in its obligations or impairment of the rights of the lessor in the present or the future," *In re Texaco Inc.*, 254 B.R. 536, 550 (Bankr. S.D.N.Y. 2000) (footnote omitted). Because the language of the Lease and Guaranty reflects a clear intention of the parties to treat the instruments as component parts of a single executory contract, which had to be assumed in its entirety during the 2008–2009 Bankruptcy, I respectfully dissent.

As the majority properly notes, North Carolina contract law controls the interpretation of the Lease.[1] Our rules of construction require "the court to examine the language of the contract itself for indications of the parties' intent at the moment of execution." *State v. Philip Morris USA Inc.* (*Philip Morris I*), 359 N.C. 763, 773, 618 S.E.2d 219, 225 (2005) (citation omitted). The "intent" of the parties "is derived not from a particular contractual term but from the contract as a whole." *Id.* (citation omitted). The contract must be considered in its entirety without placing undue emphasis on "what the separate parts mean." *Jones v. Casstevens*, 222 N.C. 411, 413–14, 23 S.E.2d 303, 305 (1942); *see also Peirson v. Am. Hardware Mut. Ins. Co.*, 249 N.C. 580, 583, 107 S.E.2d 137, 139 (1959) ("The object of interpretation should not be to find discord in differing clauses, but to harmonize all clauses if possible." (citations omitted)).

If the language of the contract is "plain and unambiguous, there is no room for construction. The contract is to be interpreted as written," *Jones*, 222 N.C. at 413, 23 S.E.2d at 305 (citations omitted), and "enforce[d] . . . as the parties have made it," *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970) (citations omitted). Ambiguity exists "only when, 'in the opinion of the court, the language of the [contract] is fairly and reasonably susceptible to either of the constructions for which the parties contend.' " *State v. Philip Morris USA Inc. (Philip Morris II)*, 363 N.C. 623, 641, 685 S.E.2d 85, 96 (2009) (quoting *Wachovia Bank & Trust Co.*, 276 N.C. at 354, 172 S.E.2d at 522); *see also Walton v. City of Raleigh*, 342 N.C. 879,

1. The choice-of-law provision in the Lease provides: "This Lease shall be governed by, and construed in accordance with, the laws of the State in which the Premises are located."

881–82, 467 S.E.2d 410, 412 (1996) ("Parties can differ as to the interpretation of language without its being ambiguous . . . .").

To determine the agreement undertaken, "[a]ll contemporaneously executed written instruments between the parties, relating to the subject matter of the contract, are to be construed together." *Yates v. Brown*, 275 N.C. 634, 640, 170 S.E.2d 477, 482 (1969) (citations omitted); *see also Wiles v. Mullinax*, 275 N.C. 473, 480, 168 S.E.2d 366, 371 (1969) ("Two sheets, attached together as parts of a single communication, must of course, be construed as one document." (citations omitted)); *Carolina Place Joint Venture v. Flamers Charburgers, Inc.*, 145 N.C. App. 696, 699, 551 S.E.2d 569, 571 (2001) (concluding that franchise agreement and guarantee, which was signed as inducement, "were merged into one document, the [f]ranchise [a]greement"). Where a document incorporates another by reference, the latter is construed as part of the former "as if it were set out at length therein." *Booker v. Everhart*, 294 N.C. 146, 152, 240 S.E.2d 360, 363 (1978) (citation omitted). In other words, if "several instruments" are "executed contemporaneously" and "pertain to the same transaction," they "are to be considered as component parts of the understanding between the parties" such that "the whole contract stands or falls together." *Pure Oil Co. of the Carolinas v. Baars*, 224 N.C. 612, 615, 31 S.E.2d 854, 856 (1944) (citations omitted).

If the contract is clear and unambiguous, there is no genuine issue of material fact; rather, construction is a matter of law for the court. *Carolina Place Joint Venture*, 145 N.C. App. at 699, 551 S.E.2d at 571 (citation omitted); *see also Asheville Mall, Inc. v. F.W. Woolworth Co.*, 76 N.C. App. 130, 132, 331 S.E.2d 772, 773–74 (1985) ("When the language of the contract is clear and unambiguous, . . . the court cannot look beyond the terms of the contract to determine the intentions of the parties." (citations omitted)). If the contract is ambiguous, however, its interpretation "is a matter for the jury." *Dockery v. Quality Plastic Custom Molding, Inc.*, 144 N.C. App. 419, 422, 547 S.E.2d 850, 852 (2001); *see also Whirlpool Corp. v. Dailey Constr., Inc.*, 110 N.C. App. 468, 471, 429 S.E.2d 748, 751 (1993) ("[I]f the terms of the contract are ambiguous then resort to extrinsic evidence is necessary and the question is one for the jury." (citation omitted)).

Applying the foregoing principles, I believe the parties expressed a clear intent to treat the Lease and Guaranty as a single contract. Bally Holding executed the Guaranty contemporaneously with, if not prior to, the Lease as an "inducement" to the lessor. The Guaranty, attached as Exhibit C to the Lease, is explicitly referenced in the recitals: "WHEREAS, the performance of the obligations of Tenant under

this Lease is to be guaranteed by BALLY TOTAL FITNESS HOLDING CORPORATION . . . pursuant to a Guaranty in the form of Exhibit C attached hereto." The Guaranty, likewise, references the Lease and the liability of Bally Holding thereunder: "Whatever reference is made to the liability of Tenant with the Lease, such reference shall be deemed likewise to refer to the Guarantor." In addition to the cross-references contained in the documents, the Lease expressly incorporates the Guaranty. Article 1.1 provides: "[T]he recitals, as well as the exhibits attached to this Lease, are hereby incorporated into this Lease in their entirety."

Because the record plainly reveals that the Lease and Guaranty constitute a single contract, ratified by the First and Second Amendments to Lease, the Guaranty had to be assumed by the terms of the Assumption Order in the 2008–2009 Bankruptcy. Bally Holding could not sever the Lease, electing to avoid its obligations on the Guaranty while leaving the more favorable provisions intact. Such a construction runs counter to the expressed intent of the parties and impairs the rights of plaintiff to secure performance of the Lease obligations from Bally Holding. Our treatment of guaranty agreements should not be so rigid to preclude parties from drafting toward more suitable arrangements.

Contrary to the trial court's conclusion, the language assented to by the parties provides a clear indication that the Guaranty was "required to be maintained" with the assumption of the Lease. Bally Holding remains liable on the Guaranty, which was a component part of the Lease assumed in the 2008–2009 Bankruptcy. I would reverse the trial court's order and remand for entry of summary judgment in favor of plaintiff on its breach of contract claim against Bally Holding raised in the original complaint and in the first cause of action of the first amended complaint.

ELIZABETH HOLLAND, PLAINTIFF
v.
DONNIE HARRISON, IN HIS OFFICIAL CAPACITY AS WAKE COUNTY SHERIFF, OBI UMESI, IN HIS INDIVIDUAL CAPACITY, TONYA MINGGIA, IN HER INDIVIDUAL CAPACITY, AND THE OHIO CASUALTY INSURANCE COMPANY, DEFENDANTS

No. COA16-889

Filed 1 August 2017

1. Appeal and Error—interlocutory orders and appeals—substantial right—possibility of inconsistent verdicts

Plaintiff county jail nurse's appeal in a wrongful termination case from an interlocutory order dismissing her First Amendment claim was entitled to immediate appellate review. A substantial right was affected where a sufficient overlap existed between the remaining wrongful discharge claim and the First Amendment claim, and there existed a possibility of inconsistent verdicts absent an immediate appeal.

2. Tort Claims Act—42 U.S.C. § 1983—free speech—failure to meet burden to show matter of public concern

The trial court did not err in a wrongful termination case by dismissing plaintiff county jail nurse's free speech claim under 42 U.S.C. § 1983 alleging that she was fired because she voiced objections about performing a medical procedure on a patient. Even viewed in the light most favorable to plaintiff, she failed to meet her burden of proof showing that the speech was a matter of public concern where she spoke to her supervisors about a particular medicine for a specific patient, she never alleged a systematic problem with patient care at the workplace, and she never publicly voiced her concerns outside of the employment setting.

Appeal by plaintiff from order entered 13 May 2016 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 9 February 2017.

Hairston Lane, PA, by M. Brad Hill and James E. Hairston Jr., for plaintiff-appellant.

Office of the Wake County Attorney, by Roger A. Askew and Claire H. Duff, and Office of the Wake County Sheriff, by Paul G. Gessner, for defendants-appellees.

DAVIS, Judge.

This case presents the issue of whether a nurse at a county jail has stated a valid First Amendment claim by alleging that she was fired because she voiced objections within the workplace to performing a medical procedure on a patient. Plaintiff Elizabeth Holland appeals from the trial court's order dismissing her free speech claim pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Because we conclude that Holland's speech did not pertain to a matter of public concern so as to invoke First Amendment protections, we affirm.

Factual and Procedural Background

We have summarized below the allegations in Holland's complaint, which we take as true in reviewing the trial court's Rule 12(b)(6) order. *See Feltman v. City of Wilson*, 238 N.C. App. 246, 247, 767 S.E.2d 615, 617 (2014).

In 2006, Holland began working as a nurse in the Wake County Detention Center. At all relevant times, she was supervised by Nurse Tonya Minggia and Dr. Obi Umesi.

During the week of 6 May 2013, Holland was asked by a Detention Center employee to administer an antibiotic — vancomycin — to a patient through an IV in order to treat the patient's infection. This drug was required to be administered twice daily for a period of six weeks. Based upon her medical experience, Holland believed that vancomycin could not be safely administered through an IV and instead should be delivered with the aid of a pump device. Holland felt that administering the drug through an IV could put the patient's life at risk, potentially expose her to a claim of malpractice, and subject her to the loss of her nursing license.

Holland expressed to Minggia her belief that the Detention Center lacked the proper equipment to safely administer the medicine. In response, Minggia informed Holland that the appropriate equipment to administer the drug would be procured.

As of Friday, 10 May 2013, the pump had not been obtained. Holland reiterated her belief to Minggia that she could not safely administer the drug through an IV, but Minggia nevertheless instructed her to do so. Holland objected that following Minggia's directive would "jeopardize her career and the life of her patient." She also informed Minggia that because of the high patient-to-nurse ratio at the Detention Center, "administering the medication as requested could endanger the health

and safety of the other patients that she was to monitor because she would have to spend the majority of her time administering the medication and could not monitor the other patients to which she was assigned."

Holland contacted the physician's assistant who oversaw the Detention Center's medical facility and relayed her concerns about administering vancomycin through an IV. The physician's assistant told Holland that she had communicated with a nurse outside of the facility who agreed with Holland's position regarding the proper administration of the drug. After Holland's continued refusal to administer vancomycin to the patient through an IV, another nurse at the Detention Center agreed to do so.

Holland was subsequently notified by the on-duty nurse supervisor that she was being removed from her normal assignment in the observation unit of the Detention Center and was instead to report the following Monday for an 11:00 a.m. to 7:00 p.m. shift in the intake unit. Holland objected to this transfer based upon her belief that it was in response to her refusal to administer the vancomycin in an unsafe manner. After receiving an email from Minggia confirming the new assignment, Holland sent an email on 11 May to Minggia, Holland's workers' compensation case manager, and the human resources department stating that she would not report to work in the new position until a medical opinion was provided by her workers' compensation healthcare provider that the new position was consistent with work restrictions previously imposed for Holland after she sustained a work-related injury.

By the end of Sunday, 12 May, Holland had not received any response to her email. She did not report to work the following day but made multiple attempts to contact her case manager and the human resources department of the Sheriff's Office.[1] She eventually reached her case manager, who stated that Holland's 11 May email had been forwarded to the workers' compensation administrator. The case manager agreed with Holland that she should not accept the intake assignment until a medical review was completed.

During a telephone call that afternoon, Minggia informed Holland that she should have reported to work for her new position in the intake unit at 11:00 that morning as directed. When Minggia asked Holland whether she would report to work the next day at 11:00 a.m., Holland responded that she would come to work after a 10:00 a.m. workers' compensation-related

1. The Detention Center is operated by the Wake County Sheriff's Office.

appointment but that she did not know when the appointment would end or whether her restrictions "would preclude her from performing certain duties under the new assignment." At that point, Minggia told Holland she was "no longer an employee of the Sheriff's [Office]" and was being "terminated because she did not show up for work [that morning]."

After her appointment the following day, Holland informed the human resources department that she would, in fact, report to work in the new position, but she was told to stay home and await further communications from the Sheriff's Office. Holland received a letter by hand-delivery later that day stating that her employment was being terminated effective immediately.

On 21 December 2015, Holland filed the present action in Wake County Superior Court against Sheriff Donnie Harrison, in his official capacity; Dr. Umesi, in his individual capacity; Minggia, in her individual capacity; and the Sheriff's Office's insurance carrier, the Ohio Casualty Insurance Company (collectively "Defendants"). In her complaint, Holland asserted (1) state law claims for wrongful discharge in violation of public policy, tortious interference with contract, and violation of her right to due process under the North Carolina Constitution; and (2) federal claims pursuant to 42 U.S.C. § 1983 for violation of her free speech and due process rights under the United States Constitution. In her complaint, Holland alleged that Minggia and Dr. Umesi had intentionally misled the Sheriff regarding the circumstances surrounding her failure to report to work on 13 May 2013 in order to induce him to dismiss Holland. She asserted that, in actuality, the reasons for their recommendation that Holland be dismissed were her objection to administering the vancomycin as well as prior disagreements between her and them about patient care.

On 3 March 2016, Defendants filed a partial motion to dismiss pursuant to Rule 12(b)(6) in which they asserted that Holland had failed to state any valid claims upon which relief could be granted except for her state law wrongful discharge claim. Following a hearing before the Honorable Paul C. Ridgeway on 13 May 2016, the trial court issued an order granting in part and denying in part Defendants' motion. The court dismissed Holland's state and federal constitutional claims but declined to dismiss her claim for tortious interference with contract.[2] Holland filed a timely notice of appeal as to the portion of the trial court's order

2. Because Holland's wrongful discharge claim was not within the scope of Defendants' motion to dismiss, that claim also remains pending.

dismissing her 42 U.S.C. § 1983 claim for violation of her free speech rights under the First Amendment.[3]

Analysis

I. Appellate Jurisdiction

[1] Defendants seek the dismissal of Holland's appeal as interlocutory. Accordingly, we must determine whether we have appellate jurisdiction to hear this appeal. *See Duval v. OM Hospitality, LLC*, 186 N.C. App. 390, 392, 651 S.E.2d 261, 263 (2007) ("[W]hether an appeal is interlocutory presents a jurisdictional issue[.]" (citation and quotation marks 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). Therefore, because the trial court's order decided some, but not all, of Holland's claims, this appeal is interlocutory.

"Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Paradigm Consultants, Ltd. v. Builders Mut. Ins. Co.*, 228 N.C. App. 314, 317, 745 S.E.2d 69, 72 (2013) (citation and quotation marks omitted). The prohibition against interlocutory appeals "prevents fragmentary, premature and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts." *Russell v. State Farm Ins. Co.*, 136 N.C. App. 798, 800, 526 S.E.2d 494, 496 (2000) (citation and brackets omitted).

> However, there are two avenues by which a party may immediately appeal an interlocutory order or judgment. First, if the order or judgment is final as to some but not all of the claims or parties, and the trial court certifies the case for appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), an immediate appeal will lie. Second, an appeal is permitted under N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)(1) if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review.

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3. Holland has not appealed the remaining aspects of the trial court's order.

N.C. Dep't of Transp. v. Page, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995) (internal citations omitted).

The trial court's 13 May 2016 order does not contain a certification under Rule 54(b). Therefore, Holland's appeal is proper only if she can demonstrate a substantial right that would be lost absent an immediate appeal. *See Embler v. Embler*, 143 N.C. App. 162, 166, 545 S.E.2d 259, 262 (2001) ("The burden is on the appellant to establish that a substantial right will be affected unless he is allowed immediate appeal from an interlocutory order." (citation omitted)).

Our caselaw makes clear that a substantial right is affected "where a possibility of inconsistent verdicts exists if the case proceeds to trial." *Heritage Operating, L.P. v. N.C. Propane Exch., LLC*, 219 N.C. App. 623, 627, 727 S.E.2d 311, 314 (2012) (citation and quotation marks omitted).

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

Id. at 627-28, 727 S.E.2d at 314-15 (citation, quotation marks, and brackets omitted); *see also Carcano v. JBSS, LLC*, 200 N.C. App. 162, 168, 684 S.E.2d 41, 47 (2009) ("[S]o long as a claim has been finally determined, delaying the appeal of that final determination will ordinarily affect a substantial right *if* there are overlapping factual issues between the claim determined and any claims which have not yet been determined." (citation and quotation marks omitted)). "Issues are the 'same' if facts relevant to their resolution overlap in such a way as to create a risk that separate litigation of those issues might result in inconsistent verdicts." *Hamilton v. Mortg. Info. Servs., Inc.*, 212 N.C. App. 73, 79, 711 S.E.2d 185, 190 (2011).

In the present case, we are satisfied that a sufficient overlap exists between Holland's surviving claim for wrongful discharge and her First Amendment claim that was dismissed by the trial court such that there exists a possibility of inconsistent verdicts absent immediate appeal of the trial court's order. Specifically, Holland's complaint alleges that she was discharged because she protested to her supervisors that administering vancomycin through an IV would be dangerous to her patient whereas Defendants assert that she was fired for not reporting to work on 13 May 2013. It is clear that the factual issue regarding the cause of Holland's dismissal would arise in both a trial on the wrongful discharge

claim and a trial on the First Amendment claim given that both claims hinge upon the actual reason for the termination of her employment.

Our consideration of this interlocutory appeal is consistent with this Court's prior caselaw. In *Bowling v. Margaret R. Pardee Mem'l Hosp.*, 79 N.C. App. 815, 635 S.E.2d 624 (2006), *appeal dismissed and disc. review denied*, 361 N.C. 425, 648 S.E.2d 206 (2007), the plaintiff asserted claims for violation of the North Carolina Disabilities Act and for wrongful discharge in violation of public policy. At the heart of both claims was the issue of whether the defendant terminated the plaintiff's employment because of poor performance or because of a health issue. At the motion to dismiss stage, the trial court dismissed the North Carolina Disabilities Act claim but allowed the wrongful discharge claim to go forward, prompting the plaintiff to file an interlocutory appeal. *Id.* at 818, 635 S.E.2d at 627. We concluded that the plaintiff's "North Carolina Disabilities Act claim and his claim for wrongful discharge in violation of public policy . . . unquestionably involve the same facts and circumstances, namely, his termination by [the defendant] Hospital. If we refuse his appeal, two trials and possibly inconsistent verdicts could result." *Id.*; *see also Taylor v. Hospice of Henderson Cnty., Inc.*, 194 N.C. App. 179, 182, 668 S.E.2d 923, 925 (2008) (applying *Bowling* in similar circumstances).

Thus, we are satisfied that we possess jurisdiction to consider the merits of Holland's appeal. *See Carcano*, 200 N.C. App. at 168, 684 S.E.2d at 47 ("Because there are overlapping factual issues, inconsistent verdicts could result. We hold, thus, that . . . plaintiffs' appeal is properly before us.").

II. Dismissal of First Amendment Claim

[2] As noted above, Holland's sole argument on appeal is that the trial court erred in granting Defendants' motion to dismiss her free speech claim under 42 U.S.C. § 1983.

> The standard of review of an order granting a Rule 12(b)(6) motion is whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true. On appeal, we review the pleadings *de novo* to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct.

Feltman, 238 N.C. App. at 251, 767 S.E.2d at 619 (citation omitted).

"Dismissal is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Podrebarac v. Horack, Talley, Pharr, & Lowndes, P.A.*, 231 N.C. App. 70, 74, 752 S.E.2d 661, 663 (2013) (citation omitted).

Section 1983 provides a private right of action against anyone who, acting under color of state law, causes the "deprivation of any rights, privileges, or immunities secured by the Constitution . . . ." 42 U.S.C. § 1983. In order to state a § 1983 claim alleging a wrongful discharge or demotion in violation of the First Amendment, a public employee must allege facts showing that (1) "the speech complained of qualified as protected speech or activity"; and (2) "such protected speech or activity was the 'motivating' or 'but for' cause for his discharge or demotion." *McLaughlin v. Bailey*, 240 N.C. App. 159, 172, 771 S.E.2d 570, 580 (2015) (citation and quotation marks omitted), *aff'd per curiam*, 368 N.C. 618, 781 S.E.2d 23 (2016).

In order to establish that the employee engaged in protected speech, she must show that "(i) the speech pertained to a matter of public concern and (ii) the public concern outweighed the governmental interest in efficient operations." *Hawkins v. State*, 117 N.C. App. 615, 625-26, 453 S.E.2d 233, 239 (1995) (citation and quotation marks omitted). The determination of whether speech is protected under the First Amendment is a question of law. *Id.* at 626, 453 S.E.2d at 239.

Defendants contend that even taking Holland's factual allegations as true, she has failed to establish that her speech related to a matter of public concern. A "matter of public concern" is one that "relates to any matter of political, social, or other concern to the community." *Id.* (citation and quotation marks omitted). "The reviewing court must examine the employee's speech in light of the content, form, and context of a given statement, as revealed by the whole record[,] to determine whether it is a matter of public concern." *Howell v. Town of Carolina Beach*, 106 N.C. App. 410, 419, 417 S.E.2d 277, 283 (1992) (citation, quotation marks, and alterations omitted).

> The test is whether the employee was speaking as a citizen about matters of public concern, or as an employee on matters of personal interest. Moreover, complaints about conditions of employment or internal office affairs generally concern an employee's self-interest rather than

> public concern, even though a governmental office may be involved[.]

Evans v. Cowan, 132 N.C. App. 1, 9, 510 S.E.2d 170, 175-76 (1999) (internal citation omitted).

As a general proposition, courts are more likely to conclude that speech involves a matter of public concern when the speech is directed at an audience wider than one's immediate supervisors. *See*, *e.g.*, *Durham v. Jones*, 737 F.3d 291, 300 (4th Cir. 2013) (noting that plaintiff "did not keep the written materials internal, but instead sent them to a broad audience" including public officials and media outlets); *Clairmont v. Sound Mental Health*, 632 F.3d 1091, 1104 (9th Cir. 2011) ("Although not dispositive, a small or limited audience weighs against a claim of protected speech." (citation, quotation marks, and brackets omitted)).

Evans is instructive on this point. In *Evans*, the plaintiff was hired by the University of North Carolina at Chapel Hill's Student Health Services ("SHS") to help run the AfterHours Program ("AfterHours"), which provided health services to students outside of normal business hours. *Evans*, 132 N.C. App. at 2, 510 S.E.2d at 171-72. During several internal task force meetings related to the operation of AfterHours, the plaintiff made numerous suggestions for improvements to the program, including the cost-saving measure of hiring full-time nurse practitioners (rather than contracting with outside physicians) and the development of a comprehensive alcohol policy that would address students' alcohol-related health problems. *Id.* at 2-3, 510 S.E.2d at 172. She also expressed concern over the fact that a particular SHS volunteer consultant "was a non-employee acting in a medical capacity at a state institution." *Id.* at 3, 510 S.E.2d at 172. In addition, she voiced her disapproval of SHS's plan to allow physicians who were part of a fellowship program to supervise nurse practitioners, a policy she felt violated a state regulation governing the supervision of nurse practitioners. *Id.* She was subsequently discharged from her employment with SHS. *Id.* at 4, 510 S.E.2d at 173.

The plaintiff filed a lawsuit in which she alleged that SHS had retaliated against her in violation of her free speech rights, and the claim was dismissed by the trial court. *Id.* at 5, 510 S.E.2d at 173. On appeal, we affirmed the trial court's dismissal of the claim because the plaintiff's statements "related to internal policies and office administration of SHS and did not rise to the level of public concern." *Id.* at 10, 510 S.E.2d at 176. Notably, we observed that "no evidence in the record indicates plaintiff ever voiced her concerns publicly outside the employment setting, which would tend to indicate a public concern." *Id.*

Evans underscores the relevance to this inquiry of the context and form of the speech at issue. The *content* of the communications made by the plaintiff in *Evans* arguably touched upon matters of public concern — *i.e.*, the cost-effectiveness of a healthcare program at a publicly-funded university, the program's ability to help students deal with alcohol problems, and the program's compliance with regulations concerning the oversight of nurses. However, the internal nature of her complaints militated against a conclusion that they involved matters of public concern such that free speech protections would attach.

Conversely, *Lenzer v. Flaherty*, 106 N.C. App. 496, 418 S.E.2d 276, *disc. review denied*, 332 N.C. 345, 421 S.E.2d 348 (1992), provides an example of a case in which we held that a public employee's speech dealt with a matter of public concern where the employee raised the issue of wrongdoing in her workplace to parties outside of her direct employment setting. In that case, the plaintiff — a physician's assistant employed by the State's Alcohol Rehabilitation Center ("ARC") — complained to the State Bureau of Investigation ("SBI") and the State Department of Human Resources ("DHR") that ARC was not adequately investigating instances of suspected sexual abuse of patients by ARC personnel. *Id.* at 501, 418 S.E.2d at 279. After the plaintiff was dismissed from her employment, she filed a lawsuit alleging that her free speech rights had been violated because she was discharged in retaliation for having reported ARC's mishandling of suspected patient abuse to the SBI and the DHR. The trial court granted the defendants' motion for summary judgment and dismissed this claim. *Id.* at 505, 418 S.E.2d at 281.

In reversing the trial court's dismissal of the plaintiff's free speech claim, we rejected the notion that the "plaintiff was speaking out for personal reasons unrelated to a matter of public concern when she questioned the vigor of investigations into possible mistreatment of patients at the ARC." *Id.* at 507, 418 S.E.2d at 283. We noted that "the ARC administration, knowing of an incident of sexual misconduct . . . , sought to keep that information from going beyond the ARC." *Id.* Thus, the fact that the plaintiff raised concerns outside of ARC about its handling of instances of sexual abuse (particularly in the face of ARC's attempt to keep such information from being made public) was relevant to our conclusion that her speech addressed a matter of public concern. *Id.* at 508, 418 S.E.2d at 283.

Warren v. New Hanover County Board of Education, 104 N.C. App. 522, 410 S.E.2d 232 (1991), provides another example of the significance of the context in which the speech at issue is conveyed to

others. In *Warren*, the plaintiff was a public school teacher who also served as the president of the New Hanover County affiliate of the North Carolina Association of Educators ("NCAE"). The plaintiff had historically received "very positive evaluations of his teaching performance" and had twice been selected as "Teacher of the Year." *Id.* at 524, 410 S.E.2d at 233. However, after publicizing the results of an NCAE survey that showed New Hanover County's public school teachers to be dissatisfied with a merit pay pilot program, the plaintiff received unfavorable performance evaluations and was denied a promotion. He sued the New Hanover County Board of Education, alleging that it had denied him the promotion in retaliation for his protected speech. *Id.*

In concluding that the plaintiff's speech involved a matter of public concern, we highlighted the fact that the plaintiff had "addressed the Board about the survey results at a public school board meeting." *Id.* at 526, 410 S.E.2d at 234. Thus, the plaintiff's act of publicly communicating the results of the teacher pay survey to the body tasked with overseeing school policy supported our determination that his speech pertained to a matter of public concern.

Guided by the cases discussed above, we conclude that in the present case the trial court did not err in dismissing Holland's § 1983 claim. Holland voiced within the workplace a disagreement with her supervisors regarding the appropriate method for administering a particular medicine to a specific patient. She has not pled facts alleging a systemic problem with patient care at the Detention Center or asserting that she "ever voiced her concerns publicly outside the employment setting, which would tend to indicate a public concern." *Evans*, 132 N.C. App. at 10, 510 S.E.2d at 176. Rather, the speech at issue here involved an internal dispute as to the proper way for Holland to perform her job duties that were largely focused on the treatment of a single patient.

Nothing in our holding, however, should be construed as diminishing the importance of patient safety in public medical facilities. In appropriate circumstances, a public employee's speech about the mistreatment of such patients could certainly rise to the level of public concern so as to invoke the First Amendment. However, even taking Holland's allegations in the light most favorable to her, we are unable to conclude that her speech under the specific circumstances alleged in her complaint involved a matter of public concern.

Accordingly, Holland has failed to state a free speech claim under 42 U.S.C. § 1983. Therefore, the trial court's dismissal of this claim was proper.

Conclusion

For the reasons stated above, we affirm the trial court's 13 May 2016 order.

AFFIRMED.

Chief Judge McGEE and Judge MURPHY concur.

IN THE MATTER OF C.M.P., C.Q.M.P., J.A.C.

No. COA16-1230

Filed 1 August 2017

1. Termination of Parental Rights—motion for continuance—unexplained absence of parent at hearing—no showing of actual prejudice

The trial court did not abuse its discretion in a termination of parental rights case by denying respondent mother's motion for a continuance based on her unexplained absence at the termination hearing. Respondent failed to preserve the issue of whether the denial of the motion violated her due process right to effective assistance of counsel by failing to raise it at trial. Further, there was no showing of actual prejudice where respondent's counsel, who represented her for three years in this matter, fully participated in the hearing and did not indicate she needed more time to prepare.

2. Termination of Parental Rights—grounds—neglect—domestic violence—unstable housing and employment—improper supervision

The trial court did not err in a termination of parental rights case by concluding grounds existed to terminate respondent mother's parental rights based on neglect under N.C.G.S. § 7B-1111(a)(1) for domestic violence issues, unstable housing and employment, and improper supervision. The trial court's findings supported the conclusion that there was a high probability of the repetition of neglect if the children were returned to respondent's care. Since one ground existed to terminate respondent's parental rights, other grounds did not need to be addressed.

Judge MURPHY concurring in a separate opinion.

IN RE C.M.P.

[254 N.C. App. 647 (2017)]

Appeal by respondent-mother from order entered 7 September 2016 by Judge David H. Strickland in Mecklenburg County District Court. Heard in the Court of Appeals 11 July 2017.

Senior Associate Attorney Keith S. Smith, for petitioner-appellee Mecklenburg County Department of Social Services, Youth and Family Services.

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

J. Thomas Diepenbrock for respondent-appellant mother.

BRYANT, Judge.

Where the trial court did not err in denying respondent's motion for a continuance or in concluding grounds existed to terminate respondent's parental rights, we affirm.

Respondent is the mother of C.M.P. ("Charlene"), C.Q.M.P. ("Charles"), and J.A.C. ("Jackson"),[1] and Mr. P. is the father of Charlene and Charles. Respondent and Mr. P have a history with the Mecklenburg County Department of Social Services, Youth and Family Services ("YFS") dating back to 2011 due to issues of domestic violence and inappropriate discipline. YFS most recently became involved with the family on 13 March 2013, when it received a referral alleging that a domestic violence incident occurred between respondent and Mr. P., wherein respondent's C-section stitches were torn during the incident. Mr. P. was charged with assault on a female. After the incident, respondent and the children briefly stayed with the maternal grandmother before moving into the paternal grandmother's home with Mr. P. and Mr. P.'s seventeen-year-old sister.

On 17 June 2013, YFS received a referral alleging suspected sexual abuse of then three-month-old Charlene. A medical examination revealed that the child's genital and rectal area had been subjected to trauma and that her hymen was not intact, but the source of the injuries could not be determined. At the time of the injury, two male cousins aged thirteen and fourteen years old were visiting at the home and had unsupervised contact with Charlene. However, no one on the paternal side of the family believed the cousins could have been the source of the injuries.

1. Pseudonyms are used to protect the juveniles' privacy and for ease of reading. N.C. R. App. P. 3.1(b) (2017).

Respondent entered into a safety plan in which she agreed to return to the home of the maternal grandmother and also agreed there would be constant "eye/sight" supervision of the children at all times by the maternal grandmother. Because there was also a history of domestic violence between the maternal grandmother and respondent, they also agreed not to engage in any violence in the presence of the children. YFS transferred the case to family intervention on 8 July 2013.

On 15 July 2013, YFS received a referral alleging that a domestic violence incident had occurred between respondent and the maternal grandmother wherein respondent assaulted the maternal grandmother by pushing her hand in the grandmother's face. YFS also received information that respondent threw a rock through the grandmother's storm door shattering the glass. The children were present during both incidents. Respondent was cited for damage to property and violating a domestic violence protective order ("DVPO") the maternal grandmother had taken out against respondent based on a "history of assaultive behavior" beginning in 2008. The maternal grandmother stated that she was overwhelmed by taking care of the children and that she could only provide care through 16 July 2013.

On 17 July 2013, YFS filed a juvenile petition alleging that the children were abused, neglected, and dependent, and took the children into nonsecure custody. The children were placed with a maternal cousin on 31 July 2013 and have remained in that placement for the duration of the case.

A hearing was held on the juvenile petition on 18 September 2013. Respondent stipulated to the allegations in the petition, and the trial court entered an order adjudicating the children neglected and dependent as to respondent.[2] The trial court ordered respondent to comply with her case plan which required her to participate in a parenting course and demonstrate the skills learned, obtain and maintain adequate employment, obtain and maintain safe and stable housing, and complete a domestic violence assessment at NOVA, a domestic violence education and services provider, and follow all recommendations.

Respondent initially engaged in her case plan by completing a parenting class, completing an assessment with NOVA, and obtaining employment. However, on 28 September 2014, respondent and Mr. P. engaged in

2. Mr. P. had not been served at the time of the hearing and the trial court held adjudication as to him in abeyance. Charlene and Charles were adjudicated neglected and dependent as to Mr. P. on 2 December 2013.

a domestic violence incident resulting in their arrests. Respondent lost her job due to her arrest, and she was allowed only supervised visitation with the children.

A permanency planning review hearing was held on 2 December 2014, and the trial court found that respondent was incarcerated due to charges of armed robbery and conspiracy to commit armed robbery. She had been arrested on 29 November 2014 and was still incarcerated at the time of the 2 December 2014 hearing. The court suspended her visitation while she was incarcerated.

Another permanency planning review hearing was held on 12 May 2015, and the trial court found that respondent had not visited with the children since December 2014, despite the fact that suspension of visitation had been lifted upon her release from jail.[3] The trial court also found that respondent was living with the maternal grandmother, and was employed. The court further found that respondent "ha[d] not yet shown that she can parent her children" and "was advised that she [would] need to have perfect compliance during [the] upcoming review period." Respondent was awarded two hours of supervised visitation a week but was ordered to complete two clean drug tests before she could exercise her visitation. The trial court continued the permanent plan (first imposed on 30 December 2013) as reunification with respondent.

On 15 April 2015, respondent was arrested again for injury to real property and injury to personal property. On 15 July 2015, respondent tested positive for cocaine. A subsequent drug screen on 22 July 2015 came back positive for cocaine and alcohol. Respondent denied using cocaine. Respondent also had an unauthorized, unsupervised four-day visit with the children in July 2015. She reentered substance abuse treatment, but had other subsequent drug screens which were positive for cocaine on 10 and 17 September 2015. She subsequently completed the substance abuse program in March 2016.

In March 2016, respondent and Mr. P. engaged in another domestic violence incident, after which they both were charged with assault and respondent obtained a DVPO against Mr. P. On 24 June 2016, YFS filed a petition to terminate respondent's parental rights on the grounds of neglect, failure to make reasonable progress, failure to pay reasonable

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3. The record indicates that respondent was able to have one supervised visit with the children on Christmas Day at the maternal grandmother's home upon her release from jail, but as of the week before the hearing on 12 May 2015, the children had no other visits with respondent after December 2014.

cost of care, and dependency. *See* N.C. Gen. Stat. § 7B-1111(a)(1), (2), (3), (6) (2015).

After a seventh permanency planning review hearing held 22 July 2016, the trial court found that respondent had been discharged from NOVA due to excessive absences, had another new job, had a pending hit and run charge, and had been arrested for assault after the March 2016 domestic violence incident with Mr. P.

The hearing on the petition to terminate respondent's parental rights was held on 25 August 2016. At the start of the hearing, respondent's counsel moved to continue because respondent was not present and counsel had "expected her to be [t]here." The trial court denied the motion and went forward with the hearing. A social worker testified that respondent had not made sufficient progress on her case plan to show she would be able to successfully and appropriately parent her children in that she did not have stable housing, had not completed the NOVA domestic violence program, and her employment had been inconsistent over time. The social worker also testified that respondent was inconsistent with her visits with the children and had not seen them in the month prior to the hearing despite being allowed to have weekly visitation. The social worker further testified respondent had a history of making progress on her case plan but then regressing. The trial court entered an order on 7 September 2016 terminating respondent's parental rights to all three children on the grounds of neglect, failure to make reasonable progress, and dependency. Respondent appeals.

On appeal, respondent contends the trial court erred by (I) summarily denying respondent's motion to continue, and (II) concluding grounds existed for terminating respondent's parental rights.

I

[1] Respondent first argues the trial court erred in summarily denying her motion to continue based on her unexplained absence at the termination hearing. Respondent contends the court's decision deprived her of her right to effective assistance of counsel. We disagree.

The standard for granting a motion to continue is set out in N.C. Gen. Stat. § 7B-803, which provides in relevant part as follows:

> The court may, for good cause, continue the hearing for as long as is reasonably required to receive additional evidence, reports, or assessments that the court has requested,

> or other information needed in the best interests of the juvenile and to allow for a reasonable time for the parties to conduct expeditious discovery. Otherwise, continuances shall be granted only in extraordinary circumstances when necessary for the proper administration of justice or in the best interests of the juvenile.

N.C. Gen. Stat. § 7B-803 (2015).

"A trial court's decision regarding a motion to continue is discretionary and will not be disturbed on appeal absent a showing of abuse of discretion. Continuances are generally disfavored, and the burden of demonstrating sufficient grounds for continuation is placed upon the party seeking the continuation." *In re J.B.*, 172 N.C. App. 1, 10, 616 S.E.2d 264, 270 (2005) (citations omitted). "However, if 'a motion to continue is based on a constitutional right, then the motion presents a question of law which is fully reviewable on appeal.' " *In re D.Q.W.*, 167 N.C. App. 38, 40–41, 604 S.E.2d 675, 677 (2004) (quoting *State v. Jones*, 342 N.C. 523, 530–31, 467 S.E.2d 12, 17 (1996)).

Respondent argues that the trial court's denial of her motion to continue implicates her due process right to effective assistance of counsel, including the right of a client and counsel to have adequate time to prepare a defense, and thus the issue presents a question of law which is fully reviewable on appeal. Respondent, however, presents this constitutional argument for the first time on appeal.

To determine whether a failure to grant a continuance implicates constitutional rights, the reasons presented for the requested continuance are of particular importance. *Id.* at 42, 604 S.E.2d at 677. In the instant case, respondent's counsel raised only one ground to support the motion to continue at the hearing: that respondent was absent from the hearing. As previously noted, respondent raises for the first time on appeal the issues of effective assistance of counsel and adequate time to prepare a defense. "In order to preserve a question 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). Therefore, respondent failed to preserve the issue of whether the denial of the motion violated her constitutional right to effective assistance of counsel.

Further, this Court has held that a parent's due process rights are not violated when parental rights are terminated at a hearing at which the parent is not present. *See In re Murphy*, 105 N.C. App. 651, 658, 414

S.E.2d 396, 400 (1992). Thus, respondent's motion to continue was not based on a constitutional right, and we review the trial court's denial of the motion for abuse of discretion. *See In re D.W.*, 202 N.C. App. 624, 627, 693 S.E.2d 357, 359 (2010) (reviewing the denial of the absent respondent mother's motion to continue based on her right to be present at the hearing for abuse of discretion).

After denying respondent's motion to continue, the trial court conducted a full hearing on the petition, heard testimony from several witnesses, and respondent's counsel was given full opportunity to cross-examine each witness. Indeed, respondent's counsel fully participated in the hearing by frequently objecting to testimony she deemed inadmissible, cross-examining witnesses, and presenting a closing argument on respondent's behalf. A court reporter also prepared a stenographic transcript of the hearing.

"When . . . a parent is absent from a termination proceeding and the trial court preserves the adversarial nature of the proceeding by allowing the parent's counsel to cross examine witnesses, with the questions and answers being recorded, the parent must demonstrate some actual prejudice in order to prevail on appeal." *Murphy*, 105 N.C. App. at 658, 414 S.E.2d at 400 (citing *In re Barkley*, 61 N.C. App. 267, 270, 300 S.E.2d 713, 715–16 (1983)). Respondent argues she was prejudiced by the denial of the motion because her presence at the hearing was essential for her attorney to present an adequate defense, and that she was not able to testify regarding her case plan progress and rebut evidence presented by YFS.

Here, respondent was served with a summons and a copy of the petition on 4 July 2016 and does not argue that she lacked notice of the hearing. Respondent's attorney informed the court that she had spoken with respondent by telephone a few days prior to the hearing and that counsel expected her to be in court that day. Counsel had been representing respondent in this matter for three years, throughout the entirety of the case starting in 2013, and at no time did she make the argument that she needed additional time to prepare for the hearing. Thus, "[w]e see no possibility that respondent was unfairly surprised or that her ability to contest the petition to terminate was prejudiced." *In re Mitchell*, 148 N.C. App. 483, 487, 559 S.E.2d 237, 240 (citations omitted), *rev'd on other grounds*, 356 N.C. 288, 570 S.E.2d 212 (2002). Further, the record does not disclose any attempt by respondent to contact the court or her counsel to inform them of any issue preventing her attendance at the hearing, and she has not provided any reason for her absence. "Courts cannot permit parties to disregard the prompt administration of judicial

matters. To hold otherwise would let parties determine for themselves when they wish to resolve judicial matters." *Id.* at 488, 559 S.E.2d at 241. Therefore, we hold the trial court did not abuse its discretion in denying respondent's motion for a continuance.

II

[2] Respondent next argues the trial court erred in concluding that grounds existed to terminate her parental rights. Specifically, respondent contends the trial court erred when it concluded respondent neglected the juveniles, willfully left the juveniles in a placement outside the home, and is incapable of proper care and supervision of the juveniles. We disagree.

"The standard of review in termination of parental rights cases is whether the findings of fact are supported by clear, cogent and convincing evidence and whether these findings, in turn, support the conclusions of law." *In re Shepard*, 162 N.C. App. 215, 221–22, 591 S.E.2d 1, 6 (2004) (quoting *In re Clark*, 72 N.C. App. 118, 124, 323 S.E.2d 754, 758 (1984)). "If the trial court's findings of fact 'are supported by ample, competent evidence, they are binding on appeal, even though there may be evidence to the contrary.' " *In re S.C.R.*, 198 N.C. App. 525, 531, 679 S.E.2d 905, 909 (2009) (quoting *In re Williamson*, 91 N.C. App. 668, 674, 373 S.E.2d 317, 320 (1988)). Unchallenged findings of fact "are conclusive on appeal and binding on this Court." *Id.* at 532, 679 S.E.2d at 909 (citation omitted). We review the trial court's conclusions of law *de novo*. *In re S.N.*, 194 N.C. App. 142, 146, 669 S.E.2d 55, 59 (2008).

Pursuant to N.C. Gen Stat. § 7B-1111(a)(1), "[t]he trial court may terminate the parental rights to a child upon a finding that the parent has neglected the child." *In re Humphrey*, 156 N.C. App. 533, 540, 577 S.E.2d 421, 427 (2003) (citing N.C.G.S. § 7B-1111(a)(1)). 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 lives in an environment injurious to the juvenile's welfare[.]" N.C. Gen. Stat. § 7B-101(15) (2015).

"A finding of neglect sufficient to terminate parental rights must be based on evidence showing neglect at the time of the termination proceeding." *In re Young*, 346 N.C. 244, 248, 485 S.E.2d 612, 615 (1997) (citation omitted). However, when, as here, the children have been removed from their parent's custody such that it would be impossible to show that the children are currently being neglected by their parent, "a prior adjudication of neglect may be admitted and considered by the trial court in ruling upon a later petition to terminate parental rights on the

ground of neglect." *In re Ballard*, 311 N.C. 708, 713–14, 319 S.E.2d 227, 231 (1984). If a prior adjudication of neglect is considered, "[t]he trial court must also consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect." *Id.* at 715, 319 S.E.2d at 232 (citation omitted). Thus, where

> there is no evidence of neglect at the time of the termination proceeding . . . parental rights may nonetheless be terminated if there is a showing of a past adjudication of neglect and the trial court finds by clear and convincing evidence a probability of repetition of neglect if the juvenile were returned to [his or] her parents.

In re Reyes, 136 N.C. App. 812, 815, 526 S.E.2d 499, 501 (2000) (citing *Ballard*, 311 N.C. at 716, 319 S.E.2d at 232).

> That a parent provides love and affection to a child does not prevent a finding of neglect. Neglect exists where the parent has failed in the past to meet the child's physical and economic needs and it appears that the parent will not, or cannot, correct those inadequate conditions within a reasonable time.

In re J.H.K., 215 N.C. App. 364, 369, 715 S.E.2d 563, 567 (2011) (citations omitted). A parent's failure to make progress in completing a case plan is indicative of a likelihood of future neglect. *See In re D.M.W.*, 173 N.C. App. 679, 688–89, 619 S.E.2d 910, 917 (2005) (Hunter, J., dissenting) ("[R]espondent needed to successfully treat her substance abuse and domestic violence issues, demonstrate appropriate parenting skills, and maintain a stable, appropriate home. Respondent provided little evidence that she has achieved any of these objectives."), *rev'd for reasons stated in dissenting opinion*, 360 N.C. 583, 635 S.E.2d 50 (2006).

Here, the trial court made the following relevant findings of fact.

> 6. The issues which caused DSS/YFS to remove these three juveniles included, among other things, [respondent's] and [Mr. P.'s] domestic violence history; unstable housing and employment as well as the parents' inappropriate supervision of the juveniles. The family's CPS[4] history was also significant. Specifically, there were three prior referrals with this family. First, on January 18, 2011, it was alleged that while [respondent] was living with the

4. *See infra* note 5.

maternal grandmother, some of the children appeared to have unexplained bruising. Second, on May 9, 2012, it was alleged that [respondent] and children had unstable housing, there was domestic violence between [respondent] and [Mr. P.], and the parenting/supervision of the children was inappropriate. Third, on March 13, 2013, there was additional domestic violence between [respondent] and [Mr. P.] where [respondent] was holding [Charles] at the time who was also reportedly injured.

7. The Court conducted an adjudicatory hearing on September 18, 2013, but the adjudication for [Mr. P.] was held in abeyance until December 2, 2013 because he had not been served with the underlying juvenile petition and summons as of the September hearing. The juveniles were all eventually adjudicated neglected and dependent. Respondent mother was present at both the September and December hearings. [Mr. P.] was present during the December hearing only.

. . . .

9. As part of her case plan, the respondent mother was required to complete parenting education, obtain and maintain safe and stable housing and employment, and complete domestic violence education (through NOVA). The expectation with the completion of the classes was that the lessons would be internalized such that there would be a behavioral change, and that the completion of classes was not just a "checklist."

. . . .

12. There was a domestic violence incident on September 28, 2014 which resulted in both respondent mother and [Mr. P.] being arrested.

13. As of the first Permanency Planning Review (PPR) Hearing on December 2, 2014, [respondent] was incarcerated due to charges of armed robbery and conspiracy to commit armed robbery. As of this hearing, [respondent] was working at Time Warner Cable arena (arena), living with the maternal grandmother and, as noted above, had completed her parenting classes. . . .

14. As of the second PPR Hearing on March 24, 2015, [respondent] was attending NOVA classes and was employed but no longer at the arena. [Respondent] had identified a possible residence, but it needed some repair work before she or the juveniles could live there. [Respondent] was also addressing her substance abuse problems with Anuvia and with FIRST Level 2 drug court. . . .

15. As of the third PPR Hearing on May 12, 2015, [respondent] was working at a new job (at Saddle Creek Cleaning), she was looking for new housing, she was inconsistently attending NOVA and weekly therapy, and had been unsuccessfully discharged from Anuvia. The Court noted during this hearing that [respondent] has not demonstrated an ability to parent her children and would need to show perfect compliance during the upcoming review period. . . .

16. As of the fourth PPR Hearing on August 25, 2015, [respondent] had provided multiple positive drug screens and had started a new drug treatment program (SACOT—substance abuse comprehensive outpatient treatment), she had a new job at a hotel and at Bank of America stadium, she had still not completed NOVA and had a four-day unauthorized, unsupervised visit with the juveniles. . . .

17. As of the seventh PPR Hearing on July 22, 2016, [respondent] had been clean and sober for several months (including the completion of an in-patient substance abuse program in early 2016 and the submission of multiple clean drug screens), she had a new job at Mercy Hospital, but had been discharged from NOVA due to excessive absences. She has never completed a domestic violence program. [Respondent] was struggling to pay the NOVA fees, but [she] had been employed for some time and was living with maternal grandmother. [Respondent] also has a pending Hit and Run charge and has been arrested twice recently for assault. The alleged victim is [Mr. P.] [Mr. P.] was arrested in June 2016 for assault as well. The respondent mother is the alleged victim of his assault charge. . . .

. . . .

22. The Court's frustration with [respondent] is that she clearly loves her children. The children also love her.

> However, [respondent] is inconsistent with her attendance at visitation. Additionally, because of her lack of case plan progress, she has never been able to put herself in a position to consistently have unsupervised visitation. Indeed, [respondent] (three years into this case) still only has two hours of weekly supervised visitation. When visits do occur between [respondent] and the juveniles, they generally go well—she brings snacks, games and other activities and sometimes clothing. Regarding her attendance at visitation, between Christmas 2014 and mid-March 2015, [respondent] did not visit with the children. Moreover, earlier in 2016, [respondent] attended five consecutive visits all of which went well, had visits on June 2 and 23, 2016 and one visit in July, but between that July 2016 visit and this hearing [on 25 August 2016], she missed four consecutive visits. Additionally, [respondent's] housing remains unstable. She was ineligible for the Family Unification Program (a government-supported housing assistance program) because of her criminal background. While [respondent] has consistently had employment throughout the history of this case, she has failed to maintain employment at one location for an extended period of time. She repeatedly loses her job and has to obtain new employment. [Respondent's] absence from this TPR hearing, despite actual notice, is also noteworthy. *It is apt to say that she will take one step forward followed by two steps back.* [Respondent] has still not demonstrated an ability to care for her children due to issues of domestic violence, housing, and stability.

(Emphasis added).

Respondent challenges Findings of Fact Nos. 6 and 22 as not being supported by clear and convincing evidence. First, respondent challenges the portion of Finding of Fact No. 6 which states that "[t]he issues which caused DSS/YFS to remove these three juveniles included, among other things, [respondent's] and [Mr. P.'s] domestic violence history; unstable housing and employment as well as the parents' inappropriate supervision of the juveniles." Respondent contends that this finding is "misleading" because although there had been domestic violence incidents between respondent and Mr. P., it was other events occurring after that time which led to YFS filing the petition, including suspected sexual abuse of Charlene, incidents of domestic violence between respondent

and her mother, and the maternal grandmother's inability to care for the children after 16 July 2013. Respondent contends that neither YFS's petition, nor the adjudication portion of the adjudication and disposition order, identified housing or employment as reasons leading to the removal of the children from their parents' care.

Contrary to respondent's assertion, domestic violence between respondent and Mr. P. was a factor for YFS becoming involved in the case and for the removal of the children from respondent's care. The juvenile petition included an allegation that YFS received a referral alleging domestic violence between respondent and Mr. P., that respondent was treated at the hospital, and that Mr. P. was charged with assault on a female. The petition also included respondent's history with Child Protective Services ("CPS")[5] due to issues of inappropriate discipline and domestic violence with Mr. P. Respondent stipulated to these findings in the initial adjudication order.

Additionally, the trial court specifically found in the adjudication and disposition order that the "problems which led to the adjudication and must be resolved to achieve reunification and/or otherwise conclude this case . . . include but are not necessarily limited to housing and employment stability." Finally, at the hearing, the social worker testified regarding respondent's CPS history and that the issues that needed to be addressed were domestic violence and unstable housing and employment. This is clear and convincing evidence to support Finding of Fact No. 6.

Respondent also challenges the portion of Finding of Fact No. 22 which states that her housing remains unstable. Respondent contends that she is living with the maternal grandmother and there are no findings that this arrangement was unstable. However, in a prior YFS report, incorporated by reference into the 30 December 2013 review order, YFS stated that respondent "does not have stable housing and is residing with her mother." Respondent was also not allowed to have unsupervised visits at the maternal grandmother's home due to their history of domestic violence. At the termination hearing, the social worker testified that respondent had not secured her own housing throughout the case and continued to reside with the maternal grandmother. Indeed, the social worker testified that respondent "doesn't have stable housing." This is clear and convincing evidence that respondent had not obtained stable housing and supports Finding of Fact No. 22.

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5. CPS is a division of the Mecklenburg County Department of Social Services ("DSS") separate from YFS.

Finally, respondent challenges the portion of the trial court's Conclusion of Law No. 6 that "[t]here is a high probability of the repetition of neglect and all respondent parents have acted inconsistently with their protected constitutional rights." Respondent contends this conclusion is inconsistent with the trial court's findings throughout the underlying case, and it is not supported by the findings in the termination of parental rights order.

The trial court's findings support the conclusion that there is a high probability of the repetition of neglect if the children are returned to respondent's care. We first note that the trial court found in Finding of Fact No. 24 that "[d]ue to . . . [respondent's] ongoing struggles . . . all three juveniles remain in foster care and there is a high probability of the repetition of neglect." Respondent does not specifically challenge this finding and it is therefore binding on appeal. *See S.C.R.*, 198 N.C. App. at 531, 679 S.E.2d at 909.

The children were removed from the parents' care due to issues of domestic violence, unstable housing and employment, and improper supervision. During the three years the children have been in custody, respondent never addressed the domestic violence issues by completing an assessment at NOVA. Indeed, shortly before YFS filed the petition to terminate her parental rights, respondent was involved in another domestic violence incident with Mr. P. and was arrested on assault charges related to that incident.

Although respondent was employed during a majority of the time the children were in custody, her employment was unstable as she failed to maintain employment at any one job for an extended period of time. The findings show that respondent had at least six different jobs during the three year period, and had a history of losing her job and obtaining new employment. Respondent also continued to live with her mother, the maternal grandmother, and never obtained independent housing. Thus, the trial court's findings show that respondent had not addressed the issues which led to the children being adjudicated neglected, and those findings support the court's conclusion that there is a high probability of repetition of neglect if the children are returned to respondent's care.

Respondent also challenges the portion of the trial court's Conclusion of Law No. 6 stating that the parents acted inconsistently with their constitutionally protected rights. However, this conclusion is not necessary to terminate parental rights based on neglect. *See* N.C.G.S. § 7B-1111(a)(1); N.C.G.S. § 7B-101(15). Having determined that the trial court's termination of respondent's parental rights based on neglect is fully supported by the record, we need not review additional grounds for termination.

See Humphrey, 156 N.C. App. at 540, 577 S.E.2d at 426 ("A finding of any one of the enumerated grounds for termination of parental rights under N.C.G.S. 7B-1111 is sufficient to support a termination." (citation omitted)). Accordingly, the order of the trial court is

AFFIRMED.

Judges HUNTER, JR. concurs.

Judge MURPHY concurs in a separate opinion.

MURPHY, Judge, concurring.

The Majority found no error in the trial court's conclusion that it had a ground to terminate Respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(1) (2015). I concur. I write separately to emphasize that I concur *only* because Finding of Fact 24 was unchallenged by Respondent and, thus, is binding on our Court. *See In re S.C.R.*, 198 N.C. App. 525, 532, 679 S.E.2d 905, 909 (2009) (explaining that unchallenged findings of fact are binding on appeal).

IN RE FORECLOSURE OF REAL PROPERTY UNDER DEED OF TRUST FROM MELVIN R. CLAYTON AND JACKIE B. CLAYTON, IN THE ORIGINAL AMOUNT OF $165,000.00 AND DATED JUNE 13, 2008 AND RECORDED ON JUNE 18, 2008 IN BOOK 2083 AT PAGE 506, HENDERSON COUNTY REGISTRY
TRUSTEE SERVICES OF CAROLINA, LLC, SUBSTITUTE TRUSTEE

No. COA16-960

Filed 1 August 2017

1. Mortgages and Deeds of Trust—promissory note—reverse mortgage—power-of-sale foreclosure proceedings—relaxed evidentiary rules

The trial court did not err by authorizing petitioner bank to foreclose under a power-of-sale provision contained within a deed of trust even though the bank never formally proffered a deed of trust and note into evidence. The relaxed evidentiary rules for power-of-sale foreclosure proceedings permitted the trial court to accept the bank's binder of documents, which included the deed of trust and note, as competent evidence to consider whether the bank satisfied its burden of proof pursuant to N.C.G.S. § 45-21.16.

2. Mortgages and Deeds of Trust—deed of trust—nonjudicial foreclosure power of sale—surviving borrower—acceleration provision—reverse mortgage

The trial court did not err by authorizing a nonjudicial foreclosure under power of sale even though respondent widower spouse alleged that petitioner bank failed to prove it had a right to foreclose under a deed of trust as required by N.C.G.S. § 45-21.16(d)(iii). Respondent was not a "surviving borrower" as contemplated by the acceleration provision in a reverse mortgage agreement despite signing the deed of trust as a borrower. The "borrower" was the obligor of the note and loan agreement, which decedent spouse signed alone, and respondent was also statutorily ineligible to qualify as a reverse-mortgage borrower based on her age.

Appeal by respondent from order entered 17 March 2016 by Judge William H. Coward in Henderson County Superior Court. Heard in the Court of Appeals 5 April 2017.

Womble Carlyle Sandridge & Rice, LLP, by B. Chad Ewing, for petitioner-appellee.

Pisgah Legal Services, by William J. Whalen; and Adams, Hendon, Carson, Crow & Saenger, P.A., by Matthew S. Roberson, for respondent-appellant.

ELMORE, Judge.

Ms. Jackie B. Clayton (respondent), a widowed spouse of a homeowner who entered into a reverse-mortgage agreement with Wells Fargo (petitioner), appeals an order authorizing Wells Fargo to foreclose under a power-of-sale provision contained within the deed of trust on the property that secured her late husband's promissory note. The deed of trust and the note contained provisions empowering Wells Fargo to accelerate the maturity of the note's debt upon a borrower's death, provided the property did not remain the principal residence of a "surviving borrower," and to exercise its contractual foreclosure right in the event of default in payment. Although respondent was not listed as a borrower to the promissory note her husband executed, she and her husband both signed the deed of trust securing the note as a "borrower."

After respondent's husband's death, Wells Fargo accelerated the maturity of the note, and then sought to foreclose on the property due to default in payment by initiating the instant nonjudicial foreclosure

proceeding. The clerk of superior court dismissed the case on the basis that Wells Fargo had no right to foreclose because respondent signed as a borrower to the deed of trust, and the property remained her principal residence. Wells Fargo appealed to the superior court, which concluded that respondent's husband "was the only borrower for this loan per the terms of the Note and Deed of Trust" and thus entered an order authorizing foreclosure. Respondent appealed this order.

On appeal, respondent argues the superior court erred by authorizing foreclosure because (1) Wells Fargo never formally proffered any evidence at the hearing from which its order arose, thereby rendering the order void for want of competent evidence; and (2) Wells Fargo had no right under the deed of trust to accelerate the maturity of the note, and thus no right to foreclose due to any resulting default, since respondent signed the deed of trust as a borrower, and the property remained her principal residence.

Because evidentiary rules are relaxed in nonjudicial power-of-sale foreclosure proceedings, we hold Wells Fargo's binder of relevant documents it supplied during the hearing, in conjunction with the parties' stipulations, provided sufficient competent evidence to support the superior court's foreclosure order. Additionally, although respondent signed the deed of trust as a borrower, a proper interpretation of its terms and her husband's simultaneously executed note and loan agreement, in conjunction with respondent's statutory ineligibility to qualify as a reverse-mortgage borrower, excludes respondent as a "surviving borrower" as contemplated by the deed of trust's acceleration provision. We thus hold the superior court properly authorized the foreclosure sale of the property and affirm its order.

I. Background

On 13 June 2008, respondent's husband, Melvin Clayton, executed a home equity conversion note (Note), commonly known as a reverse mortgage, with Wells Fargo in the principal amount of $110,000.00, and up to a maximum amount of $165,000.00. That same day, to secure Melvin's obligation to Wells Fargo under the Note, Melvin and respondent executed an adjustable rate home equity conversion deed of trust (Deed of Trust), which was recorded with the Henderson County Register of Deeds on 18 June 2008. The Note and Deed of Trust contained acceleration provisions empowering Wells Fargo to demand immediate payment of the debt under the Note when "[a] Borrower dies and the Property is not the principal residence of at least one surviving Borrower." Although respondent was not old enough to qualify

as a reverse-mortgage borrower and was thus not a party to the Note, respondent signed the Deed of Trust as a borrower. After Mr. Clayton's death on 6 December 2013, Wells Fargo accelerated the maturity of the debt, and respondent continued to live on the property.

On 30 April 2014, Trustee Services of Carolina, LLC, acting as substitute trustee under the Deed of Trust, initiated this nonjudicial foreclosure proceeding pursuant to N.C. Gen. Stat. § 45-21.16(d) based on the power-of-sale provision in the Deed of Trust due to failure to make payments under the Note. After a 9 June 2015 hearing before the Clerk of Henderson County Superior Court, the clerk dismissed the power-of-sale foreclosure proceeding, concluding that Wells Fargo failed to prove it had a right to foreclose under the terms of the Deed of Trust because respondent signed the instrument as a borrower and the property remained her principle residence, thereby prohibiting Wells Fargo from accelerating the maturity of the Note. Wells Fargo appealed to superior court. After a 13 July 2015 hearing, the superior court entered an order on 17 March 2016 authorizing the foreclosure sale. The superior court concluded that Melvin was the sole borrower under the Note and the Deed of Trust, thereby permitting Wells Fargo to accelerate the debt, and that the power-of-sale provision of the Deed of Trust gave Wells Fargo the right to foreclose on the property upon default of payment on the Note. Respondent appeals.

II. Analysis

On appeal, respondent contends the superior court erred by authorizing the nonjudicial foreclosure under power of sale because (1) Wells Fargo never presented evidence at the *de novo* hearing before the superior court, thereby rendering the order void for want of competent evidence; and (2) Wells Fargo had no right to foreclose under the Deed of Trust because its terms prohibited the acceleration of the maturity of the Note so long as the property remained respondent's principal residence. We disagree.

A. Standard of Review

> When an appellate court reviews the decision of a trial court sitting without a jury, findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain a finding to the contrary. Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal.

In re Bass, 366 N.C. 464, 467, 738 S.E.2d 173, 175 (2013) (citations and quotation marks omitted).

B. Sufficiency of Evidence

[1] As an initial matter, we reject respondent's contention that the superior court's order should be reversed because Wells Fargo never formally proffered the Deed of Trust and the Note or any other relevant documents into evidence at the hearing.

N.C. Gen. Stat. § 45-21.16(d) (2015) requires that before a clerk of superior court may authorize a nonjudicial power-of-sale foreclosure, the creditor must establish the following six findings:

> (i) a valid debt, (ii) default, (iii) the right to foreclose, (iv) notice, and (v) "home loan" classification and applicable pre-foreclosure notice, and (vi) that the sale is not barred by the debtor's military service.

In re Lucks, ___ N.C. ___, ___, 794 S.E.2d 501, 505 (2016) (interpreting N.C. Gen. Stat. § 45-21.16(d)). "If the clerk's order is appealed to superior court, that court's *de novo* hearing is limited to making a determination on the same issues as the clerk of court." *In re David A. Simpson, P.C.*, 211 N.C. App. 483, 487, 711 S.E.2d 165, 169 (2011).

Because "[n]on-judicial foreclosure by power of sale arises under contract and is not a judicial proceeding," *In re Lucks*, ___ N.C. at ___, 794 S.E.2d at 504 (citing *In re Foreclosure of Michael Weinman Assocs. Gen. P'ship*, 333 N.C. 221, 227, 424 S.E.2d 385, 388 (1993)), "the evidentiary requirements under non-judicial foreclosure proceedings are relaxed," *id.* at ___, 794 S.E.2d at 507. Significantly here, "[t]he evidentiary rules are the same when the trial court conducts a de novo hearing on an appeal from the clerk's decision." *Id.* at ___, 794 S.E.2d at 505. In the context of a superior court's *de novo* hearing on nonjudicial foreclosure under power of sale, " '[t]he competency, admissibility, and sufficiency of the evidence is a matter for the [trial] court to determine.' " *Id.* at ___, 794 S.E.2d at 506 (quoting *Queen City Coach Co. v. Lee*, 218 N.C. 320, 323, 11 S.E.2d 341, 343 (1940)).

Here, the transcript of the superior court hearing reveals that Wells Fargo gave the judge a binder of the documents it provided to the clerk at the prior hearing, which contained, *inter alia*, the Note and Deed of Trust, and the parties referred to these documents throughout the proceeding. Because the evidentiary rules are relaxed in power-of-sale foreclosure proceedings, the superior court was permitted to accept this binder of documents as competent evidence to consider whether Wells

Fargo satisfied its burden of proving the six statutorily required findings, despite Wells Fargo never formally introducing or admitting these documents into evidence.

Additionally, the transcript reveals that the parties stipulated to the existence of five of the six statutorily required findings: a debt that Wells Fargo held, a default, and notice, *see* N.C. Gen. Stat. § 45-21.16(d)(i)–(iii), and that two of the three remaining subsections were inapplicable because this was a reverse mortgage and neither party served in the military, *see id.* § 45-21.16(d)(v)–(vi). "[S]tipulations are judicial admissions and are therefore binding in every sense, . . . relieving the other party of the necessity of producing evidence to establish an admitted fact." *Thomas v. Poole*, 54 N.C. App. 239, 241, 282 S.E.2d 515, 517 (1981). The superior court thus had authority to find the existence of those five stipulated criteria based upon the parties' stipulations alone. *See*, *e.g.*, *In re Burgess*, 47 N.C. App. 599, 603–04, 267 S.E.2d 915, 918 ("The parties' stipulations that Gastonia is the owner and holder of a duly executed note and deed of trust and that there was some amount outstanding on that debt amply supports the court's finding under G.S. 45-21.16(d)(i)."), *appeal dismissed*, 301 N.C. 90 (1980). Indeed, as respondent concedes in her brief, "the only issue in contention between the parties [was] whether . . . Wells Fargo was entitled to foreclose under the terms of the . . . Deed of Trust, as required under N.C. Gen. Stat. § 45-21.16(d)(iii)."

Accordingly, based on the binder of relevant documents and the parties' stipulations, the court was supplied evidence from which it could determine whether Wells Fargo proved the existence of the six statutorily required criteria before authorizing the nonjudicial power-of-sale foreclosure. We thus reject respondent's challenge.

C. Right to Foreclose under Deed of Trust

[2] Respondent's main contention is that the superior court erred by authorizing the nonjudicial foreclosure under power of sale because Wells Fargo failed to prove it had a right to foreclose under the Deed of Trust as required by N.C. Gen. Stat. § 45-21.16(d)(iii) (requiring proof of a right to foreclose under security instrument). We disagree.

"The right to foreclose exists 'if there is competent evidence that the terms of the deed of trust permit the exercise of the power of sale under the circumstances of the particular case.' " *In re Michael Weinman Assocs. Gen. P'ship*, 103 N.C. App. 756, 759, 407 S.E.2d 288, 290 (1991) (quoting *In re Burgess*, 47 N.C. App. at 603, 267 S.E.2d at 918), *aff'd*, 333 N.C. 221, 424 S.E.2d 385 (1993). Here, the Deed of Trust contained the following power-of-sale foreclosure provision:

> Foreclosure Procedure. If Lender requires immediate payment in full under Paragraph 9, Lender may invoke the power of sale and any other remedies permitted by applicable law.

Paragraph 9 contains the challenged acceleration provision and empowered Wells Fargo to accelerate the maturity of the Note and demand payment in full if "[a] Borrower dies and the Property is not the principal residence of at least one surviving Borrower."

Based on this acceleration provision, respondent contends that although she was not a borrower to the Note, because she signed the Deed of Trust as a borrower, she is a "surviving [b]orrower." Thus, Wells Fargo was barred from accelerating the debt and, consequently, foreclosing on the property so long as it remained her principal residence. Wells Fargo concedes that both Melvin and respondent signed the Deed of Trust as a borrower but asserts that other language contained within the Deed of Trust, as well as the Note and loan agreement simultaneously executed by Melvin alone, in conjunction with respondent's statutory ineligibility to be a reverse-mortgage borrower, makes clear that respondent, a non-borrower to the reverse mortgage, was not intended to be a "surviving [b]orrower" as contemplated by the acceleration provision. We agree.

Because a power of sale is a contractual arrangement, we interpret power-of-sale provisions of a deed of trust under ordinary rules of contract interpretation. *In re Sutton Investments, Inc.*, 46 N.C. App. 654, 659, 266 S.E.2d 686, 688–89, *disc. review denied*, *appeal dismissed*, 301 N.C. 90 (1980). When interpreting contracts, " 'all contemporaneously executed written instruments between the parties, relating to the subject matter of the contract, are to be construed together in determining what was undertaken.' " *In re Hall*, 210 N.C. App. 409, 416, 708 S.E.2d 174, 178–79 (2011) (quoting *Self-Help Ventures Fund v. Custom Finish*, 199 N.C. App. 743, 747, 682 S.E.2d 746, 749 (2009)). " 'Thus, where a note and a deed of trust are executed simultaneously and each contains references to the other, the documents are to be considered as one instrument and are to be read and construed as such to determine the intent of the parties.' " *Id.* at 416, 708 S.E.2d at 178–79 (quoting *In re Foreclosure of Sutton Investments*, 46 N.C. App. at 659, 266 S.E.2d at 689). We review issues of contract interpretation *de novo*. *Price & Price Mech. of N.C., Inc. v. Milken Corp.*, 191 N.C. App. 177, 179, 661 S.E.2d 775, 777 (2008). Here, the Deed of Trust, the Note, and the loan agreement underlying the Note, were given to the superior court for consideration. Because these documents were executed simultaneously and reference each other, we

interpret these documents together to determine whether respondent was a "surviving borrower" as contemplated by the acceleration provision of the Deed of Trust.

Under the Note and the loan agreement, Melvin was the only contemplated borrower to the reverse-mortgage agreement, as he alone executed these documents and was obligated under them. The Note defined "borrower" as each person who signed the Note, which only Melvin signed. Under its terms, Melvin, and not respondent, agreed to repay any advances made by Wells Fargo. The Note contained a similar acceleration provision and empowered Wells Fargo to "require immediate payment in full . . . if (I) A Borrower dies and the property is not the principal residence of at least one surviving Borrower."

The Note references the loan agreement, which Melvin signed as the sole borrower, and which evidences again that Melvin alone had the right to receive the advanced funds and the obligation to repay those funds. The loan agreement defines the Note as follows: "[T]he promissory note *signed by Borrower* together with this Loan Agreement and given to Lender to evidence *Borrower's* promises to repay . . . Loan Advances by Lender." (Emphasis added.) Additionally, the loan agreement defines "Principal Residence" as "the dwelling where the *Borrower* maintains his or her permanent place of abode." (Emphasis added.) This indicates that the "principal residence" contemplated by the agreement was that of a borrower to the Note, not a non-borrower to the Note. Respondent neither executed, signed, nor was identified as a borrower to the Note or loan agreement.

Turning to the Deed of Trust, although both Melvin and respondent signed this security instrument as a borrower, its other provisions that reference and describe "borrower" indicate that Melvin was the only borrower actually contemplated by the reverse-mortgage agreement. For instance, its first paragraph provides: "Borrower has agreed to repay to Lender amounts which Lender is obligated to advance, including future advances, under the terms of the [loan agreement]." It provides further that "[t]his agreement to repay is evidenced by Borrower's Note dated the same date as this Security Instrument." As the sole obligor under the Note and loan agreement, these provisions make clear that Melvin was the only "surviving borrower" contemplated by the Deed of Trust's acceleration provision. Additionally, that respondent was not old enough to qualify as a reverse-mortgage borrower when Melvin executed the reverse-mortgage agreement with Wells Fargo, *see* N.C. Gen. Stat. § 53-257(2) (2015) (defining a "borrower" as one "62 years of age

or older"), further supports the interpretation that respondent was not intended to be a "surviving borrower" under the acceleration provision.

Accordingly, that Melvin was the only borrower under the Note and loan agreement, that the Deed of Trust's descriptions of "borrower" indicate that term was intended to refer only to the obligor of the reverse-mortgage agreement, and that respondent was statutory ineligible to qualify as a reverse-mortgage borrower, yield the inevitable conclusion that respondent was not intended to be a "surviving borrower" as contemplated by the acceleration provision, despite her having signed the Deed of Trust as a borrower.

Therefore, we hold that the Deed of Trust empowered Wells Fargo to accelerate the maturity of the Note upon Melvin's death and, consequently, to foreclose on the property due to default in payment. We thus hold the superior court properly authorized the nonjudicial foreclosure under a power of sale and affirm its order.

III. Conclusion

Although Wells Fargo never formally introduced evidence at the *de novo* hearing before the superior court, its delivery of the binder it presented to the clerk, which contained all the relevant documents it intended to use to prove its power-of-sale foreclosure right, in conjunction with the parties' stipulations, provided sufficient evidence from which the superior court could properly determine whether Wells Fargo satisfied its burden of proving the six statutorily required criteria before authorizing the nonjudicial foreclosure sale of the property.

Additionally, although respondent signed the Deed of Trust as a borrower, when considering its other provisions describing "borrower" as the obligor of the Note and loan agreement, the terms of the Note and loan agreement that Melvin alone signed as a borrower, and respondent's statutory ineligibility to qualify as a reverse-mortgage borrower, it is readily apparent that Melvin was the only "surviving borrower" contemplated by the Deed of Trust's acceleration provision. Respondent's signature on the Deed of Trust had no bearing on Wells Fargo's contractual right to accelerate the debt upon Melvin's death and to foreclose upon default of payment under the terms of the contract it executed with Melvin. Accordingly, we hold the trial court properly authorized the foreclosure sale and affirm its order.

AFFIRMED.

Judges INMAN and BERGER concur.

IN THE MATTER OF N.X.A.
AND
IN THE MATTER OF B.R.S.A-D. AND D.S.K.A-D.

No. COA17-95

Filed 1 August 2017

1. Jurisdiction—subject matter jurisdiction—termination of parental rights—verification of petitions—state agent acquainted with facts

The trial court had subject matter jurisdiction in a termination of parental rights case even though respondent parents contended that the affidavits filed by the Department of Social Services' attorney lacked the requisite verification of personal knowledge where all three petitions used the language "upon information and belief." The attorney, acting as a State agent, was acquainted with the facts of the case, and thus his verification was effective under N.C.G.S. § 1A-1, Rule 11(d).

2. Termination of Parental Rights—grounds—failure to pay reasonable portion of care

The trial court did not err in a termination of parental rights case by concluding that grounds existed under N.C.G.S. § 7B-1111(a)(3) to terminate respondent mother's parental rights based on her failure to pay a reasonable portion for the care of the minor children while in the custody of the Department of Health and Human Services. The mother paid nothing despite evidence of income from her work as a housekeeper and the fact that she claimed the children on her tax refunds. Since one ground existed to terminate respondent's parental rights, other grounds did not need to be addressed.

Appeal by respondents from orders entered 26 October 2016 by Judge David V. Byrd in Wilkes County District Court. Heard in the Court of Appeals 6 June 2017.

Erika L. Hamby, for petitioner-appellee Wilkes County Department of Social Services.

K&L Gates LLP, by appellate guardian ad litem attorney advocate Hillary Dawe, for petitioner-appellee guardian ad litem.

Mark L. Hayes, for respondent-appellant mother.

Richard Croutharmel, for respondent-appellant father.

CALABRIA, Judge.

Where the verification of petitions alleging neglect and dependency was made by a State agent acquainted with the facts of the case, it was sufficient to grant jurisdiction to the trial court. Where the trial court found that mother had the resources to pay some amount towards the care of the minor children greater than she in fact paid, the trial court did not err in terminating mother's parental rights for failure to provide care and support. Where one ground exists to terminate mother's parental rights, we need not address mother's arguments with respect to other grounds.

I. Factual and Procedural Background

On 10 April 2014, Paul W. Freeman ("Freeman"), an attorney, filed juvenile petitions on behalf of the Wilkes County Department of Social Services ("DSS"). These petitions alleged that N.X.A., B.R.S.A-D., and D.S.K.A-D. (collectively, "the minor children") were neglected and dependent juveniles. The petitions named J.A. ("mother") as mother of all three juveniles, and J.D. ("father") as father of B.R.S.A-D. and D.S.K.A-D. In support of the contention that each of the minor children was neglected, the petitions alleged the following language:

> Upon Information and Belief, on the above date, the Mother of the child was arrested for one or more violations of the Controlled Substances laws. A Methamphetamine Lab (or parts for same) was/were found in (or around) the home occupied by the child, his siblings and Mother. This poses a significant risk to the child should he be returned to the home, and has posed a substantial risk prior to discovery. The Wilkes County Department of Social Services has been involved with this family for many years dealing with problems of parental substance abuse and improper care/supervision of children.

All three petitions contain the identical language. All three are also verified by Freeman, in a verification section containing the following language:

> Being first duly sworn, I say that I have read this Petition and that the same is true to my own knowledge, except as to those things alleged upon information and belief, and as to those, I believe it to be true.

These petitions were ultimately heard by the District Court of Wilkes County, and in an adjudication and disposition order dated 18 July 2014, the court ordered that the minor children be placed in the custody of DSS. The matter proceeded for two years, and on 12 January 2016, DSS filed verified petitions to terminate mother's and father's parental rights with respect to the minor children. On 26 October 2016, the trial court entered orders on the petitions to terminate parental rights, in which the trial court ordered that those rights be terminated.

Father gave timely notice of appeal. We grant mother's petition for writ of certiorari.

II. Subject Matter Jurisdiction

In mother's first argument, and father's sole argument, mother and father (collectively, "respondents") contend that the trial court lacked subject matter jurisdiction to terminate their parental rights. We disagree.

A. Standard of Review

"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).

B. Analysis

[1] Respondents contend that the affidavits filed by DSS lacked the requisite verification to grant jurisdiction to the trial court.

Our General Statutes provide that:

> All reports concerning a juvenile alleged to be abused, neglected, or dependent shall be referred to the director of the department of social services for screening. Thereafter, if it is determined by the director that a report should be filed as a petition, the petition shall be drawn by the director, verified before an official authorized to administer oaths, and filed by the clerk, recording the date of filing.

N.C. Gen. Stat. § 7B-403(a) (2015). Our Supreme Court has held that "verification of a juvenile petition is no mere ministerial or procedural act[,]" but rather "is a vital link in the chain of proceedings carefully designed to protect children at risk on one hand while avoiding undue interference with family rights on the other." *In re T.R.P.*, 360 N.C. 588, 591, 636 S.E.2d 787, 790-91 (2006).

In *T.R.P.*, Wilkes County Department of Social Services, the same DSS as in the instant case, filed a petition alleging that T.R.P. was a neglected juvenile. Although it was notarized, the petition "was neither signed nor verified by the Director of WCDSS or any authorized representative thereof." *Id.* at 589, 636 S.E.2d at 789. On appeal, our Supreme Court noted that, "given the magnitude of the interests at stake in juvenile cases and the potentially devastating consequences of any errors, the General Assembly's requirement of a verified petition is a reasonable method of assuring that our courts exercise their power only when an identifiable government actor 'vouches' for the validity of the allegations in such a freighted action." *Id.* at 592, 636 S.E.2d at 791. The Court emphasized that "[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." *Id.* at 593, 636 S.E.2d at 792. The Court concluded that the trial court's jurisdiction was void *ab initio*, and that "the absence of jurisdiction ab initio logically implies that the matter reverts to the status quo ante." *Id.* at 597, 636 S.E.2d at 794. However, the Court also noted that "because dismissal of this case has no res judicata effect, and recognizing that the circumstances affecting the best interest of T.R.P. may well have changed while this case has been in litigation, we note that any party, including WCDSS, can file a new petition in this matter." *Id.*

Pursuant to Rule 11 of the North Carolina Rules of Civil Procedure, "[i]n any case in which verification of a pleading shall be required by these rules or by statute, it shall state in substance that the contents of the pleading verified are true to the knowledge of the person making the verification, except as to those matters stated on information and belief, and as to those matters he believes them to be true." N.C.R. Civ. P. 11(b). An agent of a party may verify a pleading as well, provided, in relevant part, that "all the material allegations of the pleadings are true to his personal knowledge[.]" N.C.R. Civ. P. 11(c)(2)(a). The agent must also provide reasons that the affidavit is not made by the party directly. N.C.R. Civ. P. 11(c)(2)(b).

The importance of a verification being made upon personal knowledge, and not merely upon "information and belief," is a longstanding truism in North Carolina law. *See e.g. State ex rel. Peebles v. Foote*, 83 N.C. 102, 106 (1880) (holding that "a verification upon information and belief will not answer unless it gives the sources of information"). This Court has emphasized this, holding that "a verifying attorney . . . must state in an affidavit that the material allegations of the pleadings are true to his personal knowledge, and the reasons the affidavit is not made

by the party." *Gaskill v. State ex rel. Cobey*, 109 N.C. App. 656, 659, 428 S.E.2d 474, 476 (1993).

In the instant case, respondents contend that the verification of the initial petitions was not effective to serve as an affidavit. Specifically, respondents note the use of the language "Upon Information and Belief," present in all three petitions. Certainly, that language does not demonstrate personal knowledge by Freeman, but rather that he has been informed and believes the facts alleged to be true.

Respondents overlook a key detail, however. There is an additional provision of Rule 11 which applies to corporations and state officers. Specifically, "when the State or any officer thereof in its behalf is a party, the verification may be made by any person acquainted with the facts." N.C.R. Civ. P. 11(d). Our Supreme Court has held that, with respect to certain issues, such as the provision of foster care, "the County Director of Social Services is the agent of the Social Services Commission[.]" *Vaughn v. N.C. Dep't of Human Res.*, 296 N.C. 683, 690, 252 S.E.2d 792, 797 (1979). Indeed, our General Statutes provide that the director of a county Department of Social Services has the duty "[t]o act as agent of the Social Services Commission and Department of Health and Human Services in relation to work required by the Social Services Commission and Department of Health and Human Services in the county[.]" N.C. Gen. Stat. § 108A-14(a)(5) (2015).

In the instant case, DSS was implementing the statutory provisions of the Juvenile Code, Chapter 7B of the General Statutes. DSS was giving effect to State law, for purposes defined by the State, as directed by the State agencies which oversee such laws. DSS was therefore acting as an agent of the North Carolina Department of Health and Human Services, a State agency.

As a State agent, DSS, and by extension, its representative Freeman, was not subject to Rule 11(b), governing verification of pleadings by a party, or Rule 11(c), governing verification by agent or attorney, but rather was subject to Rule 11(d), governing verification by the State. This determination is further reinforced by practicality. Many case workers, investigators, and representatives are employed by local Departments of Social Services, and it is not feasible to assume that any one should have complete personal knowledge of a given case; rather, it can be assumed that any one verifying an affidavit does so having reviewed the case materials compiled by the myriad DSS agents and employees assigned to the case, and is thus "acquainted with the facts" as required by Rule 11(d).

In addition, the director of the Department of Social Services has a statutory duty to investigate any reports of abuse, neglect, or dependency of a juvenile and to take appropriate action, including filing a petition to "invoke the jurisdiction of the court for the protection of the juvenile or juveniles." N.C. Gen. Stat. § 7B-302(c) (2015). A person who reports suspected abuse, neglect, or dependency – presumably a person with "personal knowledge" of the facts – has the right to remain anonymous. *See* N.C. Gen. Stat. § 7B-301(a) (2015) ("[r]efusal of the person making the report to give a name shall not preclude the department's assessment"). And that person who has personal knowledge of facts of abuse, neglect, or dependency has no authority to verify a petition, since that person is not authorized to file a petition under N.C. Gen. Stat. § 7B-401.1, which states that "*Only* 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." N.C. Gen. Stat. § 7B-401.1(a) (2015) (emphasis added). Were we to accept respondents' argument, it would be impossible for directors of Departments of Social Services to carry out their statutory duties to file verified petitions invoking the jurisdiction of the court unless a director or the director's authorized representative personally witnessed the events giving rise to the filing of the petition.

We hold that Freeman, acting as a State agent, was acquainted with the facts of the case, and that therefore his verification was effective pursuant to Rule 11(d) to grant jurisdiction to the trial court.

III. Termination of Parental Rights

In her second, third, and fourth arguments, mother challenges the grounds upon which the trial court terminated her parental rights. We disagree.

A. Standard of Review

"The standard for review in termination of parental rights cases is whether the findings of fact are supported by clear, cogent and convincing evidence and whether these findings, in turn, support the conclusions of law." *In re Clark*, 72 N.C. App. 118, 124, 323 S.E.2d 754, 758 (1984).

"After an adjudication that one or more grounds for terminating a parent's rights exist, the court shall determine whether terminating the parent's rights is in the juvenile's best interest." N.C. Gen. Stat. § 7B-1110(a) (2015). "We review the trial court's decision to terminate parental rights for abuse of discretion." *In re Anderson*, 151 N.C. App. 94, 98, 564 S.E.2d 599, 602 (2002).

B. Analysis

[2] Mother challenges the various bases upon which the trial court terminated her parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a) (2015). Specifically, mother challenges the trial court's determinations pursuant to N.C. Gen. Stat. §§ 7B-1111(a)(1) (parental neglect), (a)(2) (failure to correct circumstances which led to the removal of juveniles), and (a)(3) (failure to provide support for the juveniles).

With respect to the trial court's determination of mother's failure to provide support for the juveniles, N.C. Gen. Stat. § 7B-1111(a)(3) provides that the court may terminate parental rights where:

> The juvenile has been placed in the custody of a county department of social services, a licensed child-placing agency, a child-caring institution, or a foster home, and the parent, for a continuous period of six months next preceding the filing of the petition or motion, has willfully failed for such period to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so.

N.C. Gen. Stat. § 7B-1111(a)(3). It is undisputed that the minor children were in the care of DSS for six months prior to the filing of the petition. Mother contends, however, that the trial court failed to make necessary findings as to her ability to pay "a reasonable portion of the cost of care[.]"

Our Supreme Court has held that "[a] finding that a parent has ability to pay support is essential to termination for nonsupport[.]" *In re Ballard*, 311 N.C. 708, 716-17, 319 S.E.2d 227, 233 (1984). However, this Court has further clarified that "there is no requirement that the trial court make a finding as to what specific amount of support would have constituted a 'reasonable portion' under the circumstances[,]" and therefore that the only requirement is "that the trial court make specific findings that a parent was able to pay some amount greater than the amount the parent, in fact, paid during the relevant time period." *In re Huff*, 140 N.C. App. 288, 293, 536 S.E.2d 838, 842 (2000).

In the instant case, at the termination hearing, mother testified that she generated income from a house-cleaning business from June of 2015 to January of 2016. She testified that her annual income was between ten and thirteen thousand dollars. Further, the trial court found that mother "claimed her minor children as dependents for tax purposes while they were in the custody of [DSS], receiving a significant tax refund amounting

to thousands of dollars for the year 2015." This finding, unchallenged by mother, is presumed supported by competent evidence and binding upon this Court. *See In re J.K.C.*, 218 N.C. App. 22, 26, 721 S.E.2d 264, 268 (2012) (citing *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)). Despite this evidence of income and tax refunds, the trial court found that mother "paid no child support prior to the filing of the petition in this matter." Based upon these findings, the trial court found that mother "willfully failed to pay a reasonable portion for the cost and care for the minor children for a period of six (6) months preceding the filing of the Petition[.]"

Upon review, we hold that the trial court's findings make clear that mother was able to pay some amount greater than the amount she did in fact pay, which was nothing. As such, we hold that the trial court did not err in terminating mother's parental rights on the ground of a failure to pay a reasonable portion for the care of the minor children while in the custody of DSS.

Because we hold that the findings of fact supported grounds for termination of parental rights under one subdivision of N.C. Gen. Stat. § 7B-1111(a), we need not address mother's remaining arguments. *See Huff*, 140 N.C. App. at 293, 536 S.E.2d at 842.

NO ERROR.

Judges BRYANT and STROUD concur.

IN RE R.S.

[254 N.C. App. 678 (2017)]

IN THE MATTER OF R.S., A.S., C.S.

No. COA17-270

Filed 1 August 2017

Child Abuse, Dependency, and Neglect—child abuse—child neglect—serious unexplained injuries—sole caretakers

The trial court did not err by adjudicating an infant as abused and neglected, and leaving the infant in a safety placement with his maternal grandmother, where respondent parents were the sole caretakers and the infant suffered serious and unexplained injuries by other than accidental means. There was no merit to the father's claim that the trial court's adjudication of abuse amounted to an improper shifting of the burden of proof to respondents.

Appeal by respondent-father from orders entered 23 September and 4 October 2016 by Judge Susan M. Dotson-Smith in Buncombe County District Court. Heard in the Court of Appeals 11 July 2017.

Hanna Frost Honeycutt for petitioner-appellee Buncombe County Department of Health and Human Services.

Amanda Armstrong for guardian ad litem.

Peter Wood for respondent-appellant father.

MURPHY, Judge.

Respondent-father ("Floyd")[1] appeals from the trial court's order adjudicating his son "Ryan," an abused and neglected juvenile and from the resulting dispositional order leaving Ryan in a safety placement with his maternal grandmother. By order entered 5 April 2017, this Court allowed Respondent-mother's ("Emily") motion to withdraw her appeal. We now affirm the orders of the trial court.

Background

Ryan was born prematurely in late September 2015. After leaving the hospital on 1 October 2015, he lived with Floyd and Emily (collectively "Respondents") and Emily's two older children, "April," born in

1. We adopt pseudonyms to protect the juveniles' identities.

March 2008 and "Chris," born February 2010. April and Chris share a biological father, "Mr. A."

On 22 October 2015, Buncombe County Department of Health and Human Services ("BCDHHS") received a Child Protective Services ("CPS") report that Ryan, then approximately four weeks old, was admitted to Mission Hospital emergency room with a torn lingual frenulum, the tissue connecting the tongue to the floor of the mouth. Ryan was also diagnosed with failure to thrive, weighing less than he did at birth.

Dr. Cynthia H. Brown, a pediatrician and child abuse expert, examined Ryan and spoke to Respondents at the hospital. Though confirming they were Ryan's only caretakers, Respondents disclaimed any knowledge of the cause of Ryan's injury and stated that Emily first noticed a dark scab under his tongue the day before his admission. Because Ryan's lingual frenulum tear would have resulted in significant bleeding, Dr. Brown found it unusual that Respondents did not notice his injury. She further noted that "significant force" would be have been required to cause the injury. A skeletal survey and abdominal ultrasound performed on Ryan were negative for additional trauma. Dr. Brown recommended repeating the skeletal survey after two weeks. Ryan was discharged from the hospital on 25 October 2015, having showed consistent weight gain during his stay.

On 29 October 2015, Respondents brought Ryan to Dr. William L. Chambers, "to evaluate the infant to see if the injury under the tongue could have been self-inflicted." Dr. Chambers advised Respondents it would not be possible for Ryan to have caused the tear in his frenulum. Dr. Chambers scheduled a follow-up appointment for Ryan, which Emily later cancelled.

BCDHHS received a second CPS report on 9 November 2015 after Ryan's second skeletal survey revealed three healing fractures on his 11th and 12th ribs and a healing fracture on his right tibia. Dr. Burdette Sleight, an expert in pediatric radiology, concluded that the fractures were approximately three weeks old on 9 November 2015 and thus were present when Ryan was admitted to the hospital with the torn frenulum on 22 October 2015. Subsequent calcification had made the fractures more conspicuous on the x-ray at the time of the follow-up survey. Respondents were again unable to explain Ryan's injuries. They refused to allow additional diagnostic tests recommended by Dr. Brown to check Ryan for brain damage or other injuries.

On 23 November 2015, BCDHHS filed a juvenile petition alleging that Ryan was abused and neglected. After a three-day hearing in July

2016, the trial court entered an order adjudicating Ryan abused and neglected on 23 September 2016.[2] The trial court conducted a separate dispositional hearing on 18 August 2016 and entered its initial disposition on 4 October 2016. The trial court left Ryan in Respondents' custody but sanctioned the child's continued placement with the maternal grandmother. The trial court ordered Floyd to submit to a parenting capacity evaluation and attend a parenting course approved by BCDHHS.

On appeal, Floyd claims the trial court erred by basing its adjudication of abuse on Respondents' failure to provide an innocent explanation for Ryan's injuries. He contends the trial court improperly shifted the burden of proof from BCDHHS to the Respondent-parents, in violation of N.C.G.S. § 7B-805 (2015). Floyd argues that "[a] parent is not required to present evidence that shows he or she did not abuse a child."

Analysis

We review an adjudication of abuse, neglect, or dependency under N.C.G. S. § 7B-807 (2015) to determine whether the trial court's findings are supported by "clear and convincing competent evidence" and whether the findings, in turn, support the trial court's conclusions of law. *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997). Uncontested findings of fact are "presumed to be supported by competent evidence and [are] binding on appeal." *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). 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).

"Abused juvenile" is defined, *inter alia*, as one whose parent or caretaker "[i]nflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means." N.C.G.S. § 7B-101(1) (2015). The determination that a child meets the statutory definition of an abused juvenile is a conclusion of law. *In re Ellis*, 135 N.C. App. 338, 340, 520 S.E.2d 118, 120 (1999); *In re Hughes*, 74 N.C. App. 751, 759-60, 330 S.E.2d 213, 219 (1985).

The trial court made detailed findings of fact regarding the nature and causes of Ryan's injuries, based on the expert testimony of Drs. Chambers, Sleight, and Brown.[3] Among these findings are the following:

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2. The trial court also adjudicated April and Chris neglected. However, Emily has withdrawn her appeal in this cause, and Mr. A. did not appeal. Therefore, April and Chris' cases are not before us for review.

3. Respondents adduced the expert testimony of Dr. John Kelly, a family physician whom respondents chose as Ryan's primary care doctor beginning on 15 November 2015.

19. The injury to [Ryan]'s lingual frenulum would have been a very painful injury and would have resulted in a significant amount of bleeding . . . The Respondent parents' statement that they did not observe any substantial bleeding or pain associated with [Ryan]'s torn frenulum is not credible.

. . . .

23. The injury to [Ryan]'s frenulum would have taken a lot of force to cause, and could not have been caused by [Ryan]. The injury to [Ryan]'s frenulum was caused by some object being inserted into [his] mouth with considerable force. There is no medical condition that would have caused [his] frenulum to tear spontaneously. [Respondents] failed to provide an explanation for [Ryan]'s torn frenulum.

24. The injury to [Ryan]'s lingual frenulum was inflicted.

. . . .

31. [Ryan]'s rib fractures are consistent with injuries caused by squeezing forcibly. Significant force was applied to cause [his] rib fractures. This would have been painful for [Ryan]. [Ryan]'s rib fractures are inflicted injuries.

32. The November 9, 2015 skeletal survey also revealed a healing corner fracture on [Ryan]'s tibia. Based on the stage of healing, the tibia fracture was approximately three weeks old.

33. Moderate to significant force would have been required to cause the corner fracture to [Ryan]'s tibia. The injury would have been painful initially . . . . The corner fracture was caused by violent shaking or grabbing and jerking. Normal handling of [Ryan] would not have caused the corner fracture to [Ryan]'s tibia. The corner fracture is an inflicted injury.

34. [Ryan]'s bone scan did not reveal any issues with bone density, and it is unlikely that an underlying medical

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The trial court found that "[t]he testimony of Dr. Chambers, Dr. Sleight and Dr. Brown was more credible and consistent than Dr. Kelly's testimony about the non-accidental nature of [Ryan]'s injuries, and the failure to thrive."

> condition, such as osteogenesis imperfecta, contributed to [his] injuries.
>
> 35. . . . [Respondents] had no reasonable explanation of causation for [Ryan]'s broken bones.
>
> . . . .
>
> 47. [Respondents] delayed meetings between the social worker and the [older] children, delayed and limited medical tests, and appear to have omitted information.
>
> 48. [Respondents] still have not provided explanations for [Ryan]'s numerous, serious injuries.
>
> 49. A torn lingual frenulum, rib fractures and tibia fracture are all serious injuries. These serious injuries occurred by other than accidental means.
>
> 50. [Ryan] could not have caused the injuries to his frenulum, ribs or tibia . . .
>
> 51. [Ryan]'s injuries are consistent with child abuse in a pre-mobile infant.
>
> 52. These serious injuries occurred while [Respondents] were the only caretakers for [Ryan].
>
> 53. [Respondents] are jointly and individually responsible for [Ryan]'s injuries.
>
> . . . .
>
> 58. [Ryan] has been subjected to abuse . . . by [Respondents] . . . , who are adults who regularly live in the home.

As Floyd does not contest the evidentiary support for any of the trial court's findings of fact, they are binding on appeal. *See Koufman*, 330 N.C. at 97, 408 S.E.2d at 731.

The trial court found Ryan sustained a torn lingual frenulum and multiple bone fractures, all of which are "serious injuries" and were "inflicted" upon the infant child "by other than accidental means." It further found that Respondents are adults who live in the home and are responsible for his injuries. These findings support a conclusion that Ryan is abused under N.C.G.S. § 7B-101(1). *In re Y.Y.E.T.*, 205 N.C. App. 120, 128-29, 695 S.E.2d 517, 522-23, *disc. review denied*, 364 N.C. 434, 703 S.E.2d 150 (2010); *Hughes*, 74 N.C. App. 751, 758-59, 330 S.E.2d 213, 218 (1985).

We find no merit to Floyd's claim that the trial court's adjudication of abuse amounts to an improper shifting of the burden of proof to Respondents. The circumstances surrounding Ryan's injuries, as proved by BCDHHS and recounted in the trial court's findings, support a reasonable inference that Ryan sustained his injuries at the hands of Respondents, his only caretakers. Where "different inference[s] may be drawn from the evidence, [the trial court] alone determines which inferences to draw and which to reject." *Hughes*, 74 N.C. App. at 759, 330 S.E.2d at 218. Moreover, "[a]s the child's sole care providers, it necessarily follows that Respondents were jointly and individually responsible for the child's injury. Whether each Respondent directly caused the injury by inflicting the abuse or indirectly caused the injury by failing to prevent it, each Respondent is responsible." *Y.Y.E.T.*, 205 N.C. App. at 129, 695 S.E.2d at 522-23. Here, following the holding in *Y.Y.E.T.*, Ryan's parents were the sole caretakers of a pre-mobile infant who suffered serious, yet unexplained injuries, and the trial court's finding that the parents were responsible for those injuries was entirely appropriate.

Further, Floyd's claims that this case is comparable to *In re J.A.M.*, ___ N.C. App. ___, 795 S.E.2d 262 (2016) come from an incorrect reading of that case and its holdings. *In re J.A.M.* speaks to a very different set of facts, in which the child was removed from the home and then adjudicated based on past domestic violence without any evidence of ongoing domestic violence. In this case, there are clearly, as found by the trial court and recorded above, findings of current and ongoing domestic violence.

Conclusion

As the trial court properly concluded that Ryan was an abused individual and that the parents were responsible for those injuries, we affirm the court's orders.

AFFIRMED.

Judges Bryant and Hunter, Jr. concur.

KYLE v. FELFEL

[254 N.C. App. 684 (2017)]

JASON KYLE, PLAINTIFF
v.
HELMI L. FELFEL AND LAURA C. FELFEL, DEFENDANTS

No. COA16-1318

Filed 1 August 2017

1. Contracts—breach of contract—lease and option to purchase agreement—house swap—motion for judgment notwithstanding verdict—consideration—promissory note—statute of frauds

The trial court erred in a breach of contract case arising from a lease and option to purchase agreement for a possible house swap by denying defendant married couple's motion for judgment notwithstanding the verdict where the option contained in a 2010 lease document could not serve as the consideration necessary to support a promissory note. The lease document violated the statute of frauds under N.C.G.S. § 22-2 since plaintiff individual did not sign it.

2. Contracts—breach of contract—lease and option to purchase agreement—house swap—motion for judgment notwithstanding verdict—retroactive consideration—promissory note

The trial court erred in a breach of contract case arising from a lease and option to purchase agreement for a possible house swap by denying defendant married couple's motion for judgment notwithstanding the verdict where the option contained in a 2011 amended lease document could not serve as retroactive consideration for a promissory note. The note stated on its face that the consideration for its execution was the option granted in the 2010 lease agreement, and the note did not cross-reference the 2011 lease.

3. Estoppel—quasi-estoppel—promissory note—must be raised before trial—unfair benefit from taking inconsistent positions

The trial court did not err in a breach of contract case arising from a lease and option to purchase agreement for a possible house swap by concluding plaintiff individual waived his argument that the doctrine of quasi-estoppel prohibited defendant married couple from denying the validity of a promissory note where plaintiff did not raise quasi-estoppel before trial. Even assuming arguendo that the issue was not waived, quasi-estoppel did not apply under the facts of this case where there was no showing of an unfair benefit from taking inconsistent positions.

KYLE v. FELFEL

[254 N.C. App. 684 (2017)]

Appeal by defendants from order entered 26 July 2016 by Judge Yvonne M. Evans in Mecklenburg County Superior Court. Heard in the Court of Appeals 2 May 2017.

Redding Jones, PLLC, by Joseph R. Pellington and David G. Redding, for plaintiff-appellee.

Hull & Chandler, P.A., by Nathan M. Hull and Andrew S. Brendle, for defendants-appellants.

DAVIS, Judge.

This case requires us to consider whether a promissory note is unenforceable where a failure to abide by the statute of frauds invalidated the consideration intended to support the note. Defendants Helmi L. Felfel and Laura C. Felfel (the "Felfels") appeal from the trial court's order denying their motion for judgment notwithstanding the verdict following a jury verdict finding that the Felfels breached their obligations under the note. Because we conclude that the promissory note was unenforceable for lack of consideration, we reverse.

Factual and Procedural Background

In 2007, the Felfels were living in their home on Bay Harbour Road in Mooresville, North Carolina (the "Bay Harbour Property"). At the time, Plaintiff Jason Kyle owned a home on Jetton Road in Cornelius, North Carolina (the "Jetton Property"). At some point during that year, the Felfels and Kyle were introduced to each other through a mutual friend. The Felfels and Kyle ultimately engaged in discussions about a possible "house swap." The Felfels wanted to sell the Bay Harbour Property and move to the Jetton Property so that Mr. Felfel could live closer to his place of employment. Kyle wished to sell the Jetton Property and live elsewhere.

They decided to structure a transaction whereby the Felfels would rent the Jetton Property for five years and Kyle would rent the Bay Harbour Property. As part of this agreement, the Felfels were to give Kyle a promissory note in the amount of $200,000 that was intended to serve as partial consideration for their receipt of an option to purchase the Jetton Property at the end of the lease period.

Based upon the parties' agreement, the Felfels moved into the Jetton Property in 2008. In 2010, the parties sought to memorialize their agreement through the execution of two written instruments: (1) a document

titled "Amended and Restated Lease Agreement" (hereinafter the "2010 Lease Document"); and (2) a promissory note dated 1 February 2010 (hereinafter the "Note") executed by the Felfels in Kyle's favor.

The 2010 Lease Document provided the terms of the Felfels' rental of the Jetton Property and contained a provision stating that the lease would run from 1 January 2010 until 30 November 2014. The 2010 Lease Document also contained the following language in paragraph 21 purporting to grant an option (hereinafter the "2010 Option") giving the Felfels the right to purchase the Jetton Property during the lease period:

> 21. OPTION TO PURCHASE. [The Felfels] shall have an Option . . . to purchase the [Jetton Property] during the term of this lease including any extensions or renewals hereof. If [the Felfels] fail[ ] to exercise this option in the manner described, then the Option shall automatically cease and be of no further force and effect.

It is undisputed that the 2010 Lease Document was signed by the Felfels on 1 February 2010 — the same date that they signed the Note — as evidenced by a copy of the document entered into evidence at trial. However, no copy of the 2010 Lease Document bearing *Kyle's* signature was ever produced during discovery or at trial.

The Note, which was in the amount of $200,000 and carried a nine percent interest rate, was secured by a deed of trust to the Bay Harbour Property. The Note stated that it was "[d]ue and payable upon the earlier of (i) an Event of Default under the Lease by [the Felfels], (ii) the termination of the Lease, or (iii) November 30, 2014." The Note also contained the following provision:

> This Note is being given as partial consideration for the undersigned's receipt from Jason Kyle of an option to purchase that certain property located at . . . Jetton Road, Cornelius, North Carolina *pursuant to the terms of that certain Amended and Restated Lease Agreement between the parties of even date herewith*[.]

(Emphasis added.) The Note was signed by both of the Felfels on 1 February 2010.[1]

In 2011, the parties entered into a new instrument — also entitled "Amended and Restated Lease Agreement" (hereinafter the "2011

1. The Note was not signed by Kyle.

Lease") — that adjusted the amount of monthly rent the Felfels were to pay Kyle for the Jetton Property and extended the lease term to 31 May 2015. The 2011 Lease also stated, in pertinent part, the following:

> [Kyle] previously granted to [the Felfels] an option to purchase the [Jetton Property] under Paragraph 21 of the Original Lease. *Said purchase option is hereby terminated and replaced in full with the following Option* . . . hereby granted to [the Felfels] to purchase the [Jetton Property] during the term of this Lease, including any extensions or renewals hereof. *The Option is being given in consideration of [the Felfels'] agreement to enter into this Lease*. If [the Felfels] fail[ ] to exercise this option in the manner described, then the Option shall automatically cease and be of no further force and effect.

(Emphasis added.)

Thus, the 2011 Lease contained a new option (hereinafter the "2011 Option"). A copy of the 2011 Lease entered into evidence at trial shows that it was signed by the Felfels on 10 January 2011 and by Kyle on 15 February 2011. Thus, unlike the 2010 Lease Document, the 2011 Lease was signed by both Kyle and the Felfels.

After occupying the Jetton Property and making their monthly rental payments during the lease period, the Felfels vacated the Jetton Property when the 2011 Lease term ended on 31 May 2015. At no point did the Felfels ever attempt to exercise their option to purchase the Jetton Property.

Despite Kyle's demand that the Felfels pay the sums due under the Note, they refused to do so. On 26 August 2015, Kyle filed the present lawsuit in Mecklenburg County Superior Court in which he alleged as his sole cause of action that the Felfels had breached the Note when they failed to pay him the $200,000, plus interest, upon his demand for payment. In both their initial answer and their amended answer, the Felfels asserted the defense that the Note was unenforceable for lack of consideration.

A jury trial was held before the Honorable Yvonne M. Evans beginning on 27 June 2016. Both at the close of Kyle's evidence and at the close of all of the evidence, the Felfels moved for a directed verdict. Both motions were denied by the trial court. The jury entered a verdict in Kyle's favor, answering the following questions in the affirmative: (1) "Did Mr. Kyle and the Felfels enter into a contract?"; and (2) "Did the

Felfels breach the contract by failing to pay Mr. Kyle the amount owed?" The jury determined that Kyle was entitled to recover $250,000 in damages from the Felfels. The trial court entered judgment upon the verdict on 1 July 2016.

On 7 July 2016, the Felfels filed a motion for judgment notwithstanding the verdict ("JNOV") in which they asserted, among other grounds, that Kyle had failed to offer any evidence at trial showing that he provided legally sufficient consideration in exchange for the Felfels' execution of the Note. After holding a hearing on 20 July 2016, the trial court entered an order denying the JNOV motion on 26 July 2016. The Felfels filed a timely notice of appeal from that order.

Analysis

The Felfels argue on appeal that the trial court erred in denying their motion for JNOV given that the Note was unenforceable for lack of consideration. This assertion is premised upon their contention that the 2010 Lease Document (which contained the 2010 Option that purported to be the consideration for the Note) violated the statute of frauds because it was not signed by Kyle. The Felfels contend that this failure to comply with the statute of frauds, in turn, means that the 2010 Option was illusory in that it could not have been legally enforced by them against Kyle. Accordingly, the Felfels reason, consideration for the Note was never actually given by Kyle and thus the Note is unenforceable.

Kyle, conversely, asserts that either the 2010 Option or the 2011 Option did, in fact, serve as the necessary consideration for the Note. Alternatively, he argues that the doctrine of quasi-estoppel precludes the Felfels from contesting the validity of the Note.

In order to survive a JNOV motion,

> the non-movant must present more than a scintilla of evidence to support its claim. While a scintilla is very slight evidence, the non-movant's evidence must still do more than raise a suspicion, conjecture, guess, surmise, or speculation as to the pertinent facts in order to justify its submission to the jury. The trial court must construe the evidence in the light most favorable to the non-movant and resolve all evidentiary conflicts in the non-movant's favor.

Morris v. Scenera Research, LLC, 368 N.C. 857, 861, 788 S.E.2d 154, 157-58 (2016) (internal citations and quotation marks omitted). We review the trial court's ruling on a JNOV motion *de novo*. *Id.*

I. Lack of Consideration

In order to recover on a promissory note, "the party seeking relief must show execution, delivery, consideration, demand, and nonpayment." *Kane Plaza Assocs. v. Chadwick*, 126 N.C. App. 661, 664, 486 S.E.2d 465, 467 (1997) (citation omitted). At issue here is whether Kyle provided consideration, which "consists of any benefit, right, or interest bestowed upon the promisor, or any forbearance, detriment, or loss undertaken by the promisee." *McLamb v. T.P. Inc.*, 173 N.C. App. 586, 590, 619 S.E.2d 577, 581 (2005) (citation and quotation marks omitted), *disc. review denied*, 360 N.C. 290, 627 S.E.2d 621 (2006).

Kyle asserts that the option to purchase the Jetton Property was the consideration that the Felfels received in exchange for executing the Note.[2] Therefore, in order to prove that consideration existed to support the Note, Kyle was required to establish either that (1) the 2010 Option contained in the 2010 Lease Document — which was executed contemporaneously with the Note — was a legally enforceable agreement; or (2) the 2011 Option contained in the 2011 Lease served as retroactive consideration for the Note. We address each issue in turn.

A. 2010 Option as Consideration for the Note

[1] The Felfels contended in the trial court, and maintain in this appeal, that the option contained in the 2010 Lease Document could not serve as the consideration necessary to support the Note because the 2010 Lease Document violated the statute of frauds in that it was not signed by Kyle. North Carolina's statute of frauds states as follows:

> All contracts to sell or convey any lands, tenements or hereditaments, or any interest in or concerning them . . . and all other leases and contracts for leasing lands exceeding in duration three years from the making thereof, shall be void unless said contract, or 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.

N.C. Gen. Stat. § 22-2 (2015). It is well established that the "statute of frauds . . . is applicable to option contracts for the purchase of property[.]" *Craig v. Kessing*, 36 N.C. App. 389, 392, 244 S.E.2d 721, 723 (1978), *aff'd*, 297 N.C. 32, 253 S.E.2d 264 (1979).

2. Indeed, neither Paragraph 21 of the 2010 Lease Document nor the Note itself indicate that anything other than the 2010 Option was to serve as consideration for the Felfels' execution of the Note.

With regard to documents required by the statute of frauds to be in writing, the only admissible evidence to establish the agreement — including the fact that it was signed — is the writing itself. *See Jamerson v. Logan*, 228 N.C. 540, 544, 46 S.E.2d 561, 564 (1948) ("A contract which the law requires to be in writing can be proved only by the writing itself, not as the *best*, but as the *only admissible evidence of its existence*." (citation and quotation marks omitted)).

Here, it is undisputed that the 2010 Lease Document purported to contain both an agreement for the Felfels to lease the Jetton Property for a period exceeding three years and an option for them to purchase that property. Therefore, the 2010 Lease Document (including the 2010 Option contained therein) was subject to the statute of frauds. Because neither party introduced a version of the 2010 Lease Document that had been signed by Kyle, the statute of frauds would have barred any attempt by the Felfels to enforce the 2010 Option against Kyle. Accordingly, because the 2010 Option was unenforceable against Kyle, it cannot serve as consideration for the Note. *See McLamb*, 173 N.C. App. at 591, 619 S.E.2d at 581 ("[O]ur courts have held that consideration which may be withdrawn on a whim is illusory consideration which is insufficient to support a contract."); *see also Milner Airco, Inc. of Charlotte, N.C. v. Morris*, 111 N.C. App. 866, 870, 433 S.E.2d 811, 814 (1993) (holding contract unenforceable for lack of consideration because "while reciting consideration, [the contract] does not bind the employer to any promise").

B. 2011 Lease as Consideration for the Note

[2] Kyle also argues, in the alternative, that even if the 2010 Lease Document — standing alone — did not serve as consideration for the Note, consideration was provided retroactively by the 2011 Lease, which both referenced the 2010 Option and purported to grant the Felfels a new option. We reject this argument for several reasons.

First, the Note clearly stated on its face that the consideration for its execution was the option granted *in the 2010 Lease Document*: "This Note is being given as partial consideration for the [Felfels'] receipt from Jason Kyle of an option to purchase [the Jetton Property] pursuant to the terms of that certain Amended and Restated Lease Agreement between the parties *of even date herewith*[.]" (Emphasis added.) The phrase "even date" means "the same date." Black's Law Dictionary 635 (9th ed. 2009). Thus, it is clear that the option being referenced in the Note was the one contained in the 2010 Lease Document as that was the "Amended and Restated Lease Agreement" signed by the Felfels on the same date as the Note — *not* the 2011 Lease signed a year later. This fact is fatal to Kyle's argument. *See, e.g., In re Head Grading Co., Inc.*, 353 B.R. 122, 123-24

(Bankr. E.D.N.C. 2006) (applying North Carolina law to invalidate deed of trust secured by "Promissory Note of even date herewith" because promissory note was executed on later date than deed of trust).

Second, we are not persuaded by Kyle's contention that because multiple writings may in some circumstances be construed together to satisfy the statute of frauds, we should hold that in this case "the [2011] Lease, with its internal references to the 2010 Lease [Document] and the Note, is sufficient to comply with the statute of frauds." The cases Kyle cites in support of this argument stand merely for the proposition that an agreement comprising separate, cross-referenced writings does not necessarily violate the statute of frauds simply because the documents are not physically attached. *See*, *e.g.*, *Fuller v. Southland Corp.*, 57 N.C. App. 1, 7, 290 S.E.2d 754, 758 ("[T]he writings need not be physically connected if they contain internal reference to other writings[,]" and "unconnected writings must contain a reference to the other writings, not merely a reference to the same subject matter." (emphasis omitted)), *disc. review denied*, 306 N.C. 556, 294 S.E.2d 223 (1982); *Mezzanotte v. Freeland*, 20 N.C. App. 11, 16, 200 S.E.2d 410, 414 (1973) (explaining that "[t]he papers need not be physically attached if they are connected by internal reference" and holding that document referenced within sales agreement and delivered contemporaneously with that agreement constituted part of the "writing" for purposes of statute of frauds), *disc. review denied*, 284 N.C. 616, 201 S.E.2d 689 (1974).

Here, however, the Note did not cross-reference the 2011 Lease.[3] Rather, the Note only cross-referenced the "Amended and Restated Lease Agreement between the parties of even date herewith" — that is, the 2010 Lease Document.[4] Accordingly, the Note is unenforceable for lack of consideration.

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3. The lack of such a cross-reference is logical given that the 2011 Lease was not executed until approximately one year after the Note was signed.

4. We are also unpersuaded by Kyle's citation to *Millikan v. Simmons*, 244 N.C. 195, 93 S.E.2d 59 (1956). We are not presented with a situation, as occurred in *Millikan*, where an agreement was entered verbally on a certain date, memorialized and signed on a later date, and properly construed as having been in effect on the earlier of the two dates. *See id.* at 199-200, 93 S.E.2d at 62-63 ("It is not necessary . . . that a writing be signed at the time a contract is made. The writing is not the contract; it is the party's admission that the contract was made. It is sufficient if subsequent to the contract a memorandum thereof is reduced to writing and signed by the party to be charged. The extension agreement, if made on the 13th and reduced to writing and signed on the 15th, would be enforceable between the parties as of the 13th." (internal citation and quotation marks omitted)). Here, the 2011 Lease was *not* simply the memorialization of an earlier verbal agreement; rather, it was a *separate* agreement made a year after the Note and the 2010 Lease Document were executed.

II. Quasi-Estoppel

[3] Kyle's fallback argument is that the doctrine of quasi-estoppel prohibits the Felfels from denying the validity of the Note. "Under a quasi-estoppel theory, a party who accepts a transaction or instrument and then accepts benefits under it may be estopped to take a later position inconsistent with the prior acceptance of that same transaction or instrument." *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 18, 591 S.E.2d 870, 881-82 (2004) (citation and quotation marks omitted). "[T]he essential purpose of quasi-estoppel is to prevent a party from benefitting by taking two clearly inconsistent positions." *Id.* at 18-19, 591 S.E.2d at 882 (citation, quotation marks, and ellipsis omitted). Quasi-estoppel "rests upon principles of equity and is designed to aid the law in the administration of justice when without its intervention injustice would result. Equity serves to moderate the unjust results that would follow from the unbending application of common law rules and statutes." *Brooks v. Hackney*, 329 N.C. 166, 173, 404 S.E.2d 854, 859 (1991) (internal citation and quotation marks omitted).

Because the Felfels accepted benefits in connection with the Note, Kyle asserts, they should be estopped from taking the inconsistent position of denying the Note's validity. However, Kyle did not assert this doctrine at any time prior to the beginning of trial. Rather, his counsel raised the general doctrine of estoppel for the first time while arguing in favor of the denial of the Felfels' motion for a directed verdict at the close of evidence at trial. Kyle's attorney did not specifically refer to *quasi*-estoppel until the JNOV stage of the proceeding.[5]

In *Parkersmith Properties v. Johnson*, 136 N.C. App. 626, 525 S.E.2d 491 (2000), we stated the following in assessing the timeliness of the plaintiff's attempt to invoke quasi-estoppel:

> Defendants argue Plaintiff cannot raise the issue of estoppel on appeal because Plaintiff did not allege a theory of estoppel in its complaint. Plaintiff did, however, assert a theory of estoppel in its motion in opposition to summary judgment. Because estoppel is an affirmative defense and Defendants had notice of the defense prior to the summary judgment hearing, Plaintiff properly raised the theory of estoppel and the issue is, therefore, properly before this Court.

Id. at 632 n.3, 525 S.E.2d at 495 n.3.

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5. We note that the applicability of the quasi-estoppel doctrine was never expressly ruled upon by the trial court.

However, Kyle has failed to point us to any legal authority standing for the proposition that quasi-estoppel may be raised as an alternative theory of recovery for the first time after a trial has begun — much less at the directed verdict or JNOV stages. Moreover, there is no valid justification for Kyle's delay in raising this issue given that the Felfels asserted the defense of lack of consideration in their answer. Notably, it was *Kyle's* burden in this lawsuit to prove that the Note was an enforceable agreement. The doctrine of quasi-estoppel constituted a discrete theory of recovery in this case — i.e., that this equitable doctrine allowed enforcement of the Note despite the absence of consideration. Therefore, we deem this theory of recovery to have been waived.

We note that our Supreme Court has held that the closely-related doctrine of equitable estoppel may present a jury question. *See Creech v. Melnik*, 347 N.C. 520, 528, 495 S.E.2d 907, 913 (1998) ("[W]here the evidence raises a permissible inference that the elements of equitable estoppel are present, but where other inferences may be drawn from contrary evidence, estoppel is a *question of fact for the jury*, upon proper instructions from the trial court." (emphasis added)). Although *Creech* dealt with equitable estoppel rather than quasi-estoppel, the Supreme Court has characterized quasi-estoppel as a "branch of equitable estoppel," *Whitacre*, 358 N.C. at 18, 591 S.E.2d at 881, and we see no distinction between the two doctrines for purposes of this issue. *Creech* is, therefore, consistent with the proposition that a party seeking to rely upon a theory of quasi-estoppel must invoke the doctrine in advance of trial.

Moreover, even assuming *arguendo* that Kyle had not waived this issue, quasi-estoppel would not apply under the facts of this case. The 2010 Option (which is the primary benefit Kyle claims the Felfels received in exchange for executing the Note) was only in effect for approximately one year. It was superseded by the 2011 Option contained in the 2011 Lease. By the express terms of the 2011 Lease, the payment of rent by the Felfels during the lease period served as consideration for the 2011 Option.

We do not believe that the facts of this case are sufficient to invoke the doctrine of quasi-estoppel, which is designed to "prevent a party from benefitting by taking two clearly inconsistent positions." *Id.* at 18-19, 591 S.E.2d at 882 (citation and quotation marks omitted). Kyle has failed to show that the Felfels unfairly benefited from taking inconsistent positions as they never attempted to exercise the 2010 Option (or, for that matter, the 2011 Option). In short, this case simply does not cry out for the need to "moderate . . . unjust results that would follow from

the unbending application of common law rules and statutes." *Brooks*, 329 N.C. at 173, 404 S.E.2d at 859.

Accordingly, because the Note failed for lack of consideration and the doctrine of quasi-estoppel is inapplicable, the Felfels were entitled to JNOV. Therefore, the trial court erred in denying their JNOV motion.

Conclusion

For the reasons stated above, we reverse the trial court's 26 July 2016 order and remand for entry of judgment consistent with this opinion.

REVERSED AND REMANDED.

Judges BRYANT and STROUD concur.

MARTIN LEONARD, Plaintiff
v.
RONALD BELL, M.D., Individually, PHILLIP STOVER, M.D., Individually, Defendants

No. COA17-130

Filed 1 August 2017

1. Appeal and Error—interlocutory orders and appeals—public officer immunity—personal jurisdiction—substantial right

Defendant doctors' appeal in a medical malpractice case from an interlocutory order denying their motions to dismiss based on public official immunity was immediately appealable under N.C.G.S. § 1-277(b). Immunity presents a question of personal jurisdiction and thus affects a substantial right.

2. Immunity—public official immunity—physicians providing health services to inmates—positions not created by statute

The trial court did not err in a medical malpractice case by denying defendant doctors' motions to dismiss based on assertions of public official immunity. Although defendants were employed by the Department of Public Safety (DPS) to help fulfill the State's duty to provide health services to inmates, DPS's decision to employ its own physicians in the Division of Adult Correction did not mean that those physicians held positions created by statute so as to be considered a public official. Further, although not dispositive, neither defendant took an oath of office to be considered a public official.

Appeal by defendants from order entered 25 October 2016 by Judge Tanya T. Wallace in Cumberland County Superior Court. Heard in the Court of Appeals 7 June 2017.

Knott & Boyle, PLLC, by W. Ellis Boyle and Benjamin Van Steinburgh, for plaintiff-appellee.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Joshua D. Neighbors, Luke Sbarra, and M. Duane Jones, for defendant-appellant Ronald Bell, M.D.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Charles G. Whitehead and Special Deputy Attorney General Amar Majmundar, for defendant-appellant Phillip Stover, M.D.

ARROWOOD, Judge.

Defendants Ronald Bell, M.D. ("Dr. Bell"), and Phillip Stover, M.D. ("Dr. Stover"), appeal the denial of their motions to dismiss based on grounds of public official immunity. For the following reasons, we affirm.

I. Background

Martin Leonard ("plaintiff") initiated this case against defendants in their individual capacities with the filing of summonses and a complaint on 5 May 2016. In the complaint, plaintiff asserts negligence claims against Dr. Bell and Dr. Stover, both physicians employed by the Department of Public Safety ("DPS"), albeit in different capacities. Those claims are based on allegations that Dr. Bell and Dr. Stover failed to meet the requisite standard of care for physicians while treating plaintiff, who at all relevant times was incarcerated in the Division of Adult Correction (the "DAC").

Specifically, plaintiff alleges that he began experiencing severe back pain in late October 2012 and submitted the first of many requests for medical care. Over the next ten months, plaintiff was repeatedly evaluated in the DAC system by nurses, physician assistants, and Dr. Bell in response to plaintiff's complaints of increasing back pain and other attendant symptoms. Dr. Bell personally evaluated plaintiff nine times and, at the time of the seventh evaluation in June 2013, submitted a request for an MRI to the Utilization Review Board (the "Review Board"). Dr. Stover, a member of the Review Board, denied Dr. Bell's request for an MRI and instead recommended four weeks of physical therapy. Plaintiff continued to submit requests for medical care as his

condition worsened. Upon further evaluations by a nurse and a physician assistant in August 2013, the physician assistant sent plaintiff to Columbus Regional Health Emergency Department for treatment. Physicians at Columbus Regional performed an x-ray and an MRI. Those tests revealed plaintiff was suffering from an erosion of bone in the L4 and L3 vertebra and a spinal infection. Plaintiff asserts Dr. Bell's failure to adequately evaluate and treat his condition, and Dr. Stover's refusal of requested treatment, amounts to medical malpractice.

In response to the complaint, Dr. Bell filed a motion to dismiss pursuant to Rule 12(b)(6) on 13 July 2016. Among the grounds asserted for dismissal, Dr. Bell claimed he was entitled to "public official immunity for all acts and omissions alleged against him[.]" Likewise, on 19 July 2016, Dr. Stover filed a motion to dismiss pursuant to Rule 12(b)(1), (2), and (6). Defendants' motions were heard during the 3 October 2016 session of Cumberland County Superior Court before the Honorable Tanya T. Wallace. On 25 October 2016, the court denied defendants' motions to dismiss.

Dr. Stover filed notice of appeal from the 25 October 2016 order on 18 November 2016. Dr. Bell filed notice of appeal from the 25 October 2016 order on 21 November 2016.

II. Discussion

On appeal, both Dr. Bell and Dr. Stover contend the trial court erred in denying their motions to dismiss. Specifically, Dr. Bell argues the trial court erred in denying his Rule 12(b)(6) motion for failure to state a claim because he is entitled to public official immunity. Dr. Stover similarly argues the trial court erred in denying his Rule 12(b)(2) and (6) motions for lack of personal jurisdiction and failure to state a claim because he is entitled to public official immunity.

A. Interlocutory Nature of Appeals

[1] At the outset, we note that defendants' appeals are interlocutory because the trial court's denial of their motions to dismiss did not dispose of the case. *See Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) ("An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy."). "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). Immediate appeal is available, however, from an interlocutory order that affects a

substantial right. N.C. Gen. Stat. §§ 1-277(a) (2015) and 7A-27(b)(3)(a) (2015). "Orders 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); *see also Can Am South, LLC v. State*, 234 N.C. App. 119, 122, 759 S.E.2d 304, 307 (acknowledging the longstanding rule that the denial of a motion to dismiss based on immunity pursuant to Rule 12(b)(6) affects a substantial right and is immediately appealable under N.C. Gen. Stat. § 1-277(a)), *disc. review denied*, 367 N.C. 791, 766 S.E.2d 624 (2014). "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.' " *Farrell v. Transylvania Cnty. Bd. of Educ.*, 175 N.C. App. 689, 694, 625 S.E.2d 128, 133 (2006) (quoting *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)). Consequently, we address defendants' interlocutory appeals from the denials of their Rule 12(b)(6) motions to dismiss.

Immediate appeal is also available from an adverse ruling as to personal jurisdiction. N.C. Gen. Stat. § 1-277(b). This Court has consistently held that immunity presents a question of personal jurisdiction and, therefore, denial of a Rule 12(b)(2) motion premised on immunity is immediately appealable under N.C. Gen. Stat. § 1-277(b). *Can Am South*, 234 N.C. App. at 124, 759 S.E.2d at 308. Thus, review of Dr. Stover's interlocutory appeal is proper on this additional ground.

B. Standard of Review

The standard of review for an appeal from a denial of a Rule 12(b)(6) motion is well settled.

> The motion to dismiss under [Rule] 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, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003).

When this Court reviews the denial of a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, "[w]e must review the record to determine whether there is evidence to support the trial court's determination that exercising its jurisdiction would be appropriate." *Martinez v. Univ. of North Carolina*, 223 N.C. App. 428, 430-31, 741 S.E.2d 330, 332 (2012).

C. Public Official Immunity

[2] Each defendant contends the trial court erred in denying his motion to dismiss because each defendant is entitled to public official immunity. "Public official immunity precludes suits against public officials in their individual capacities and protects them from liability '[a]s long as a public officer lawfully exercises the judgment and discretion with which he is invested by virtue of his office, keeps within the scope of his official authority, and acts without malice or corruption[.]' " *Fullwood v. Barnes*, __ N.C. App. __, __, 792 S.E.2d 545, 550 (2016) (quoting *Smith v. State*, 289 N.C. 303, 331, 222 S.E.2d 412, 430 (1976) (citation omitted)). Our Supreme Court has explained that "[p]ublic officials receive immunity because it would be difficult to find those who would accept public office or engage in the administration of public affairs if they were to be personally liable for acts or omissions involved in exercising their discretion." *Isenhour v. Hutto*, 350 N.C. 601, 610, 517 S.E.2d 121, 127 (1999) (citations and quotation marks omitted).

In the present case, all parties agree that there were no allegations that defendants acted outside the scope of their authority or that defendants acted with malice or corruption. The sole question on appeal is whether defendants qualify as public officials entitled to immunity from suit in their individual capacities.

"Under the doctrine of public official immunity, '[w]hen a governmental worker is sued individually, or in his or her personal capacity, our courts distinguish between public employees and public officials in determining negligence liability.' " *Farrell*, 175 N.C. App. at 695, 625 S.E.2d at 133 (quoting *Hare v. Butler*, 99 N.C. App. 693, 699-700, 394 S.E.2d 231, 236 (1990) (citations omitted)).

> It is settled in this jurisdiction that 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. An employee, on the other hand, is personally liable for negligence in the performance of his or her duties proximately causing an injury.

Isenhour, 350 N.C. at 609-10, 517 S.E.2d at 127 (citations 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.

Fraley v. Griffin, 217 N.C. App. 624, 627, 720 S.E.2d 694, 696 (2011) (*Murray v. Cnty. of Person*, 191 N.C. App. 575, 579-80, 664 S.E.2d 58, 61 (2008) (internal quotations and citations omitted)); *see also Isenhour*, 350 N.C. at 610, 517 S.E.2d at 127 (recognizing the same "basic distinctions between a public official and a public employee").

Defendants each maintain that they have been delegated and carry out the DAC's constitutional and statutory duty to provide health services to inmates. They further maintain that they exercise a portion of the sovereign power and substantial discretion in fulfilling that duty. Thus, defendants argue that they are public officials and not public employees. We disagree.

Defendants fail to point to any constitutional or statutory provisions creating their respective positions; and we have found no such authority. Instead, defendants contend they satisfy the first prong in the public official analysis because they have been delegated the DAC's duty to provide health services to inmates.

This Court has stated that "[a] position is considered 'created by statute' when 'the officer's position ha[s] a clear statutory basis *or the officer ha[s] been delegated a statutory duty by a person or organization created by statute*' or the Constitution." *Baker v. Smith*, 224 N.C. App. 423, 428, 737 S.E.2d 144, 148 (2012) (emphasis in original) (quoting *Fraley*, 217 N.C. App. at 627, 720 S.E.2d at 696 (citation and quotation marks omitted)). Thus, in *Baker*, this Court concluded that the position of assistant jailer was "created by statute" for purposes of public official immunity even though there was not an explicit statutory basis for the position. *Id.* at 428-30, 737 S.E.2d at 148-49. The Court reasoned that,

> N.C. Gen. Stat. § 162-22 establishes that sheriffs have the duty to operate the jail and the power to "appoint[] the keeper thereof." N.C. Gen. Stat. § 162-22 (2011). . . .

> Regardless of whether we read § 162-22 to include assistant jailers, that statute establishes the duty of the sheriff to operate the jail. N.C. Gen. Stat. § 162-24 permits a sheriff to "appoint a deputy *or employ others to assist him in performing his official duties*." N.C. Gen. Stat. § 162-24 (2011) (emphasis added). Read together with § 162-22, it is clear that the legislature intended to permit the sheriff to "employ others"—plural—to help perform his official duties, including his duty to take "care and custody of the jail." N.C. Gen. Stat. § 162-22.
>
> That statutory duty defines the role of an assistant jailer. Assistant jailers are "charged with the care, custody, and maintenance of prisoners." *State v. Shepherd*, 156 N.C. App. 603, 607, 577 S.E.2d 341, 344 (2003). The same article that vests the sheriff and chief jailer with their powers also vests them with the authority to appoint subordinates, such as assistant jailers. *See* N.C. Gen. Stat. § 162-24. Our legislature, in a different article, described detention officers, i.e. jailers, as "[a] person, who through the special trust and confidence of the sheriff, has been appointed as a detention officer by the sheriff." N.C. Gen. Stat. § 17E-2 (2011). Indeed, the jail cannot operate without "custodial personnel" to "supervise" and "maintain safe custody and control" of the prisoners. N.C. Gen. Stat. § 153-224(a) (2011) ("No person may be confined in a local confinement facility unless custodial personnel are present and available to provide continuous supervision in order that custody will be secure . . .") *Thus, assistant jailers are delegated the statutory duty to take care of the jail and the detainees therein by the sheriff-a position created by our Constitution*. N.C. Const. art. VII, § 2.

Id. at 429-30, 737 S.E.2d at 148-49 (footnote omitted) (emphasis added). Other cases have similarly held that positions with no explicit statutory basis are nonetheless "created by statute" when there is statutory authorization for the delegation of a duty. *See, e.g.*, *Cherry v. Harris*, 110 N.C. App. 478, 480-81, 429 S.E.2d 771, 772-73 (1993) (a forensic pathologist who conducted an autopsy and prepared reports in response to an official request by a county medical examiner satisfied the first element of the public official analysis because the medical examiner, a position created by statute, had the statutory authority pursuant to N.C. Gen. Stat. § 130A-389(a) to order that an autopsy be performed by

a competent pathologist designated by the Chief Medical Examiner, and the forensic pathologist had been so designated).

Defendants rely on *Baker* and contend the result in the present case should be no different because the DAC is statutorily created and they have been delegated the DAC's constitutional and statutory duty to provide health services to inmates.

Defendants correctly point out that the DAC is statutorily created. The relevant statute provides that "[t]here is hereby created and established a division to be known as the Division of Adult Correction of the Department of Public Safety with the organization, powers, and duties hereafter defined in the Executive Organization Act of 1973." N.C. Gen. Stat. § 143B-700 (2015). The immediately following statute adds that "[i]t shall be the duty of the [DAC] to provide the necessary custody, supervision, and treatment to control and rehabilitate criminal offenders . . . ." N.C. Gen. Stat. § 143B-701 (2015). Defendants also correctly point out that the duties of the DAC include the duty to provide health services to inmates. Specifically, our general statutes provide that "[t]he general policies, rules and regulations of the [DAC] shall prescribe standards for health services to prisoners, which shall include preventive, diagnostic, and therapeutic measures on both an outpatient and a hospital basis, for all types of patients." N.C. Gen. Stat. § 148-19(a) (2015). The duty to provide health services to inmates also has a constitutional basis, as recognized in *West v. Atkins*, 487 U.S. 42, 54-55, 101 L. Ed. 2d 40, 53 (1988) (explaining that "the State has a constitutional obligation, under the Eight Amendment, to provide adequate medical care to those whom it has incarcerated[]" because "[i]t is only those physicians authorized by the State to whom [an] inmate may turn[]"), and *Medley v. N.C. Dep't of Correction*, 330 N.C. 837, 842, 412 S.E.2d 654, 658 (1992) (citing *West* while acknowledging that "[i]n addition to common-law and statutory duties to provide adequate medical care for inmates, the state also bears this responsibility under our state Constitution and the federal Constitution[]").

West and *Medley* are only relevant in this case to establish that the DAC has a duty to provide health services to inmates. Otherwise, both cases hold that the State cannot escape liability by delegating that constitutional duty. In *West*, the Supreme Court explained that a physician who is under contract with the State to provide medical services to inmates acts "under color of state law" while providing those services for purposes of asserting an action under 42 U.S.C. § 1983. *West*, 487 U.S. at 54, 101 L. Ed. 2d at 53. Thus, the physician's "conduct is fairly attributable to the State." *Id.* In *Medley*, the Court explained "that the duty to provide adequate medical care to inmates, imposed by the state and federal

Constitutions, and recognized in state statute and caselaw, is such a fundamental and paramount obligation of the state that the state cannot absolve itself of responsibility by delegating it to another." *Medley*, 330 N.C. at 844, 412 S.E.2d at 659. Thus, the North Carolina Department of Correction could not avoid liability by contracting a physician to fulfill its duty because the physician "is as a matter of law an agent for purposes of applying the doctrine of *respondeat superior*." *Id.* at 845, 412 S.E.2d at 659. However, neither *West* nor *Medley* stands for the proposition that a physician fulfilling the DAC's duty to provide health services to inmates was immune from suit in their individual capacity. Any argument that defendants cannot be sued in their individual capacities based on the holdings of *West* or *Medley* is erroneous and misplaced.

Based on the above, we agree with defendants that the DAC is statutorily created and that the DAC has a duty to provide health services to inmates. We, however, find the present case distinguishable from *Baker* and other cases that hold a position is created by statute when there has been a delegation of a statutory duty by a person or organization created by statute or the constitution. In each of those cases, the Court points directly to a statute that authorizes a constitutionally or statutorily created person or organization to delegate its statutory duty to another individual. In *Baker*, that statute was N.C. Gen. Stat. § 162-24, which "permits a sheriff to 'appoint a deputy or employ others to assist him in performing his official duties.' " 224 N.C. App. at 429, 737 S.E.2d at 148 (quoting N.C. Gen. Stat. § 162-24) (emphasis omitted). In *Cherry*, that statute is N.C. Gen. Stat. § 130A-389(a), which allows a county medical examiner to order an autopsy to be performed by a pathologist. 110 N.C. App. at 481, 429 S.E.2d at 773. Even in *Chastain v. Arndt*, __ N.C. App. __, __ S.E.2d __ (18 April 2017) (COA 16-1151) (holding a Basic Law Enforcement Training ("BLET") firearms instructor was a public official entitled to immunity), a recent decision that both defendants cite in reply to plaintiff's arguments, this Court, in support of its finding that "[the defendant], in his role as a BLET firearms instructor, was delegated a statutory duty by a person or organization created by statute[,]" points to statutory authority that establishes the North Carolina Criminal Justice Education and Training Standards Commission (the "Commission") and shows that its duty to train officers is to be delegated to instructors. *Id.* at __, __ S.Ed.2d at __. As this Court summarized in *Chastain*, those provisions involving instructors provide as follows:

> The Commission . . . 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 (7).

Id.

In the present case, defendants contend the DAC has delegated to them its duty to provide health services to inmates. Yet, defendants fail to point to any statutory provisions similar to those in *Baker*, *Cherry*, or *Chastain* contemplating the delegation of the DAC's duty, or contemplating that the DAC will hire its own physicians. Instead, defendants cite the following portions of N.C. Gen. Stat. § 148-19:

> (a) . . . The [DAC] shall seek the cooperation of public and private agencies, institutions, officials and individuals in the development of adequate health services to prisoners.
>
> . . . .
>
> (c) Each prisoner committed to the [DAC] shall receive a physical and mental examination by a health care professional authorized by the North Carolina Medical Board to perform such examinations as soon as practicable after admission and before being assigned to work. . . .

Neither of those portions of N.C. Gen. Stat. § 148-19, however, indicate that the legislature intended for DAC to hire its own physicians. The cited portion of subsection (a) is broad and shows only that the legislature left it to DAC to develop adequate health services; it does not provide any indication how health services would be provided. Subsection (c) is similarly broad, requiring an initial evaluation by an authorized health care professional, but no further indication as to how the DAC was to provide that health care professional. There are many ways the DAC could fulfill its duty to provide health services to inmates. In fact, subsection (b) contemplates that the Secretary of Public Safety may request personnel employed by the Department of Health and Human Services or other State agencies to be detailed to the DAC for purposes of providing health services. N.C. Gen. Stat. § 148-19(b). DPS's decision to employ its own physicians appears to be a policy decision.

In deciding defendants are not public officials entitled to immunity, we find additional guidance in this Court's decision in *Farrell v. Transylvania Cnty. Bd. Of Educ.*, 199 N.C. App. 173, 682 S.E.2d 224 (2009). In *Farrell*, the Court addressed whether a special needs teacher in the public school system was entitled to public official immunity from claims related to the physical and emotional abuse of the plaintiffs' son. *Id.* at 174, 682 S.E.2d at 226. In concluding that the teacher was not a public official, the Court distinguished the teacher's case from *Kitchin v. Halifax Cnty.*, 192 N.C. App. 559, 665 S.E.2d 760 (2008), *disc. rev. denied.*, 363 N.C. 127, 673 S.E.2d 135 (2009) (holding that an animal control officer was a public official because the position is created by statute), *Hobbs v. N.C. Dep't of Human Res.*, 135 N.C. App. 412, 520 S.E.2d 595 (1999) (holding that department of social services staff members who were acting for and representing the director of social services were public officials because the director, a public official, had the statutory authority to delegate to staff members authority to act as his representative), and *Price v. Davis*, 132 N.C. App. 556, 512 S.E.2d 783 (1999) (without discussing the *Isenhour* criteria, holding that a correctional sergeant and an assistant superintendent at a correctional facility were public officials), stating that "the party being sued [in those cases] was either employed in a position created by statute, or delegated a statutory duty by a person or organization created by statute." *Farrell*, 199 N.C. App. at 179, 682 S.E.2d at 229. In contrast, the Court in *Farrell* noted that although N.C. Gen. Stat. § 115C-307 defines the duties of teachers and N.C. Gen. Stat. § 115C-325 governs the system of employment for public school teachers, neither of those statutes create the position of teacher. *Id.* at 177, 682 S.Ed.2d at 228. Thus, despite the explicit constitutional guarantee of the right to a free public education, *see Leandro v. State*, 346 N.C. 336, 488 S.E.2d 249 (1997), the State's constitutional duty to guard and maintain that right, *see* N.C. Const. art. 1, § 15, and statutes providing for the hiring of teachers, defining the duties of teaches, and governing the system of employment for teaches, *see* N.C. Gen. Stat. §§ 115C-299, -307, and -325, teachers that are employed to fulfill the State's duty are not public officials entitled to immunity.

Similarly, although defendants are employed by DPS to help fulfill the State's duty to provide health services to inmates, DPS's decision to employ its own physicians in the DAC does not mean that those physicians hold positions created by statute to be considered a public official. To hold otherwise would open the flood gates so that any physician providing health services to an inmate in the DAC, whether or not the physician was directly employed by DPS, or any DPS employees providing services relating to the care and wellbeing of inmates for that matter,

even those providing the food services, would be considered to hold positions created by statute so as to satisfy the first prong of the public official analysis. We reject such an analysis that vastly expands the scope of public official immunity to those employees. Although Dr. Bell and Dr. Stover were both physicians employed by DPS to provide health services to inmates in the DAC, their positions were not created by statute. Therefore, like the teacher in *Farrell*, they are not public officials for purposes of public official immunity.

Regarding the second and third prongs in the public official analysis, defendants contend that because they fulfill the DAC's duty to provide health services to inmates, their jobs necessarily involve the power of the sovereign and the exercise of discretion. Because we hold that defendants' positions are not created by statute, we need not address the remaining elements to reach the conclusion that defendants are not public officials entitled to immunity. We, however, take this opportunity to note that there is nothing uniquely sovereign about the health services provided by defendants to plaintiff in this case, except that plaintiff was an inmate in the DAC. Furthermore, all physicians exercise discretion in the evaluation and treatment of patients. The discretion exercised by defendants in providing health services to plaintiff in this case is no different than the discretion exercised by physicians treating patients outside of the DAC system.

Finally, while not dispositive to our analysis, we note that neither of these defendants took an oath of office as is often required to be considered a public official. *See Baker*, 224 N.C. App. at 433, 737 S.E.2d at 151.

III. Conclusion

For the foregoing reasons, we affirm the trial court's decision to deny defendants' motions to dismiss based on assertions of public official immunity.

AFFIRMED.

Judges ELMORE and DIETZ concur.

MITCHELL, BREWER, RICHARDSON, ADAMS, BURGE & BOUGHMAN; GLENN B. ADAMS; HAROLD L. BOUGHMAN, JR. AND VICKIE L. BURGE, PLAINTIFFS
v.
COY E. BREWER, JR., RONNIE A. MITCHELL, WILLIAM O. RICHARDSON, AND CHARLES BRITTAIN, DEFENDANTS[1]

No. COA16-1122

Filed 1 August 2017

1. Appeal and Error—preservation of issues—waiver—failure to object—dissolution of law firm

Although defendants contended the trial court erred in an action involving an accounting and distribution for the dissolution of a law firm by adopting an appointed referee's report, defendants waived their right to have a jury decide the scope and manner of the referee's duties by failing to object to the compulsory reference order, the scope of the reference order, and the procedures employed by the referee. A referee has significant discretion, and neither N.C.G.S. § 1A-1, Rule 53 nor the reference order required the referee to conduct the accounting process in the manner defendants argued was required.

2. Attorneys—accounting and distribution—dissolution of law firm—professional limited liability corporation—judicial dissolution

The trial court did not err in an action involving an accounting and distribution for the dissolution of a law firm by granting summary judgment in favor of plaintiffs on defendants' counterclaims that incorrectly assumed the professional limited liability corporation (PLLC) remained an ongoing entity. A judicial dissolution was necessary where there was a deadlock between the PLLC members, and any confusion on the status of the PLLC was eliminated by the decision in *Mitchell I*. Further, an extensive analysis of the values of contingent fee cases that had been received before dissolution, but resolved afterward, were contained in the appointed referee's report.

Appeal by defendants from orders entered 26 February 2013, 18 September 2015, and 19 February 2016 by Judge John R. Jolly, Jr. in Cumberland County Superior Court. Heard in the Court of Appeals 2 May 2017.

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1. Richardson and Brittain have settled their disputes with Plaintiffs and are not parties to this appeal.

Everett Gaskins Hancock LLP, by E.D. Gaskins, Jr., James M. Hash and Fiona K. Steer, for plaintiffs-appellees.

Ronnie M. Mitchell and Coy E. Brewer, Jr., pro se, for defendants-appellants.

DAVIS, Judge.

This appeal involves a number of issues surrounding the break-up of the Mitchell, Brewer, Richardson, Adams, Burge & Boughman, PLLC law firm. Upon remand of the case following our resolution of the parties' initial appeal, the trial court dissolved the law firm and appointed a referee to conduct an accounting and distribution. Ronnie M. Mitchell[2] and Coy E. Brewer, Jr. (collectively "Defendants") now appeal from the trial court's orders appointing a referee, adopting the report of the referee, and granting the motion for summary judgment of Glenn B. Adams, Harold L. Boughman, Jr., and Vickie L. Burge (collectively "Plaintiffs") as to Defendants' remaining counterclaims. We affirm each of the trial court's orders.

Factual and Procedural Background

The full factual background relating to the break-up of the firm is set out in our prior opinion. *See Mitchell, Brewer, Richardson, Adams, Burge & Boughman, PLLC v. Brewer*, 209 N.C. App. 369, 705 S.E.2d 757 (hereinafter "*Mitchell I*"), *disc. review denied*, 365 N.C. 188, 707 S.E.2d 243 (2011). Accordingly, we only discuss below those facts relevant to the present appeal.

This lawsuit arose out of a dispute between the members of the Mitchell, Brewer, Richardson, Adams, Burge & Boughman, PLLC law firm, which resulted in the firm breaking up in the summer of 2005.[3] Plaintiffs subsequently formed a new firm called Adams, Burge & Boughman, PLLC ("AB&B"), while Brewer, Mitchell, William O. Richardson, and Charles Brittain continued to practice law together as Mitchell, Brewer, Richardson. In the aftermath of the break-up, numerous disagreements

2. The complaint and the captions of the trial court's orders incorrectly identify Mitchell as "Ronnie *A*. Mitchell" rather than "Ronnie *M*. Mitchell."

3. For purposes of clarity, in this opinion we refer to the firm that existed at the time of dissolution — Mitchell, Brewer, Richardson, Adams, Burge & Boughman, PLLC — as "the PLLC."

arose between the parties regarding the ownership of certain PLLC assets — including future profits from unresolved contingent fee cases brought into the PLLC before the break-up.

On 5 July 2006, Plaintiffs filed the present lawsuit in Cumberland County Superior Court against Brewer, Mitchell, Richardson, and Brittain in which they asserted claims for (1) an accounting to the PLLC; (2) an accounting to Plaintiffs; (3) a "liquidating distribution"; (4) constructive fraud and breach of fiduciary duty; and (5) unfair and deceptive trade practices. In connection with these claims, Plaintiffs sought a judicial dissolution and winding up of the PLLC. Plaintiffs asserted these claims both individually and derivatively on behalf of the PLLC. Plaintiffs subsequently amended their complaint on 1 August 2006, 23 May 2007, and 17 February 2009.

The lawsuit was designated a complex business case pursuant to N.C. Gen. Stat. § 7A-45.4 and assigned to the Honorable John R. Jolly, Jr. of the North Carolina Business Court. On 1 November 2006, Defendants moved to dismiss Plaintiffs' complaint, and the trial court denied the motion by order entered on 8 May 2007. Defendants subsequently filed an answer on 13 June 2007, raising multiple defenses and asserting the following counterclaims: (1) a request for a declaratory judgment that Plaintiffs "voluntarily and unilaterally withdrew" from the PLLC; (2) a declaratory judgment that Plaintiffs were equitably estopped from denying that they had agreed to a dissolution of the PLLC pursuant to the terms of a memorandum drafted by Brewer; (3) breach of fiduciary duty in connection with Plaintiffs' misuse of PLLC assets, failure to meet financial obligations of the PLLC, and failure to account for fees generated through PLLC business; (4) conversion and misappropriation of PLLC assets; (5) unjust enrichment for failure to account to the PLLC; (6) a request for imposition of a constructive trust, equitable lien, or resulting trust; (7) breach of fiduciary duty in connection with "the defense of [a] malpractice action[;]" (8) unjust enrichment in connection with "the defense of [a] malpractice action[;]" (9) breach of fiduciary duty based on *ultra vires* acts; and (10) a request for a statutory distribution of assets.

On 9 January 2008, the parties each filed motions for partial summary judgment. Plaintiffs' motion requested judicial dissolution of the PLLC and dismissal of Defendants' counterclaims that were "predicated on the proposition that no such dissolution occurred." Defendants' motion requested an order declaring that Plaintiffs had "withdrawn" from the PLLC as opposed to there having been a dissolution of the firm. On 15 August 2008, Defendants filed a second motion for summary judgment

as to all of Plaintiffs' claims on the grounds that the PLLC lacked standing to bring this action on its own behalf and the individual plaintiffs lacked standing to bring this action derivatively on behalf of the PLLC.

The trial court issued an order on 31 March 2009 ruling, in part, that Plaintiffs were equitably estopped from denying that they had withdrawn from the PLLC. Therefore, the court held, all of the parties' claims would be evaluated in the context of a withdrawal by Plaintiffs from the PLLC rather than a dissolution of the PLLC. *Mitchell I*, 209 N.C. App. at 375-76, 705 S.E.2d at 762-63. All of the parties appealed to this Court from the trial court's order.

In *Mitchell I*, we affirmed in part the trial court's order, reversed in part, and remanded for further proceedings. With respect to the issue of standing, we held that Plaintiffs possessed standing under N.C. Gen. Stat. § 57C-8-01(a) to assert derivative claims on behalf of the PLLC. *Id.* at 382-87, 705 S.E.2d at 767-70. We further ruled that because "withdrawal pursuant to N.C. Gen. Stat. § 57C-5-06 was not available as a remedy at law for the parties[,]" the dismissal of Defendants' counterclaims premised upon an alleged withdrawal by Plaintiffs was proper. *Id.* at 390, 705 S.E.2d at 772. We also held that pursuant to N.C. Gen. Stat. § 57C-6-02 dissolution of the PLLC was necessary because there was a deadlock in its management. *Id.* at 390-91, 705 S.E.2d at 772.[4]

With respect to dissolution and the need for a liquidation and distribution, we explained as follows:

> Here, since 14 June 2005, there has been a deadlock between the PLLC members as a result of their disagreement regarding division of profits derived from pending contingent fee cases when three members of the PLLC left the PLLC, and plaintiffs and defendants began practicing separate and apart beginning on 1 July 2005. Although there were communications between plaintiffs and defendants addressing the assets of the PLLC, none resolved this deadlock. Because the three plaintiffs were no longer

4. We also rejected Defendants' allegation in Counterclaim Two that a memorandum drafted by Brewer (the "Brewer Memorandum") and provided to Plaintiffs on 8 July 2005 set forth the terms governing a dissolution of the PLLC. The Brewer Memorandum had sought to lay out the terms that would apply to the PLLC's break-up, including the distribution of certain PLLC assets and the handling of PLLC liabilities. In *Mitchell I*, we determined that Counterclaim Two failed because, among other reasons, there was no "indication that the plaintiffs expressly assented to the terms as proposed by defendants" in the Brewer Memorandum. *Id.* at 386, 705 S.E.2d at 769 (quotation marks omitted).

> willing to practice with defendants, the PLLC could "no longer be conducted to the advantage of the members generally[.]" *See* [N.C. Gen. Stat. § 57C-6-02]. Liquidation of the PLLC's assets "is reasonably necessary for the protection of the rights or interests of the complaining member[s]" as the PLLC's members have been unable to reach any agreement regarding profits from the disputed pending contingent fee cases. *See id.* Also, there is evidence that profits made by defendants since the deadlock from one of the disputed contingent fee cases were not distributed to the members or accounted for by defendants. Therefore, there is a potential that the PLLC's assets are being misapplied. Accordingly, plaintiffs have forecast facts which would permit judicial dissolution pursuant to N.C. Gen. Stat. § 57C-6-02. As defendants had "a full and complete remedy at law[,]" the business court erred in not applying this legal remedy and instead applying the principles of equity to resolve the issues arising from this breakup.

Id.

Thus, we determined that "because the business court improperly applied equitable estoppel in this situation, it abused its discretion by not ordering judicial dissolution of the PLLC." *Id.* at 392, 705 S.E.2d at 773. We then concluded as follows:

> Accordingly, we reverse the business court's judgment granting partial summary judgment in favor of defendants on the basis of equitable estoppel and remand to the business court for [the] granting of summary judgment in favor of plaintiffs on the issue of judicial dissolution pursuant [to] N.C. Gen. Stat. § 57C-6-02, for a decree of dissolution, and directing the winding up of the PLLC pursuant to N.C. Gen. Stat. § 57C-6-02.3 (2007). Given this ruling, plaintiffs' derivative claims for an accounting to the PLLC (claim one), an accounting to plaintiffs (claim two), and a demand of liquidating distribution (claim three), as well as defendants' counterclaim for a demand for statutory distribution of assets (counterclaim ten), will be addressed by the business court in its directing the winding up of the PLLC.

Id. at 393, 705 S.E.2d at 773. Finally, we reversed the trial court's dismissal of Plaintiffs' Claims Four and Five and Defendants' Counterclaims

Three through Six and Nine on the ground that the trial court had dismissed those claims based upon its incorrect determination that a withdrawal had occurred. *Id.* at 393, 705 S.E.2d at 773-74.

Upon remand, the trial court held a hearing on 17 August 2012 in order to consider the parties' arguments regarding the potential appointment of a referee to oversee accounting and distribution issues in connection with the dissolution of the PLLC. Prior to the hearing, the parties submitted briefs setting forth their respective positions regarding the appointment of a referee and the methodology that should be employed in valuing disputed contingent fee engagements.

On 26 February 2013, the trial court issued an "Opinion and Order Dissolving Company and Appointing Special Master" (the "Reference Order").[5] In this order, the court entered a decree of dissolution retroactively dissolving the PLLC as of 1 July 2005 (the "Dissolution Date"). The trial court noted that "[t]he parties agree that a dissolution of the [PLLC] is required, as well as an accounting and distribution of its assets" but that "[t]he parties dispute various aspects of the financial and accounting records of the [PLLC] and the amounts owed by and to the respective parties." The court observed that "[a] primary point of contention between the parties is the appropriate accounting method for profits derived from the contingent-fee engagements that the [PLLC] entered into prior to dissolution but were resolved post-dissolution by Defendants ('Contingent Fee Engagements')." The court stated that

> [t]he difficulty in liquidating contingent-fee engagements by conventional means leads inevitably to the conclusion that the only way in which they may be converted to value following dissolution is by pursuing them to resolution. Further, it is unrealistic to suppose that all former members will collaborate in order to resolve contingent-fee engagements following dissolution. As is often the case in a law-firm setting, only a few of the members, perhaps only one, will have been involved personally in the engagement prior to dissolution and possess an adequate familiarity with the client and the subject matter of the litigation to proceed with representation following dissolution. Therefore, the task of pursuing such engagements following dissolution is likely to fall to those members

5. The parties and the trial court use the terms "referee" and "special master" interchangeably. For the sake of consistency, we will use the term "referee" as that is the term used in Rule 53 of the North Carolina Rules of Civil Procedure.

> who pursued the engagements prior to dissolution, usually at the affirmative direction of the client. Practically, this means that following dissolution an individual member or members will pursue the engagements using individual effort and skill without collaboration with former members.

The trial court then concluded that

> the appropriate measure of the value of the Contingent Fee Engagements to the [PLLC] is the reasonable value of the services provided by or in behalf of the [PLLC] up to the date of dissolution. Under the present circumstances, the best means by which to measure the reasonable value of pre-dissolution services is to determine (a) the total attorney hours ("Time") expended on a particular Contingent Fee Engagement, both prior to and after dissolution, (b) the percentage of Time that was expended prior to dissolution and (c) the net profit ultimately realized from the Contingent Fee Engagement. The reasonable asset value to the [PLLC] of each such matter would be determined by the percentage of pre-dissolution Time expended relative to the net profit ultimately realized on that matter. As an example, if a total of 100 attorney hours were expended on a particular Contingent Fee Engagement and 50 of those hours were performed prior to dissolution, the net fee ultimately received by Defendants should be shared 50/50 with Plaintiffs. This method, as opposed to others, best accounts for the risk borne by the [PLLC] in initially taking on the Contingent Fee Engagements and also reflects the parties' expectations at the time they entered into the Contingent Fee Engagements.
>
> The court therefore will direct the winding up of the [PLLC] in accordance with the findings and conclusions above. In doing so, the court observes that the reasoning relative to liquidation and sharing between the [PLLC] and Defendants of ultimate profits from Contingent Fee Engagements ordinarily also would hold true for any professional engagements ("Other Engagements") initially undertaken by the [PLLC] but completed and billed for post-dissolution by Defendants. This Opinion and Order is intended to encompass such Other Engagements.

(Footnote omitted.)

The trial court proceeded to determine that the appointment of a referee "to conduct an accounting of the [PLLC] as to the Contingent Fee Engagements and any Other Engagements . . . will be in the best interest of the parties." Accordingly, the trial court ordered as follows:

> [31] The [PLLC] is DISSOLVED, pursuant to G.S. 57C-6-02. The dissolution of the [PLLC] shall be effective as of July 1, 2005 ("Dissolution Date").
>
> [32] The court appoints Craig A. Adams, CPA, as Special Master, pursuant to Rule 53. . . .
>
> [33] In undertaking and performing this engagement, the Special Master is authorized to engage the professional services of other members of his accounting firm, at their customary and usual hourly rates, as he reasonably determines are needed.
>
> [34] The Special Master shall take an account of the [PLLC] and the Defendants, consistent with the provisions of this Opinion and Order, and shall:
>
> (a) Take control of and secure the financial records, or appropriate copies thereof, of the [PLLC];
>
> (b) Secure the financial records, or appropriate copies thereof, of the Defendants, as they relate to the Contingent Fee Engagements or any Other Engagements;
>
> (c) Assess the state of the financial records of the [PLLC];
>
> (d) Assess the state of the financial records of the Defendants as they relate to the Contingent Fee Engagements or any Other Engagements;
>
> (e) Direct and assist in the preparation of financial statements that state the financial condition of the [PLLC] with reasonable accuracy;
>
> (f) Investigate and report to the court the nature and extent of the outstanding assets and liabilities of the [PLLC];
>
> (g) If there are [PLLC] assets subject to distribution under G.S. 57C-6-05, determine and recommend

> to the court the amount in which those assets should be distributed to the [PLLC] using generally accepted accounting principles and the protocols established in this Opinion and Order;
>
> (h) With regard to any [PLLC] assets available for distribution, determine and recommend to the court the manner and proportions of such distributions to the various members of the [PLLC] as of the date of dissolution; and
>
> (i) The [PLLC] shall submit to the Special Master records of all attorney billable hours expended prior to the Dissolution Date on any matter pending as of the Dissolution Date. This record shall indicate the number of total billable hours attributable to the Contingent Fee Engagements or any Other Engagements. Defendants shall submit to the Special Master a record of all attorney hours expended on the Contingent Fee Engagements or any Other Engagements.
>
> [35] All parties to this civil action shall cooperate fully with the Special Master in the performance of his duties.
>
> [36] The Special Master shall report his finding to the court as soon as practicable and may request from the parties or the court any further information, authority, direction or actions he might need from the court or parties in order to perform the duties reflected in this Opinion and Order.
>
> . . . .
>
> [38] All parties to this civil action are directed to cooperate with the Special Master and provide any and all financial information and records he might request.
>
> [39] During [the] pendency of this civil action or unless otherwise ordered, all parties are directed not to destroy, remove, alter or obscure any of the financial or otherwise relevant records of the [PLLC].

None of the parties filed objections to the Reference Order or to the appointment of the Referee as provided for therein. The trial court subsequently issued an order on 14 June 2013 providing additional specificity regarding the materials that the parties were required to make

available to the Referee. During the course of the accounting process, the Referee conducted *ex parte* interviews with the parties in order to better understand the records that had been submitted to him. On 24 October 2014, after the Referee had completed his report but before it was filed with the trial court, the parties were allowed to depose Sarah Armstrong — senior manager for the Referee's accounting firm and the report's principal author — regarding the accounting process and methodology that had been used.

The Referee subsequently filed his report (the "Referee's Report") with the trial court on 13 February 2015. The report had "three primary areas of focus: profit allocation percentages; restoration of negative capital accounts; and allocation of contingent fees." After explaining its determinations with respect to each of these issues, the Referee ultimately concluded that Defendants owed a total of $358,000 to Plaintiffs — specifically, $109,000 to Adams, $96,000 to Boughman, and $153,000 to Burge.

On 13 March 2015, Brewer, Mitchell, and Brittain filed "Exceptions and Objections Regarding Report of Special Master." Among other things, they argued that the trial court's prior orders related to the Referee "did not and do not clearly define the methodology to be employed and the scope of the responsibilities and powers of the appointed referee or special master." They also requested that certain findings in the Referee's Report be submitted to a jury.

Plaintiffs subsequently filed a motion requesting that the trial court adopt the Referee's Report. Following a hearing on 8 May 2015, the trial court issued its "Opinion, Order and Judgment" (the "Adoption Order") on 18 September 2015 granting Plaintiffs' motion to adopt the Referee's Report and rejecting the objections raised by Brewer, Mitchell, and Brittain.[6]

In the Adoption Order, the trial court determined that by failing to object at the time the Reference Order was issued, Defendants had waived their right to (1) demand a jury trial on contested issues addressed in the Reference Order; and (2) argue that the Reference Order failed to clearly define the methodology to be employed by the Referee and the scope of his responsibilities and powers. The court also rejected Defendants' various exceptions to the substantive findings of the report.

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6. By the time the Adoption Order was filed, only Mitchell and Brewer remained as defendants.

The trial court ultimately concluded that "the Referee's Report complies with the Reference Order, is supported by competent evidence and that the conclusions reached in the Referee's Report are supported by the facts found." Accordingly, the trial court adopted the Referee's Report "in its entirety as constituting the findings and conclusions of the court" and entered judgments against Defendants in the amount of $102,578 each.

The trial court then explained that its ruling did "not constitute a final disposition of this civil action, as there remain unresolved claims and counterclaims." The court therefore ordered the parties to file by 12 October 2015 any dispositive motions related to those unresolved claims — namely, Plaintiffs' Claims Four and Five and Defendants' Counterclaims Three through Nine.

On that date, Plaintiffs filed a motion for summary judgment as to Defendants' remaining counterclaims. In support of this motion, Plaintiffs relied upon our decision in *Mitchell I* as well as the trial court's Adoption Order and the Referee's Report. Defendants submitted affidavits from Mitchell and Brewer in opposition to Plaintiffs' motion and also filed a cross-motion for summary judgment as to Plaintiffs' claims for fraud and breach of fiduciary duty (Claim Four) and unfair and deceptive trade practices (Claim Five). On 9 December 2015, Plaintiffs voluntarily dismissed Claims Four and Five, thereby mooting Defendants' summary judgment motion.

On 19 February 2016, the trial court issued an "Order and Opinion" (the "Final Order") granting Plaintiffs' motion for summary judgment and dismissing all of Defendants' remaining counterclaims. Defendants filed a timely notice of appeal to this Court as to the Reference Order, the Adoption Order, and the Final Order.

Analysis

Defendants' arguments on appeal fall into two main categories: (1) challenges related to the appointment of the Referee, the accounting process utilized by the Referee, and the trial court's adoption of the Referee's Report; and (2) challenges to the trial court's entry of summary judgment in Plaintiffs' favor on Defendants' Counterclaims Three through Six and Nine.[7] We address each set of arguments in turn.[8]

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7. Defendants do not appeal the trial court's dismissal of Counterclaims Seven and Eight, which the court dismissed because Defendants' brief in opposition to Plaintiffs' motion for summary judgment neither addressed them nor pointed to evidence that would create a genuine issue of material fact as to them.

8. Defendants do not raise on appeal any of the substantive exceptions that they asserted below to the findings in the Referee's Report. Accordingly, those exceptions are

I. Issues Related to Referee's Report

[1] In addition to challenging the initial decision to appoint a referee, Defendants also argue on appeal that the trial court "failed to define clearly the methodology to be employed and the scope of the responsibilities and powers of the appointed referee . . . or the means for consideration of the issues in the case." Relatedly, they challenge the manner in which the Referee conducted the accounting, including his decisions not to place interviewees under oath or to compile transcripts of their interviews as well as his use of *ex parte* communications with the various parties.

In order to assess these arguments, we begin with an overview of the procedure by which a trial court may refer matters to a referee. Pursuant to Rule 53 of the North Carolina Rules of Civil Procedure, "(1) upon consent of the parties, (2) upon application of one of the parties, or (3) upon its own motion, a trial court may order that a referee determine issues of fact raised by the pleadings and evidence." *Rushing v. Aldridge*, 214 N.C. App. 23, 24, 713 S.E.2d 566, 568 (2011) (citation omitted). If one of the parties does not consent, the court may order a reference in the following instances:

> a. Where the trial of an issue requires the examination of a long or complicated account; in which case the referee may be directed to hear and decide the whole issue, or to report upon any specific question of fact involved therein.
>
> b. Where the taking of an account is necessary for the information of the court before judgment, or for carrying a judgment or order into effect.
>
> c. Where the case involves a complicated question of boundary, or requires a personal view of the premises.
>
> d. Where a question of fact arises outside the pleadings, upon motion or otherwise, at any stage of the action.

N.C. R. Civ. P. 53(a)(2).

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waived. *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."); *Larsen v. Black Diamond French Truffles, Inc.*, 241 N.C. App. 74, 79, 772 S.E.2d 93, 96 (2015) ("[U]nder Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure, where a party fails to assert a claim in its principal brief, it abandons that issue . . . .").

A trial court's decision to order a "compulsory reference in an action which the court has authority to refer is a matter within the sound discretion of the court." *Dockery v. Hocutt*, 357 N.C. 210, 215, 581 S.E.2d 431, 434 (2003). When a reference is made, "[t]he duty and powers of the referee are not inherent but are determined by the order of the judge." *Godwin v. Clark, Godwin, Harris & Li, P.A.*, 40 N.C. App. 710, 713, 253 S.E.2d 598, 601 (citation omitted), *appeal dismissed*, 297 N.C. 698, 259 S.E.2d 295 (1979).

After gathering the relevant facts, "[t]he referee shall prepare a report upon the matters submitted to him by the order of reference and shall include therein his decision on all matters so submitted." N.C. R. Civ. P. 53(g)(1). After hearing any exceptions to the referee's report lodged by the parties, the court "may adopt, modify or reject the report in whole or in part, render judgment, or may remand the proceedings to the referee with instructions." N.C. R. Civ. P. 53(g)(2).

If a reference is compulsory, a party may preserve its right to a jury trial on issues decided by the referee by taking each of the following steps:

> a. Objecting to the order of compulsory reference *at the time it is made*, and
>
> b. By filing specific exceptions to particular findings of fact made by the referee within 30 days after the referee files his report with the clerk of the court in which the action is pending, and
>
> c. By formulating appropriate issues based upon the exceptions taken and demanding a jury trial upon such issues. Such issues shall be tendered at the same time the exceptions to the referee's report are filed. If there is a trial by jury upon any issue referred, the trial shall be only upon the evidence taken before the referee.

N.C. R. Civ. P. 53(b)(2) (emphasis added). If these requirements are satisfied, "[t]he objecting party will then be entitled to a jury trial on the specified issues unless the evidence presented to the referee would entitle one of the parties to a directed verdict." *Rushing*, 214 N.C. App. at 26, 713 S.E.2d at 569 (citation omitted).

As an initial matter, Defendants have not preserved their right to have a jury decide any matters determined by the Referee as they failed to "[o]bject[ ] to the order of compulsory reference at the time it [was]

made[.]"[9] N.C. R. Civ. P. 53(b)(2)(a); *see also Gaynor v. Melvin*, 155 N.C. App. 618, 621, 573 S.E.2d 763, 765 (2002) ("In order to preserve the right to a jury trial where a compulsory reference has been ordered, a party must, among other things, object to the order of reference at the time it is made.").

Our decision in *Godwin* is instructive in addressing Defendants' arguments — both procedurally and substantively. In *Godwin*, the plaintiff contended on appeal that "the trial court and referee did not comply with the terms of Rule 53 in that [the] referee did not conduct hearings, examine witnesses under oath, admit exhibits into evidence, prepare a record, make definite findings of fact and conduct an audit before making the valuation." *Godwin*, 40 N.C. App. at 713-14, 253 S.E.2d at 601. This Court rejected these contentions on several grounds. With regard to the plaintiff's substantive arguments, we held that "[n]one of these procedures are required under the statute" and noted that "[t]he trial court order did not require any of these procedures." *Id.* at 714, 253 S.E.2d at 601.

With regard to the issue of whether the plaintiff had properly preserved its right to challenge the procedures set forth in the reference order, we stated that "[a]t the time the order for a compulsory reference was entered, plaintiff did not object to the contents of the order. Plaintiff cannot now complain." *Id.* Similarly, we noted that "[d]uring the proceedings before the referee, plaintiff did not object at any time to the procedures used." *Id.*

Here, we similarly reject as untimely Defendants' challenges to the scope of the Reference Order or the manner in which the Referee carried out his duties. At no point during the two years between the issuance of the Reference Order and the filing of the Referee's Report did Defendants formally object to the scope of the Reference Order or the process by which the Referee was conducting the accounting. The first time Defendants raised any such objections on the record was on 13 March 2015 in their Exceptions and Objections Regarding Report of Special Master.

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9. Defendants point to a footnote contained in Mitchell's 15 August 2012 submission to the trial court — over six months *before* the 26 February 2013 Reference Order was issued — stating that he did "not desire or consent to the entry of an order of reference . . . ." We do not believe, however, that this preliminary objection to the potential appointment of a referee satisfied Rule 53 as it was not raised *at the time the reference was made* as required by Rule 53(b)(2)(a).

It is important to note that Defendants do not contend that they were unaware of how the Referee was conducting the accounting while the process was ongoing. Nevertheless, they waited until *after* the Referee's Report was issued to object to the procedures utilized by the Referee.[10] Accordingly, Defendants' challenges to the scope of the Reference Order and the procedures employed by the Referee have been waived.

Moreover, Defendants' arguments fail substantively as well. Our holding in *Godwin* demonstrates that Rule 53 provides few hard-and-fast rules governing the manner in which an accounting must be conducted as well as the fact that trial courts possess broad discretion in determining how a referee is to fulfill his duties:

> Plaintiff maintains that the trial court and referee did not comply with the terms of Rule 53 in that [the] referee did not conduct hearings, examine witnesses under oath, admit exhibits into evidence, prepare a record, make definite findings of fact and conduct an audit before making the valuation. *None of these procedures are required under the statute. The trial court order did not require any of these procedures.*

Godwin, 40 N.C. App. at 713-14, 253 S.E.2d at 601 (emphasis added).

Moreover, Rule 53 provides that a referee conducting an accounting has significant discretion regarding how he obtains financial information:

> When matters of accounting are in issue before the referee, he may prescribe the form in which the accounts shall be submitted . . . . [U]pon a showing that the form of statement is insufficient, the referee may require a different form of statement to be furnished, or the accounts of specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as he directs.

N.C. R. Civ. P. 53(f)(2).[11]

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10. In addition, we observe that some of Defendants' specific arguments on appeal — such as those relating to the Referee's use of *ex parte* communications and the lack of interview transcripts — were not even raised in their Exceptions and Objections Regarding Report of Special Master.

11. Indeed, Defendants acknowledge in their brief that "Rule 53 does not always require that the referee conduct a hearing, examine witnesses, receive evidence, or make findings of fact unless the order of reference so directs[.]"

We are not persuaded by Defendants' citation to *Synco, Inc. v. Headen*, 47 N.C. App. 109, 266 S.E.2d 715, *disc. review denied*, 301 N.C. 238, 283 S.E.2d 135 (1980), to support their argument that the Referee's failure to require sworn testimony and produce transcripts of his interviews was improper. In *Synco*, the trial court appointed a referee to resolve a lawsuit involving a large number of individual transactions between the parties related to repairs made to several apartment complexes. *Id.* at 112, 266 S.E.2d at 717. The referee engaged the services of a court reporter who recorded nine days of witness testimony before the referee. However, transcripts of the testimony were never actually prepared and entered into the record. After the referee issued his report, the defendants filed an exception regarding the lack of transcripts. *Id.* at 114, 266 S.E.2d at 718.

On appeal, the defendants argued that the trial court had erred in adopting the referee's report without the production of transcripts. In our decision, we cited Rule 53(f)(3), which provides that "[t]he testimony of all witnesses must be reduced to writing by the referee, or by someone acting under his direction and shall be filed in the cause and constitute a part of the record." *Id.* at 113, 266 S.E.2d at 718. We noted that "[t]he transcript requirement of Rule 53 may, however, be waived by agreement of the parties." *Id.* at 114, 266 S.E.2d at 718. We then held that because the defendants had raised the transcript issue in their exceptions to the referee's report, the issue was preserved. We therefore reversed on this ground. *Id.* at 113-14, 266 S.E.2d at 718.

Synco is distinguishable on its face. That case involved nine days of testimony before a referee that the parties and the trial court fully expected to be transcribed, yet no transcripts were ever provided by the court reporter. *Id.* at 113, 266 S.E.2d at 717. Here, conversely, the trial court did not direct — and the parties did not expressly request — that the Referee take sworn testimony from witnesses. Thus, the Referee possessed the authority to conduct the accounting process in the manner he believed would be most efficient.

In short, neither Rule 53 nor the Reference Order mandated that the Referee conduct the accounting process in the manner that Defendants are now arguing was required. Accordingly, for all of the reasons set out above, we are unable to conclude that Defendants have demonstrated legal error with regard to the trial court's appointment of the Referee, the court's articulation of the scope of the Referee's duties, the manner in which the Referee carried out those duties, or the trial court's adoption of the Referee's Report. Therefore, we affirm both the Reference Order and the Adoption Order.

II. Entry of Summary Judgment as to Defendants' Counterclaims

[2] Defendants' final argument is that the trial court erred in granting summary judgment in favor of Plaintiffs on Counterclaims Three through Six and Nine. "On an appeal from an order granting summary judgment, this Court reviews the trial court's decision *de novo*. Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *Premier, Inc. v. Peterson*, 232 N.C. App. 601, 605, 755 S.E.2d 56, 59 (2014) (internal citations and quotation marks omitted).

It is well established that "[t]he moving party has the burden of demonstrating the lack of any triable issue of fact and entitlement to judgment as a matter of law. The evidence produced by the parties is viewed in the light most favorable to the non-moving party." *Hardin v. KCS Int'l, Inc.*, 199 N.C. App. 687, 695, 682 S.E.2d 726, 733 (2009) (internal citations omitted). We have held that "[a]n issue is 'genuine' if it can be proven by substantial evidence and a fact is 'material' if it would constitute or irrevocably establish any material element of a claim or a defense." *In re Alessandrini*, 239 N.C. App. 313, 315, 769 S.E.2d 214, 216 (2015) (citation omitted).

We agree with the trial court that Counterclaims Three through Six and Nine fail as a matter of law. Defendants' answer contained the following prefatory language introducing these counterclaims:

> If it is determined that the individual Plaintiffs did not withdraw [from] the [PLLC] and there was no dissolution upon the terms set forth in the July 8, 2005 Memorandum, *then there has been no dissolution of the [PLLC]* because none of the requirement[s] in G.S. § 57C-6-01 have been met. *In the event the individual Plaintiffs are still members of the [PLLC]*, then Defendant alleges the following claims in the alternative[.]

(Emphasis added.)

Similarly, Counterclaims Three through Six and Nine each individually asserted that "[i]f it is determined that the individual Plaintiffs have not withdrawn from the [PLLC], *the individual Plaintiffs are still members of the [PLLC]* and still owe a fiduciary duty to the [PLLC] and to the Defendants . . . ." (Emphasis added.)

Thus, each of the counterclaims at issue in this appeal were — by their express terms — premised upon the incorrect proposition that dissolution of the PLLC was not required and that the PLLC, therefore, remained an ongoing entity.[12] Critically, none of these counterclaims were based upon the correct theory — that a judicial dissolution was necessary because of the deadlock between the PLLC's members. This mistaken assumption that the PLLC remained in existence was further reflected in the substantive allegations contained within each of these counterclaims.

Counterclaim Three ("Breach of Fiduciary Duty") alleged that

> [t]he individual Plaintiffs have breached their fiduciary duties to the [PLLC] and to the Defendants by, among other things, failing to meet their financial obligations to the [PLLC] through payment of a portion of the [PLLC]'s expenses and liabilities, failing to account for the legal fees they have generated on legal matters after they ceased practicing law with the [PLLC], and failing to pay to the [PLLC] and/or to the Defendants a share of such legal fees.

Counterclaim Four ("Conversion/Misappropriation of Firm Assets") asserted that

> [t]he individual Plaintiffs have wrongfully converted and/or misappropriated assets of the [PLLC] by, among other things, failing to pay to the [PLLC] or to the Defendants their share of the [PLLC]'s expenses or liabilities and by failing to pay to the [PLLC] or to the Defendants a portion of the legal fees the individual Plaintiffs and/or AB&B generated from legal matters after they ceased practicing law with the [PLLC].

Counterclaim Five ("Unjust Enrichment") alleged that

> [t]he individual Plaintiffs and/or AB&B have been unjustly enriched by failing to pay their share of the [PLLC]'s expenses and liabilities and by failing to pay to the [PLLC] or to the Defendants a portion of the legal fees the individual Plaintiffs and/or [sic] generated on legal matters

12. The only counterclaim that was premised upon a dissolution theory was Counterclaim Two, which was based upon the notion that the PLLC had dissolved *in accordance with the terms of the Brewer Memorandum*. As discussed above, however, *Mitchell I* foreclosed Defendants' reliance upon that theory.

> after the individual Plaintiffs[ ] ceased practicing law with the [PLLC].

Counterclaim Six ("Constructive Trust, Equitable Lien, and/or Resulting Trust") asserted that

> Defendants and the [PLLC] are entitled to a constructive trust, an equitable lien, and/or a resulting trust upon any and all fees, deposits, or property acquired by the individual [Plaintiffs] and/or AB&B for the individual Plaintiffs' share of the [PLLC]'s expenses and liabilities and for Defendants' share of the legal fees the individual Plaintiffs generated from legal matters after they ceased practicing law with the [PLLC].

Finally, Counterclaim Nine (Breach of Fiduciary Duty/*Ultra Vires* Act) alleged that

> [a]fter the individual [Plaintiffs] withdrew from the [PLLC], they filed a legal action against the Defendants without making any reasonable inquiry or investigation to determine whether the [PLLC] had dissolved, whether Defendants and/or the [PLLC] had commingled assets or whether there was any factual basis for their legal claims.
>
> 121. Had the individual Plaintiffs conducted such a reasonably [sic] inquiry or investigation, they would have determined the [PLLC] has not dissolved, that there had been no commingling of [PLLC] assets, and that there was no basis for individual Plaintiffs['] legal claims against Defendants.

Accordingly, it is clear that Counterclaims Three through Six and Nine were premised upon neither a withdrawal *nor* a dissolution having occurred. Rather, the essence of these counterclaims was that Plaintiffs were required to pay their share of the PLLC's ongoing debts and liabilities based upon their continuing status as members of the PLLC and to account for legal fees received by them since their dispute with Defendants had occurred. However, such a legal theory is inconsistent with our ruling in *Mitchell I* in which we held that a judicial dissolution was necessary. In accordance with our decision, the trial court ordered that the PLLC be dissolved as of 1 July 2005.

Thus, any confusion that may have existed between the parties as to the status of the PLLC was eliminated by our decision in *Mitchell I*.

Nevertheless, Defendants failed to amend their counterclaims in the aftermath of *Mitchell I* to reflect the reality that the PLLC had been judicially dissolved and to reframe their claims for relief accordingly.[13]

Moreover, it is important to note that despite the above-referenced defects with respect to Counterclaims Three through Six and Nine, Defendants nevertheless had a full and fair opportunity during the accounting process to seek all sums that they claimed they were owed and to raise any issues that they felt needed to be addressed in the accounting. Additionally, the Referee's Report largely encompassed the matters raised in these counterclaims, including the accounting of legal fees connected to matters that had originated with the PLLC but were later resolved by the various parties after the break-up.

The Referee's Report focused on three primary areas: "[1] profit allocation percentages; [2] restoration of negative capital accounts; and [3] allocation of contingent fees[,]" which it rightly determined were "the most relevant and significant financial components of a settlement between the Parties." With respect to this last category — which has been the principal source of disagreement over the course of this litigation — the report contained an extensive analysis of the values of contingent fee cases that had been received before dissolution but resolved afterward. Significantly, this analysis encompassed cases that were resolved following the break-up by both Defendants and Plaintiffs.

Thus, the Referee's Report contained a thorough and detailed accounting in connection with the dissolution of the PLLC. The Defendants had an opportunity prior to the completion of the accounting to request that the Referee consider additional financial matters related to the PLLC, but they did not do so. Moreover, Defendants have not challenged on appeal the substance of the Referee's Report. Therefore, any issues concerning the validity of the Referee's substantive findings are not before us.

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13. Nor does the fact that *Mitchell I* reversed the trial court's dismissal of Counterclaims Three through Six and Nine mean that those claims are currently viable. Our ruling in *Mitchell I* on this issue was based upon the fact that the trial court had improperly dismissed those counterclaims pursuant to its legally incorrect ruling that a withdrawal had occurred based upon principles of equitable estoppel. We therefore reversed the trial court's dismissal of these counterclaims because of this error of law. The issue of whether Counterclaims Three through Six and Nine — as pled — would survive a subsequent order of dissolution by the trial court was not before us.

Conclusion

For the reasons stated above, we affirm the trial court's orders of 26 February 2013, 18 September 2015, and 19 February 2016.

AFFIRMED.

Judges BRYANT and STROUD concur.

NASH HOSPITALS, INC., Plaintiff
v.
STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., Defendant

No. COA16-532

Filed 1 August 2017

1. Liens—medical liens—insurance company—failure to retain funds

The trial court did not err by granting summary judgment in favor of a lienholder where an insurance company violated the North Carolina medical lien statutes under N.C.G.S. § 44-50 by failing to retain funds subjected to medical liens under N.C.G.S. § 44-49 where it issued a multi-party check to a personal injury claimant and two medical providers for the total settlement amount instead of a check solely payable to a hospital to satisfy its lien.

2. Unfair Trade Practices—insurance company—failure to pay directly to lienholder

The trial court did not err by granting summary judgment in favor of a lienholder where an insurance company committed an unfair or deceptive trade practice by failing to pay directly to the lienholder its pro rata share of funds for several months despite repeated demands.

Appeal by Defendant from an order entered 15 February 2016 by Judge Cy Grant in Nash County Superior Court. Heard in the Court of Appeals 15 November 2016.

Creech Law Firm, P.A., by J. Christopher Dunn, for Plaintiff-Appellee.

Butler Snow LLP, by Scott Lewis and Pamela R. Lawrence, for Defendant-Appellant.

INMAN, Judge.

This appeal arises from a $757 hospital bill. It concerns an insurance company's payment of a total settlement directly to a *pro se* personal injury claimant by check made payable jointly to the claimant and two of her medical providers, each of which held valid liens on the settlement funds. We affirm the trial court's ruling, in granting summary judgment for a lienholder, that the insurance company violated the North Carolina medical lien statutes by failing to retain funds subject to medical liens and committed an unfair or deceptive trade practice by failing to pay directly to the lienholder its *pro rata* share of funds for several months despite repeated demands. Because the trial court miscalculated the statutory amount required to satisfy the lien, however, we vacate that portion of the judgment and remand for entry of judgment in an amount consistent with the statute and this opinion.

State Farm Mutual Automobile Insurance Company ("Defendant") appeals from an order granting summary judgment in favor of Nash Hospitals, Inc. ("Plaintiff" or "Nash Hospitals") and denying Defendant's motion for summary judgment. Defendant argues that its issuance to a *pro se* personal injury claimant of a check for a total settlement—without retaining funds owed to medical lienholders—did not violate N.C. Gen. Stat. §§ 44-50 and 44-50.1 because the check was made payable jointly to the claimant and the lienholders. Defendant also argues that the trial court erred in concluding that Defendant committed an unfair or deceptive trade practice, in part because Nash Hospitals suffered no injury as a result of Defendant's issuance of the multi-party check to the claimant. After careful review, we affirm the trial court's order in part and vacate and remand the trial court's order in part.

Facts and Procedural Background

The undisputed facts are as follows:

On 9 April 2013, Jessica Whitaker ("Whitaker") was injured in an automobile accident caused by Defendant's insured, Christopher Helton ("Helton").

Whitaker incurred $2,272 in medical expenses following the accident. The majority of these expenses—$1,515—was for treatment at Rocky Mount Chiropractic ("Rocky Mount"); the remaining $757 was for treatment at Nash Hospitals.

On 10 May 2013, counsel for Nash Hospitals sent Defendant a notice of medical lien pursuant to N.C. Gen. Stat. §§ 44-49 and 44-50. A month later, Rocky Mount sent a similar notice of medical lien to Defendant.

Defendant evaluated Whitaker's claims and questioned whether all Whitaker's medical treatment was related to the accident. Defendant negotiated with Whitaker and reached a settlement on 28 October 2013 for $1,943. The settlement amount was insufficient to satisfy the medical liens in full.

On 10 December 2013, Defendant received Whitaker's signed release for the settlement and sent her a check for $1,943, made payable to Whitaker, Nash Hospitals, and Rocky Mount. Whitaker did not present the settlement check to Nash Hospitals, nor did Defendant notify Nash Hospitals of the settlement.

In February 2014, an employee of Nash Hospitals contacted Defendant regarding Whitaker's claim and Nash Hospitals' lien. Defendant's representative disclosed that it had reached a settlement with Whitaker and had delivered to her a check payable to Whitaker, Nash Hospitals, and Rocky Mount. Defendant's representative said the multi-party check protected Nash Hospitals' lien and told Nash Hospitals' employee to contact Whitaker.

On 13 March 2014, counsel for Nash Hospitals sent a letter to Defendant asserting that Defendant's issuance of the multi-party check violated North Carolina law, noting that N.C. Gen. Stat. § 44-50 "specifically requires the liability insurer to retain out of any recovery, *before any disbursements*, a sufficient sum to pay lien holders." (emphasis in original). The letter also asserted that "by issuing a check that can't be cashed by the patient, State Farm is forcing the patient to obtain an attorney and incur unnecessary expense." Defendant did not respond.

In April 2014, Nash Hospitals made a third unsuccessful attempt to collect on its lien from Defendant.

On 25 August 2014, Nash Hospitals filed a verified complaint against Defendant alleging violations of N.C. Gen. Stat. §§ 44-49 and 44-50 and alleging that Defendant engaged in an unfair or deceptive trade practice. On 19 September 2014, Defendant asked Whitaker to return the uncashed multi-party check, and on 17 November 2014, Defendant issued a check payable solely to Nash Hospitals for $757, the total amount of Nash Hospitals' lien. Nash Hospitals did not agree to accept the payment as satisfaction of the lawsuit or the underlying lien. Both parties then filed motions for summary judgment.

On 15 February 2016, the trial court issued an order granting Nash Hospitals' motion for summary judgment and denying Defendant's motion for summary judgment. The trial court found damages in the full amount of the lien—$757—and awarded Nash Hospitals treble damages pursuant to N.C. Gen. Stat. § 75-16 for a total award of $2,271. Defendant timely filed notice of appeal.

Analysis

I. Standard of Review

The standard of review for 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). Summary 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.' " *Id.* at 573, 669 S.E.2d at 576 (quoting *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007)). "When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party." *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001) (citation omitted). "Evidence properly considered on a motion for summary judgment 'includes admissions in the pleadings, depositions on file, answers to Rule 33 interrogatories, admissions on file[,] . . . affidavits, and any other material which would be admissible in evidence or of which judicial notice may properly be taken.' " *Murray v. Nationwide Mut. Ins. Co.*, 123 N.C. App. 1, 8, 472 S.E.2d 358, 362 (1996) (alteration in original) (quoting *Kessing v. Nat'l Mortg. Corp.*, 278 N.C. 523, 533, 180 S.E.2d 823, 829 (1971)).

The material facts are undisputed. Therefore, we examine the applicable law to determine whether either party was entitled to judgment as a matter of law.

II. Violation of N.C. Gen. Stat. §§ 44-50 and 44-50.1

[1] Once Defendant received proper notice of Nash Hospitals' lien and agreed to a negotiated settlement with Whitaker, Nash Hospitals was entitled—under North Carolina's medical lien statutes—to receive payment from Defendant for a *pro rata* portion of its unpaid bill before Defendant disbursed funds to Whitaker. Defendant argues that the statutes do not prohibit an insurance company from issuing a check payable jointly to a claimant and her medical lienholders in lieu of directly paying the lienholders, and that its issuance of the multi-party check did not amount to a disbursement of funds. For the reasons explained below, we disagree.

Chapter 44, Article 9 of the General Statutes contains a series of statutes enacted by the General Assembly to help medical providers recover payment for services rendered to patients who later collect compensation for medical treatment resulting from a personal injury incident. N.C. Gen. Stat. § 44-49 creates a lien "upon any sums recovered as damages for personal injury in any civil action in this State."[1] Section 44-50 provides, *inter alia*,

> A lien as provided under [N.C. Gen. Stat. §] 44-49 shall also attach upon all funds paid to any person in compensation for or settlement of the injuries, whether in litigation or otherwise. . . . *Before their disbursement*, any person that receives those funds *shall retain* out of any recovery or any compensation so received *a sufficient amount to pay the just and bona fide claims* for any drugs, medical supplies, ambulance services, services rendered by any physician, dentist, nurse, or hospital, or hospital attention or services, after having received notice of those claims.

N.C. Gen. Stat. § 44-50 (2015) (emphasis added). Section 44-50 further dictates that "[t]he lien provided for shall in no case, exclusive of attorneys' fees, exceed fifty percent (50%) of the amount of damages recovered." *Id.* If the total liens are in excess of fifty percent of the recovery, fifty percent of the recovery will be distributed on a *pro rata* basis to valid lienholders while the remaining recovery is disbursed to the claimant. N.C. Gen. Stat. § 44-50.1. By enacting the retention requirement in Section 44-50 and the *pro rata* distribution structure in Section 44-50.1—the General Assembly removed the guesswork and negotiation process surrounding liens created under Section 44-49, furthering the statute's intent of protecting hospitals and medical providers.

Our Court has held that the "obvious intent of [N.C. Gen. Stat. §§ 44-49 and 44-50] is to protect hospitals that provide medical services to an injured person who may not be able to pay but who may later receive compensation for such injuries which includes the cost of the medical services provided." *Smith*, 157 N.C. App. at 602, 580 S.E.2d at 50 (internal quotation marks and citation omitted). *Smith* held that "[u]pon consideration of both the language and purpose of the statutes . . . a lien against the settlement proceeds received by a *pro se* injured

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1. N.C. Gen. Stat. § 44-49 applies to settlement agreements between insurance companies and victims of personal injury incidents. *See Smith v. State Farm Mut. Auto. Ins. Co.*, 157 N.C. App. 596, 602, 580 S.E.2d 46, 50 (2003), r*ev'd per curiam on other grounds by* 358 N.C. 725, 599 S.E.2d 905 (2004) (internal quotation marks and citation omitted).

party arises by operation of law, and is perfected when the insurer has 'received notice' of the 'just and bona fide claims' of the medical service provider." *Id.* at 602-03, 580 S.E.2d at 51.

Defendant concedes that N.C. Gen. Stat. § 44-50 requires insurance companies to retain sufficient funds to pay valid liens before disbursing settlement funds directly to a claimant. *See Charlotte-Mecklenburg Hosp. v. First of Ga. Ins. Co.*, 340 N.C. 88, 90-91, 455 S.E.2d 655, 657 (1995) ("If the plaintiff under [N.C. Gen. Stat.] § 44-50 is to have a lien '[s]uch . . . as provided for in [N.C. Gen. Stat.] § 44-49' the lien should attach before the insurance company makes its payments and when the parties agree upon a settlement.") (second alteration in original). But Defendant contends that by issuing a multi-party check that could not be cashed without Nash Hospitals' authorization, it did not "disburse" any funds, and therefore did not violate Section 44-50.

N.C. Gen. Stat. §§ 44-49 *et seq.* do not expressly define a disbursement of funds or specify acceptable methods of payment to comply with the statutory provisions. *Charlotte-Mecklenburg* and *Smith* each concerned an insurance company's issuance of a check payable only to the claimant. *Charlotte-Mecklenburg Hosp.*, 340 N.C. at 90-91, 455 S.E.2d at 657; *Smith*, 157 N.C. App. at 602, 580 S.E.2d at 50. Therefore, we are presented with an issue of first impression. The overall statutory language, other relevant statutes, and controlling appellate decisions interpreting the General Assembly's intent persuade us that an insurance company's failure to retain, for payment directly to medical lienholders, their share of proceeds from a settlement with a *pro se* claimant violates these statutes.

Our Court has held that "[b]ecause sections 44-49 and 44-50 'provide rather extraordinary remedies in derogation of the common law . . . they must be strictly construed.' " *N.C. Baptist Hosps., Inc. v. Crowson*, 155 N.C. App. 746, 749, 573 S.E.2d 922, 924 (2003) (quoting *Ellington v. Bradford*, 242 N.C. 159, 162, 86 S.E.2d 925, 927 (1955)). "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." *State v. Camp*, 286 N.C. 148, 152, 209 S.E.2d 754, 576 (1974) (citation omitted). "However, when the language of a statute is ambiguous, this Court will determine the purpose of the statute and the intent of the legislature in its enactment." *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006) (citation omitted).

Our General Statutes define a "check" as "(i) a draft, other than a documentary draft, payable on demand and drawn on a bank or (ii) a

cashier's check or teller's check." N.C. Gen. Stat. § 25-3-104(f) (2015). A "draft" is a negotiable instrument that orders the payment of funds. N.C. Gen. Stat. § 25-3-104(c). A negotiable instrument is "an unconditional promise or *order to pay a fixed amount of money*[.]" N.C. Gen. Stat. § 25-3-104(a) (emphasis added). Regardless to whom a check is addressed, it is by definition a draft, which is by definition a negotiable instrument. *See* N.C. Gen. Stat. §§ 25-3-104(e)-(f). The underlying principle behind this definition is that upon issuing a check, the drafter is relinquishing control over the funds to be drafted.

Here, Defendant lost control over the funds, as evidenced by its need to retrieve the check prior to re-disbursing funds directly to Nash Hospitals, at the time it issued the check to Whitaker. While Defendant argues that the check did not become negotiable until the parties to whom it was addressed reached an agreement regarding the distribution of funds, there were no additional actions necessary for Defendant to take before the funds could be withdrawn. The risks that Whitaker, or any *pro se* claimant who has received a settlement check, would shortcut the process by obtaining forged signatures for the lienholders or would, like Whitaker, simply not seek to negotiate the check, leaving the valid liens unenforced, are the consequences beyond the control of a settlement payor that the medical lien statutes were intended to avoid. We are satisfied that Defendant's effective loss of control over the funds amounted to a disbursement for the purposes of N.C. Gen. Stat. § 44-50.

An insurance company can hardly protect the interests of medical lienholders—which is the undisputed intent of the statutes—by relying on a *pro se* claimant to notify them of a multi-party check in an amount insufficient to cover the liens. Without the advice of counsel,[2] a *pro se* claimant has little incentive to notify the lienholders of the settlement or to seek their cooperation to cash the check. If the multi-party check is never cashed and the lienholders do not make a demand as Nash Hospitals did here, the insurance company ultimately avoids its settlement obligation.

The settlement between Defendant and Whitaker resulted in insufficient funds to cover the valid liens in full, and Defendant, as a result, had a duty to retain sufficient funds—not to exceed fifty percent of the settlement—to satisfy those liens and to distribute those funds to

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2. Counsel would have advised Whitaker that N.C. Gen. Stat. § 44-50 limits the recovery of medical lienholders to a *pro rata* share of no more than fifty percent of a personal injury claimant's recovery. There is no indication in the record that Whitaker was aware of this limitation on Plaintiff's lien.

the lienholders on a *pro rata* basis prior to disbursing the remaining funds to Whitaker. N.C. Gen. Stat. §§ 44-50 and 44-50.1. By issuing the multi-party check for the total settlement amount rather than issuing a check solely payable to Nash Hospitals to satisfy its lien, Defendant violated N.C. Gen. Stat. § 44-50's provision requiring the retention of funds sufficient to satisfy Nash Hospitals' lien created under N.C. Gen. Stat. § 44-49, for which Defendant had proper notice. Accordingly, the trial court did not err in granting Nash Hospitals' motion for summary judgment and denying Defendant's motion for summary judgment for violation of N.C. Gen. Stat. §§ 44-50 and 44-50.1.

III. Unfair or Deceptive Trade Practices

[2] Defendant next argues that the trial court erred by granting Nash Hospitals' motion for summary judgment and denying Defendant's motion for summary judgment on Nash Hospitals' unfair or deceptive trade practice claim. Defendant asserts that: (1) this dispute does not arise out of an insurance contract, (2) the undisputed facts did not establish that Defendant engaged in "immoral, unscrupulous, or deceptive conduct," and (3) the undisputed facts did not establish that an actual injury to Nash Hospitals proximately resulted from the alleged unfair or deceptive conduct. We disagree.

" '[U]nder [N.C. Gen. Stat.] § 75-1.1, it is a question for the jury as to whether [the defendants] committed the alleged acts, and then it is a question of law for the court as to whether these proven facts constitute an unfair or deceptive trade practice.' " *Richardson v. Bank of America, N.A.*, 182 N.C. App. 531, 540, 643 S.E.2d 410, 416 (2007) (first alteration in original) (quoting *United Lab., Inc. v. Kuykendall*, 322 N.C. 643, 664, 370 S.E.2d 375, 389 (1988) (citation omitted)). To succeed on an unfair or deceptive trade practice claim, a plaintiff must show: "(1) [the] defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *Dalton*, 353 N.C. at 656, 548 S.E.2d at 711 (citation omitted).

1. Privity To Bring Suit

As an initial matter, Defendant argues that Nash Hospitals is unable to bring an unfair or deceptive trade practice claim because this suit does not involve a dispute over an insurance contract. We disagree.

In *Wilson v. Wilson*, 121 N.C. App. 662, 665, 468 S.E.2d 495, 497 (1996), this Court held that "North Carolina does not recognize a cause of action for third-party claimants against the insurance company of

an adverse party based on unfair and deceptive trade practices under [N.C. Gen. Stat.] § 75-1.1." The *Wilson* holding arose out of an instance in which the "plaintiff [was] neither an insured nor in privity with the insurer." *Id.* at 665, 468 S.E.2d at 497. The Court reasoned that "allowing such third-party suits against insurers would encourage unwarranted settlement demands, since [the] plaintiffs would be able to threaten a claim for an alleged violation of [N.C. Gen. Stat.] § 58-63.15 in an attempt to extract a settlement offer." *Id.* at 666, 468 S.E.2d at 498.

Our Courts have defined "privity" as "a [d]erivative interest founded on, or growing out of, contract, connection, or bond of union between parties; mutuality of interest." *Murray*, 123 N.C. App. at 15, 472 S.E.2d at 366 (alteration in original) (internal quotation marks and citations omitted). Additionally, "[o]ur case law establishes that ' "[i]f the third party is an intended beneficiary, the law implies privity of contract." ' " *Id.* at 15, 472 S.E.2d at 366 (quoting *Coastal Leasing Corp. v. O'Neal*, 103 N.C. App. 230, 236, 405 S.E.2d 208, 212 (1991) (quoting *Johnson v. Wall*, 38 N.C. App. 406, 410, 248 S.E.2d 571, 574 (1978))).

In the context of insurance disputes following an incident resulting in a personal injury judgment or settlement agreement, "[t]he injured party in an automobile accident [becomes] an intended third-party beneficiary to the insurance contract between insurer and the tortfeasor/insured party." *Murray*, 123 N.C. App. at 15, 472 S.E.2d at 366 (citations omitted). Once a claimant and an insurance company enter into a settlement agreement, they are therefore in privity. And by enacting N.C. Gen. Stat. §§ 44-49 *et seq.*, the General Assembly expanded the scope of privity to hospitals and medical service providers. As discussed *supra*, the purpose of N.C. Gen. Stat. §§ 44-49 *et seq.* is to protect hospitals and other health care providers that provide medical services to injured persons who may be unable to pay at the time the services are rendered, but who may later receive compensation for their injuries. *Smith*, 157 N.C. App. at 602, 580 S.E.2d at 50. As a result, Nash Hospitals' privity became effective the moment Defendant received notice from Nash Hospitals of its assertion of a valid lien pursuant to N.C. Gen. Stat. § 44-49 and reached a settlement agreement with Whitaker.

This conclusion is further supported by the Supreme Court's decision in *Smith v. State Farm Mut. Auto. Ins. Co.* 358 N.C. at 725, 599 S.E.2d at 905. The Supreme Court, by adopting the reasoning in the dissent, overruled this Court's determination in *Smith* that the medical provider had failed to perfect its lien under N.C. Gen. Stat. § 44-49, but it did not overrule the underlying rationale that once a lien is perfected, an insurance company is required to first pay the medical providers before

disbursing the remaining funds directly to a *pro se* personal injury claimant. *Id.* at 725, 599 S.E.2d at 905; *Smith*, 157 N.C. App. at 606, 580 S.E.2d at 52-53 (Levinson, J. dissenting).

The claim we are reviewing arises from Defendant's post-settlement conduct, *i.e.*, at a time when Nash Hospitals and Defendant were in privity as a result of N.C. Gen. Stat. §§ 44-49 and 44-50. For this reason, the holding in *Wilson* is inapposite.

Defendant was on notice following the *Smith* decisions of its duty to settle valid Section 44-49 liens before disbursing funds directly to a *pro se* claimant. Nash Hospitals provided Defendant with the required documentation that "(1) constitutes a valid assignment of rights signed by the injured; or (2) contains unambiguous language that the medical provider is asserting a lien under the provisions of [N.C. Gen. Stat.] §§ 44-49 and 44-50, or language asserting an interest in or claim to settlement proceeds." *Smith*, 157 N.C. App. at 608, 580 S.E.2d at 54 (Levinson, J., dissenting). Accordingly, we hold Nash Hospitals was in privity with Defendant and is permitted to assert a claim for unfair or deceptive trade practices under N.C. Gen. Stat. § 75-1.1.

2. Unfair or Deceptive Act

Whether Defendant's violation of N.C. Gen. Stat. §§ 44-49 and 44-50 and refusal to pay Nash Hospitals' lien before disbursing settlement funds to a *pro se* claimant amounts to an unfair or deceptive act is an issue of first impression. It requires a determination of whether: (a) the alleged acts occurred, and (b) the acts are unfair or deceptive pursuant to N.C. Gen. Stat. § 75-1.1.

a. Occurrence of the Alleged Acts

Defendant challenges the trial court's recitation of Undisputed Facts numbers 7 and 10 as being unsupported by the evidence.

The trial court's Undisputed Fact number 7 states:

> Defendant has a general business practice of issuing multi-party checks in lieu of retaining funds to pay valid medical lien holders and said practice is authorized by its internal written policies and procedures provided to all claim representatives.

The trial court may have surmised this Undisputed Fact based on Defendant's counsel's argument that the payment to Whitaker was consistent with "the way it has routinely been done with other hospitals and other chiropractors" and that "the three parties agree of [sic] who's

going to get what." Defendant correctly notes that the arguments of counsel are not a proper substitute for evidence necessary to support a motion for summary judgment. *Strickland v. Doe*, 156 N.C. App. 292, 297, 577 S.E.2d 124, 129 (2003) ("The trial court may also consider arguments of counsel as long as the arguments are not considered as facts or evidence.") (citations omitted).[3] But the challenged Undisputed Fact is immaterial, and accordingly any error in this regard is not a ground for reversal. *See Faucette v. 6303 Carmel Rd., LLC*, __ N.C. App. __, __, 775 S.E.2d 316, 324 (2015).

Even an isolated occurrence can constitute an unfair business practice, so long as the occurrence falls within the definition of "commerce" provided by N.C. Gen. Stat. § 75-1.1. *Id.* at __, 775 S.E.2d at 324 (affirming the trial court's final judgment that the defendants were liable for an unfair or deceptive trade practice by "[w]ithholding money owed from an insurance carrier's settlement payment in order to force the rightful recipient of those funds to resolve other, unrelated business disputes . . ."). It is undisputed that Defendant issued the multi-party check to Whitaker in December 2013 without retaining funds required to satisfy Nash Hospitals' lien and then failed to tender payment to satisfy the lien until November 2014—nearly a year after settling Whitaker's claim and several months after Nash Hospitals' repeated demands for payment went unanswered, resulting in the commencement of this action. Whether Defendant's conduct is a "general business practice" is irrelevant to whether Defendant engaged in an unfair or deceptive trade practice regarding its actions with this plaintiff. Accordingly, we hold Defendant's argument as to the trial court's Undisputed Fact number 7 without merit.

The trial court's Undisputed Fact number 10 states:

> Defendant repeatedly refused to reissue a check payable solely to Plaintiff despite Plaintiff's assertion N.C. Gen. Stat. §§ 44-50 and 50.1 required Defendant to do so.

A review of the record indicates that there was sufficient evidence to support this Undisputed Fact. Nash Hospitals presented letters it sent to Defendant requesting payment of the lien, admissions by Defendant of receipt of those letters, and Defendant's admission of its failure to respond to Nash Hospitals' requests. Moreover, whether Defendant

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3. Defendant's assertion in its brief before this Court that it issued a multi-party check to Whitaker in "direct response" to the *Charlotte-Mecklenburg* and *Smith* decisions also suggests a general business practice, but the existence of a general practice is not material to our analysis.

"refused" to satisfy Nash Hospitals' lien for several months or simply ignored its demand for payment for several months, or even in "good faith" believed that it was not required to satisfy the lien also is not dispositive. As discussed *infra*, good faith is not a defense to a claim of unfair or deceptive trade practices. *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981). We therefore reject Defendant's argument.

b. Unfairness and Deceptiveness of the Acts

"A practice is unfair if it is unethical or unscrupulous, and it is deceptive if it has a tendency to deceive." *Dalton*, 353 N.C. at 656, 548 S.E.2d at 711 (citations omitted). "[U]nfairness" is broader than and includes the concept of "deception." *Overstreet v. Brookland, Inc.*, 52 N.C. App. 444, 279 S.E.2d 1 (1981).

"The term 'unfair' has been interpreted by our Courts as meaning a practice which offends established public policy, and which can be characterized by one or more of the following terms: 'immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.' " *Murray*, 123 N.C. App. at 9, 472 S.E.2d at 362 (quoting *Miller v. Nationwide Mut. Ins. Co.*, 112 N.C. App. 295, 301, 435 S.E.2d 537, 542 (1994)). "[T]he fairness or unfairness of particular conduct is not an abstraction to be derived by logic. Rather, the fair or unfair nature of particular conduct is to be judged by viewing it against the background of actual human experience and actual effects on others." *Harrington Mfg. Co. v. Powell Mfg. Co.*, 38 N.C. App. 393, 400, 248 S.E.2d 739, 744 (1978), *disc. rev. denied*, 296 N.C. 411, 251 S.E.2d 469 (1979).

When "an insurance company engages in conduct manifesting an inequitable assertion of power or position, that conduct constitutes an unfair trade practice." *Murray*, 123 N.C. App. at 9, 472 S.E.2d at 362 (citing *Johnson v. Beverly-Hanks & Assocs., Inc.*, 328 N.C. 202, 208, 400 S.E.2d 38, 42 (1991)); *see also Pittman v. Hyatt Coin & Gun, Inc.*, 224 N.C. App. 326, 329, 735 S.E.2d 856, 858 (2012) (" 'A party is guilty of an unfair act or practice when it engages in conduct which amounts to an inequitable assertion of its power or position.' ") (quoting *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 264, 266 S.E.2d 610, 622 (1980) (citations omitted), *overruled in part on other grounds by Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 374 S.E.2d 385 (1988)). Our Supreme Court has held that because ordinarily "unfairness and deception are gauged by consideration of the effect of the practice on the marketplace, it follows that the intent of the actor is irrelevant. Good faith is equally irrelevant. What is relevant is the effect of the actor's conduct on the consuming public." *Marshall*, 302 N.C. at 548,

276 S.E.2d at 403 (holding that "good faith is not a defense to an alleged violation of [N.C. Gen. Stat. §] 75-1.1").

Defendant's failure to notify the medical lienholders of its settlement, and Defendant's direction of Nash Hospitals for months to seek its recovery from Whitaker were not only unfair, but also deceptive. A trade practice is deceptive if it has the capacity or tendency to deceive. *Marshall*, 302 N.C. at 548, 276 S.E.2d at 404 (citation omitted). If Nash Hospitals had contacted Whitaker and obtained her cooperation, it still could not satisfy its lien without also contacting Rocky Mount and obtaining its cooperation.

Defendant's unfair and deceptive conduct arose out of its violation of N.C. Gen. Stat. §§ 44-50 and 44-50.1 and its repeated failure to settle a medical provider's valid lien upon request. It is undisputed that Defendant issued a multi-party check to Whitaker as purported resolution of her liability claim and for Nash Hospitals' medical lien without Nash Hospitals' knowledge or consent. Defendant also repeatedly failed to settle the medical lienholder's lien upon request and refused to reissue a check made payable solely to the lienholder prior to the commencement of this action. Defendant's failure to protect Nash Hospitals' valid lien by retaining the requisite funds before disbursing the remaining settlement payment to Whitaker defeated the purpose of N.C. Gen. Stat. §§ 44-50 and 44-50.1. This conduct violated the established public policy of North Carolina's medical lien statutes and amounted to an inequitable assertion of Defendant's power as an insurer, which effectively deprived Nash Hospitals, as well as Rocky Mount and Whitaker, of the funds to which each was entitled by law. We hold that this conduct amounts to an unfair or deceptive trade practice, but note that our holding does not establish violations of N.C. Gen. Stat. § 44-49 *et. seq.* as *per se* unfair or deceptive trade practices. It is the culmination of Defendant's violation and its failure to cure the violation absent litigation that support the trial court's ruling, which we affirm.

3. In or Affecting Commerce

We are satisfied that the activity in question here falls within the definition of "commerce" pursuant to N.C. Gen. Stat. § 75-1.1(b) (2015)—"all business activities, however denominated, but [not including] professional services rendered by a member of a learned profession." We note that "[o]ur courts have repeatedly defined the insurance business as affecting commerce, when an insurer provides insurance to a consumer purchasing a policy." *Murray*, 123 N.C. App. at 10, 472 S.E.2d at 363 (citing *Pearce v. Am. Def. Life Ins. Co.*, 316 N.C. 461, 469, 343 S.E.2d 174, 179 (1986)).

4. Proximate Injury

In addition to showing that a defendant's conduct is unfair or deceptive and affecting commerce, "a plaintiff must have 'suffered actual injury as a proximate result of defendant's deceptive [conduct].' " *Ellis v. N. Star Co.*, 326 N.C. 219, 226, 388 S.E.2d 127, 131 (1990) (quoting *Pearce*, 316 N.C. at 471, 343 S.E.2d at 180).

Here, Defendant's failure to withhold funds subject to valid medical liens, including Nash Hospitals' lien, prior to its disbursement of funds to Whitaker resulted in an actual injury to Nash Hospitals. Nash Hospitals was entitled to a *pro rata* share of fifty percent of the settlement proceeds, as directed by N.C. Gen. Stat. §§ 44-50 and 44-50.1, *before* any funds were disbursed to Whitaker. Defendant's failure to retain funds delayed Nash Hospitals' recovery of funds to which it was legally entitled. That delay constitutes injury. Accordingly, we hold that the trial court did not err in concluding that Defendant committed an unfair trade practice pursuant to N.C. Gen. Stat. § 75-1.1.

IV. Damages

Defendant correctly argues that because the fifty percent of the settlement proceeds subject to medical liens was insufficient to satisfy the liens of Nash Hospitals and Rocky Mount, Nash Hospitals' lien was enforceable for no more than its *pro rata* share of lien funds, which amounted to $323.69.

In *N.C. Baptist Hosps. Inc. v. Crowson*, 155 N.C. App. 746, 748, 573 S.E.2d 922, 923 (2003), this Court held that "sections 44-49 and 44-50 do not require a *pro rata* disbursement of funds" to valid medical lienholders when there was insufficient funds to compensate all the lienholders. The dispute in *Baptist Hospitals* arose after an attorney disbursed funds from the settlement of a personal injury incident in favor of two medical lienholders to the detriment of the third. *Id.* at 747, 573 S.E.2d at 922-23. However, the General Assembly subsequently amended Article 9 of Chapter 44 of the General Statutes to include the following provision entitled "Accounting of disbursements; attorney's fees to enforce lien rights" which states, *inter alia*:

> (a) Notwithstanding any confidentiality agreement entered into between the injured person and the payor of proceeds as settlement of compensation for injuries, upon the lienholder's written request and the lienholder's written agreement to be bound by any confidentiality agreements regarding the contents of the accounting, *any person*

> *distributing funds to a lienholder under this Article in an amount less than the amount claimed by that lienholder shall provide to that lienholder a certification with sufficient information to demonstrate that the distribution was pro rata and consistent with this Article.*

2003 N.C. Sess. Laws ch. 309, § 1; N.C. Gen. Stat. § 44-50.1 (emphasis added). We interpret this amendment as superseding this Court's holding in *Baptist Hospitals* and requiring a *pro rata* distribution to lienholders in the event that fifty percent of a judgment or settlement amount is insufficient to satisfy all valid medical liens created under N.C. Gen. Stat. §§ 44-49.

Black's Law Dictionary defines *pro rata* as "[p]roportionately; according to an exact rate, measure, or interest." *Black's Law Dictionary* 1415 (10th ed. 2014). A proper determination of *pro rata* distributions under N.C. Gen. Stat. §§ 44-50 and 44-50.1 can be calculated with the following formula:[4]

$$Pro\ Rata\ Share\ for\ Lien\ A = \left(\frac{Lien\ A}{(Lien\ A + Lien\ B)}\right) \times \left(\begin{matrix} 50\%\ of \\ Total\ Settlement\ Amount \end{matrix}\right)$$

Here, we can calculate the proper *pro rata* distribution share for Nash Hospitals by first identifying the lien amounts and the total settlement amount. Nash Hospitals' lien was for $757. Rocky Mount's lien was for $1,515. The total settlement agreement was $1,943. Inserting these values in the formula calculates Nash Hospitals' *pro rata* share to be $323.69.

$$\frac{(\$757)}{(\$757 + \$1515)} \times (50\% \times \$1943) = \$323.69$$

When trebled based on the trial court's judgment that Defendant engaged in an unfair or deceptive trade practice, the total damages to which Nash Hospitals is entitled is $971.07. N.C. Gen. Stat. § 75-16. Accordingly, the trial court's calculation of damages awarded to Nash Hospitals was in error. Because the correct calculation is dictated by the undisputed facts and applicable statute, we vacate the trial court's damage award in the summary judgment order and remand for entry of summary judgment in favor of Nash Hospitals for $971.07.

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4. This equation applies to cases involving two valid liens—Lien A and Lien B. But the same formula may be used for any number of liens. The denominator is the aggregate value of all liens.

Conclusion

For the foregoing reasons, we hold that the trial court did not err in granting summary judgment in favor of Nash Hospitals on its claims pursuant to N.C. Gen. Stat. §§ 44-50 and 44-50.1 and the unfair or deceptive trade practices statutes. Defendant's actions were offensive to public policy—impairing the contractual rights of a *pro se* claimant and her medical providers—and amounted to an inequitable assertion of power. We vacate the portion of the order awarding damages and remand for an award consistent with this opinion. Accordingly, we affirm in part and vacate and remand in part the trial court's order.

AFFIRMED IN PART, VACATED AND REMANDED IN PART.

Judges CALABRIA and ZACHARY concur.

PLUM PROPERTIES, LLC, Plaintiff
v.
NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, INC., SABAHETA SELAK, MATEJ SELAK aka Matek Selak, DELISA L. SPARKS aka Delisa L. Thompson aka Delisa L. Tucker, JEREMY TUCKER, Defendants

No. COA16-1078

Filed 1 August 2017

Declaratory Judgments—homeowners insurance coverage—minors vandalizing and breaking into properties—intentional acts not covered

In a declaratory judgment action seeking damages from defendant parents' homeowners insurance policies arising from the underlying claim that defendant minors vandalized and broke into plaintiff company's properties, the trial court did not err by granting defendant insurance company's motion for summary judgment. The damages were excluded from the insurance policies where coverage did not protect against the intentional destructive acts of the children and did not qualify as an "occurrence" since the damage was not accidental.

Appeal by plaintiff from order entered 14 June 2016 by Judge Susan E. Bray in Guilford County Superior Court. Heard in the Court of Appeals 5 April 2017.

Gregory A. Wendling for plaintiff-appellant.

Pinto Coates Kyre & Bowers, PLLC, by Deborah J. Bowers, for defendant-appellee.

BERGER, Judge.

Plum Properties, LLC ("Plaintiff") appeals the June 14, 2016 order granting Defendants' motion for summary judgment on Plaintiff's declaratory judgment action. Plaintiff argues that summary judgment was improper because there remain genuine issues of material fact concerning ambiguities in insurance policies issued by North Carolina Farm Bureau Mutual Insurance Company, Inc. ("Defendant Insurance Company"; insurance company and its insureds, collectively, "Defendants") that may entitle Plaintiff to relief. We disagree.

Factual & Procedural Background

This declaratory judgment action arose from an underlying claim brought by Plaintiff against Defendants, including M. Selak and J. Tucker (collectively "minor insureds"), for allegedly vandalizing and breaking into properties owned by Plaintiff.

During the late night and early morning hours between November 5 and 21, 2010, Plaintiff claims that the minor insureds vandalized four houses on Orville Drive in High Point, North Carolina ("Properties") which are owned or managed by Plaintiff. The vandalism allegedly occurred on three separate occasions, causing approximately $58,000.00 in damages. In addition to the claims made against the minor insureds for "intentionally, willfully and maliciously" damaging and destroying the Properties, Plaintiff also brought claims against Sabaheta Selak, the mother of M. Selak, and Delisa Sparks, the mother of J. Tucker (collectively "parent insureds"), for negligence and negligent supervision of their minor children.

The parent insureds have homeowners' insurance policies issued through Defendant Insurance Company ("Policies") that were in effect for the period during which the damage occurred. The Policies, for each parent insured, contain the same relevant provisions for purposes of determining whether coverage exists for the damage caused by the minor insureds.

Section II(A) of the Policies controls the extent of coverage for personal liability claims brought against persons insured under the Policies. Section II(A) covers, in relevant part, all claims "brought against an

'insured' for damages because of . . . 'property damage' caused by an 'occurrence'." The definitions section of the Policies defines "insured" to include relatives of the policy holder who reside in the policy holder's household. "Occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions" which results in property damage. Where Section II(A) applies, the Policies will pay up to the Policies' respective liability limits for any damages for which an insured is legally liable.

The Policies also contain specific exclusion clauses to the personal liability coverage. Under Section II(E), coverage of Section II(A) is excluded where the property damage that occurs "is intended or may be reasonably expected to result from the intentional acts or omissions or criminal acts or omissions of one or more 'insured' persons." This exclusion applies regardless of whether the insured is charged with or convicted of a crime.

On July 29, 2015, Plaintiff brought this declaratory judgment action against Defendant Insurance Company seeking a declaration that the alleged damages arising out of the underlying claim are covered under the Policies issued by Defendant Insurance Company. Defendant Insurance Company filed motions for dismissal and summary judgment on February 11, 2016.

In an order filed June 14, 2016, the trial court granted Defendant Insurance Company's motion for summary judgment on the declaratory judgment action concluding that the damages sustained by Plaintiff were excluded from the insurance coverage of the Policies. It is from this order that Plaintiff timely appeals.

Analysis

Summary judgment exists to eliminate the need for a trial "when the only questions involved are questions of law." *Ellis v. Williams*, 319 N.C. 413, 415, 355 S.E.2d 479, 481 (1987) (citations omitted). Under Rule 56 of the North Carolina Rules of Civil Procedure, "summary judgment . . . is . . . based on two underlying questions of law," *Id.* (citations omitted), and may be granted when: (1) there are no genuine issues of material fact and (2) any party is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c) (2015). Alleged errors in the application of law are subject to *de novo* review on appeal. *Falk Integrated Tech., Inc. v. Stack*, 132 N.C. App. 807, 809, 513 S.E.2d 572, 574 (1999). "On appeal, review of summary judgment is . . . limited to whether the trial court's conclusions as to these [two] questions of law were correct ones." *Ellis*, 319 N.C. at 415, 355 S.E.2d at 481.

An issue is deemed " 'genuine' if it can be proven by substantial evidence[,] and a fact is 'material' " where it constitutes or establishes a material element of the claim. *Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982) (citation omitted). In determining that there are no genuine issues of material fact, "[i]t is not the trial court's role to resolve conflicts in the evidence." *Wallen v. Riverside Sports Ctr.*, 173 N.C. App. 408, 413, 618 S.E.2d 858, 862 (2005) (citation omitted). Rather, the court's role is only to determine whether such issues exist. *Id.* (citation omitted). Furthermore, in considering whether a genuine issue of material fact exists, "the court must view the evidence in the light most favorable to the nonmovant." *Id.* at 410, 618 S.E.2d at 858, 860-61 (citation omitted).

The North Carolina Supreme Court instructed in *Harleysville Mut. In. Co. v. Buzz Off Insect Shield, L.L.C.* that when the language of an insurance policy and the contents of a complaint are undisputed, we review *de novo* whether the insurer has a duty to defend its insured against the complaint's allegations. 364 N.C. 1, 6, 692 S.E.2d 605, 610 (2010). To make this determination, our courts apply the "comparison test" which requires that the insured's policy and the complaint be read side-by-side to determine whether the events alleged are covered or excluded by the policy. *Id.* In applying this test, "the question is not whether some interpretation of the facts as alleged could possibly bring the injury within the coverage provided by the insurance policy"; but rather, "assuming the facts as alleged to be true, whether the insurance policy covers that injury." *Id.* at 364 N.C. at 7, 692 S.E.2d at 611.

Where an insurance policy's language is clear and unambiguous, our courts will enforce the policy as written. *N.C. Farm Bureau Mut. Ins. Co. v. Mizell*, 138 N.C. App. 530, 532, 530 S.E.2d 93, 95 (2000). When interpreting the language of a policy, non-technical words are given their ordinary meaning unless the evidence shows that the parties intended the words to have a specific technical meaning. *Id.* at 532-33, 530 S.E.2d at 95. Ambiguous policy language, by comparison, is subject to judicial construction. *Id.* at 532, 530 S.E.2d at 95.

However, our courts "must enforce the [policy] as the parties have made it and may not, under the guise of interpreting an ambiguous provision, remake the [policy] and impose liability upon the [insurance] company which it did not assume and for which the policyholder did not pay." *Wachovia Bank and Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970). When interpreting provisions of an insurance policy, provisions that extend coverage are to be construed liberally to "provide coverage, whenever possible by reasonable

construction." *State Capital Ins. Co. v. Nationwide Mut. Ins. Co.*, 318 N.C. 534, 538, 350 S.E.2d 66, 68 (1986).

In the Policies at issue here, personal liability coverage extended to cover claims brought against an insured for property damage resulting from an "occurrence." An occurrence is described by the Polices as "an accident." Our Supreme Court has previously interpreted what constitutes an occurrence within the context of a insurance policy issued by Defendant Insurance Company containing the same operational definition of "occurrence" as is contained within the Policies. *Waste Mgmt. of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 694, 340 S.E.2d 374, 379 (1986). Based on the nontechnical definition of "accident," the Court described an "occurrence" as being limited to events that are not "expected or intended from the point of view of the insured." *Id.* at 696, 340 S.E.2d at 380. While acknowledging that "it is possible to perceive ambiguity" in determining the type of events that constitute an accident, the Court noted that under a commonsense reading of the language "it strains logic to do so." *Id.* at 695, 340 S.E.2d at 379. Accordingly, where the potentially damaging effects of an insured's intentional actions can be anticipated by the insured, there is no "occurrence." *Id.*, 340 S.E.2d at 380.

In the present case, Plaintiff contends that summary judgment was improper because there is ambiguity in the Policies' language as to what constitutes an occurrence. Relying largely on the deposition of Phillip Todd Childers, a Claims Director for Defendant Insurance Company, Plaintiff argues that because there are "occasions when there are shades of gray" in determining whether an event should qualify as an occurrence, that there is a genuine issue of material fact as to whether the damage caused by the minor insureds should be covered under the Policies.

As noted above in *Harleysville Mutual Insurance*, the question properly raised by the trial court is not whether some interpretation of the facts could possibly bring Plaintiff's injury within the coverage of the Policies but whether the facts, as alleged in the complaint and taken as true, are enough to bring the injury within the Policies' coverage. It strains logic to conjure ambiguity into the Policies' language as applied to the facts at hand. The damages arising from the alleged vandalism of the Properties by the minor insureds do not qualify as unexpected or unintended from the viewpoint of the minor insureds. *See American Mfrs. Mut. Ins. Co. v. Morgan*, 147 N.C. App. 438, 442, 556 S.E.2d 25, 28 (2001) (holding that intentional actions that are reasonably certain to result in injury will not qualify as an accident for purposes of insurance coverage).

Plaintiff further contends that summary judgment was improper because the parent insureds, who themselves are alleged of negligence and negligent supervision in the underlying case, did not intend that the minor insureds vandalize the Properties. Thus, the vandalism should qualify as an occurrence as applied to the parent insureds. But this attenuation of the nexus between Plaintiff's injury and the mechanism causing the damage is not sufficient to create a genuine issue of material fact as to whether intentional destructive actions qualify as an occurrence covered by the Policies. Section II(A) of the Policies cannot be read to cover intentional damage knowingly caused by insureds, which severally would not qualify as an occurrence, merely because the damages inflicted were not intended by other insureds covered by the Policies. The parent insureds neither purchased, nor did Defendant Insurance Company provide, coverage to protect against the intentional destructive acts of their children. Therefore, the actions that caused Plaintiff's damages did not fall within the coverage of the Policies.

While coverage clauses, such as Section II(A), are interpreted broadly, exclusionary clauses, such as Section II(E), are construed narrowly against the insurer in favor of coverage for the insured. *State Capital Ins. Co.*, 318 N.C. at 543-44, 350 S.E.2d at 71. However, as previously noted, where no ambiguity exists, an insurance policy must be enforced as written. *Mizell*, 138 N.C. App. at 532, 530 S.E.2d at 95.

In the present Policies, Section II(E) specifically excludes from coverage any property damage that "is intended or may be reasonably expected to result from the intentional acts or omissions . . . of one or more 'insured' persons." Thus, even if Section II(A) included insurance coverage for the minor insureds' alleged acts of vandalism resulting from the negligence or negligent supervision of the parent insureds, summary judgment would again be proper because Section II(E) excludes coverage for damages that occur as the reasonably expected result of an insureds' intentional acts.

As children of policyholders residing in the policyholders' households, both M. Selak and J. Tucker qualify as insured persons covered by the Policies. Accordingly, because the alleged damage to Plaintiff's Properties occurred due to these minor insureds' intentional, willful, and malicious acts, the damage is excluded from coverage under the Policies by Section II(E).

Under the Policies, the intentional acts by the minor insureds that allegedly damaged Plaintiff's properties do not qualify as an 'occurrence' because the damage was not accidental, and are, therefore, not

covered by the Policies' personal liability coverage. Furthermore, intentional acts of the minor insureds are specifically excluded from coverage by Section II(E) of the Policies. Accordingly, the damages allegedly caused by the minor insureds were not covered by the parent insureds' Defendant Insurance Company Policies.

Conclusion

The language of the Policies issued by Defendant Insurance Company both intentionally omitted and specifically excluded liability coverage for damages caused by the intentional, malicious acts of the insureds. Thus, there were no genuine issues of material fact and the trial court did not err in granting Defendants' motion for summary judgment because Defendants were entitled to judgment as a matter of law. We therefore affirm the trial court's determination that Plaintiff's damages, allegedly caused by the actions of the insureds, are not covered by the Defendant Insurance Company Policies issued to the individual Defendants.

AFFIRMED.

Judges ELMORE and INMAN concur.

MOLLY SCHWARZ, Plaintiff
v.
ST. JUDE MEDICAL, INC., ST. JUDE MEDICAL S.C., INC., DUKE UNIVERSITY, DUKE UNIVERSITY HEALTH SYSTEM, INC., ERIC DELISSIO, TED COLE, and THOMAS J. WEBER, JR., Defendants

No. COA16-1307

Filed 1 August 2017

1. Appeal and Error—interlocutory orders and appeals—substantial right—avoiding two trials on same facts—improper venue—venue selection clause dispute

Plaintiff at-will employee's appeal in a wrongful discharge case from an interlocutory order granting a motion to dismiss some but not all claims was entitled to immediate appellate review where plaintiff showed the order affected substantial rights including avoiding two trials on the same facts and also alleged improper venue based upon a jurisdiction or venue selection clause dispute.

2. Jurisdiction—forum selection clause—Minnesota—wrongful discharge—at-will employee—employment agreement

The trial court did not err in a wrongful discharge case by concluding plaintiff at-will employee's tort claims were subject to the forum-selection clause in the parties' employment agreement where the clause was broadly worded to encompass all actions or proceedings and reflected an intention to litigate claims in Minnesota.

3. Venue—motion to dismiss—employment contract—Minnesota forum-selection clause—last act necessary

The trial court erred in a wrongful discharge case by granting the St. Jude defendants' motion to dismiss for improper venue where the parties' employment contract was entered into in North Carolina, thus making the Minnesota forum-selection clause in the agreement void and unenforceable under N.C.G.S. § 22B-3. The last act necessary to the formation of the agreement was plaintiff's signature and delivery in North Carolina, and not the company agent's signature in Texas.

Judge ARROWOOD concurring by separate opinion.

Appeal by plaintiff from order entered 21 September 2016 by Judge Carla N. Archie in Mecklenburg County Superior Court. Heard in the Court of Appeals 7 June 2017.

Kennedy, Kennedy, Kennedy and Kennedy, LLP, by Harvey L. Kennedy and Harold L. Kennedy III, for plaintiff-appellant.

Parker Poe Adams & Bernstein LLP, by Keith M. Weddington, and Dorsey & Whitney LLP, by Meghan Des Lauriers, for defendant-appellees St. Jude Medical, Inc. and St. Jude Medical S.C., Inc.

ELMORE, Judge.

The Mecklenburg County Superior Court dismissed plaintiff's complaint against her former employer, St. Jude Medical S.C., Inc., and its parent company, St. Jude Medical, Inc., because the forum-selection clause in the employment agreement designates Ramsey County, Minnesota, as the exclusive venue to litigate plaintiff's claims. Pursuant to N.C. Gen. Stat. § 22B-3 (2015), "any provision in a contract entered into in North Carolina that requires the prosecution of any action . . . that arises from the contract to be instituted or heard in another state is against public

policy and is void and unenforceable." Because the employment agreement was "entered into in North Carolina," not Texas as the trial court concluded, the forum-selection clause is void and unenforceable under N.C. Gen. Stat. § 22B-3. Reversed.

I. Background

Plaintiff Molly Schwarz is a resident of Mecklenburg County. Defendants St. Jude Medical and St. Jude Medical S.C. are Minnesota corporations doing business in Mecklenburg County. St. Jude Medical S.C. has its principal office in Austin, Texas.

Plaintiff was employed as a clinical specialist with St. Jude Medical S.C. from 2004 to 2009. St. Jude Medical S.C. employs a sales team that sells medical devices to hospitals, clinics, and other medical providers. In her role, plaintiff supported the sales representatives and their provider accounts, including Duke University and Duke University Health Systems, Inc. (collectively, Duke), where Dr. Thomas J. Weber Jr. was employed.

After her first term of employment ended, plaintiff re-applied for the same position. On 27 August 2012, she executed an at-will employment agreement with St. Jude Medical S.C. and began working. The agreement addresses standard employment issues including duties, compensation, and termination. It also contains the following choice-of-law and forum-selection provisions:

> Governing Law. This Agreement will be governed by the laws of the state of Minnesota without giving effect to the principles of conflict of laws of any jurisdiction.
>
> Exclusive Jurisdiction. All actions or proceedings relating to this Agreement will be tried and litigated only in the Minnesota State or Federal Courts located in Ramsey County, Minnesota. Employee submits to the exclusive jurisdiction of these courts for the purpose of any such action or proceeding, and this submission cannot be revoked. Employee understands that Employee is surrendering the right to bring litigation against SJMSC outside the State of Minnesota.

Plaintiff signed the agreement in North Carolina and faxed it to a representative of St. Jude Medical S.C. in Austin, Texas, where, on 13 September 2012, Keith Boettiger executed the agreement on behalf of St. Jude Medical S.C. By its terms, the agreement was effective as of 4 September 2012.

Plaintiff's sales team worked primarily with Duke. In July 2014, plaintiff reported to management that Dr. Weber was involved in an extramarital affair with one of plaintiff's co-workers. When Ted Cole, a manager for St. Jude Medical S.C., spoke with Dr. Weber about the allegations, Dr. Weber was "irate." He told Cole that plaintiff was in his clinic "talking to his staff members around patients" about his personal life. Dr. Weber demanded a letter of apology and informed Cole that plaintiff was no longer welcome in the Duke-Raleigh system, which comprised more than 85 percent of St. Jude Medical S.C.'s Raleigh territory.

Seven months later, on Friday, 27 February 2015, Cole received an e-mail from a patient who reported feeling "very uncomfortable" during an appointment with plaintiff. The patient complained that plaintiff read the film backwards, exposed the patient to unnecessary radiation, and several times during three visits she was "loud," "argumentative," and asked "the same questions over and over again." Cole forwarded the e-mail to his manager, Eric Delissio, who in turn sent the e-mail to human resources. Plaintiff was terminated the following Monday.

Plaintiff filed a complaint in Mecklenburg County Superior Court alleging claims of wrongful discharge from employment in violation of public policy and libel against St. Jude Medical and St. Jude Medical S.C.; tortious interference with contractual rights and libel against Cole and Delissio; and tortious interference with contractual rights against Duke and Dr. Weber.

St. Jude Medical and St. Jude Medical S.C. (collectively, the St. Jude defendants) moved to dismiss plaintiff's complaint pursuant to Rule 12(b)(3) of the North Carolina Rules of Civil Procedure.[1] The St. Jude defendants argued that venue in Mecklenburg County was improper because the forum-selection clause in the employment agreement provides that all claims related to the agreement must be litigated in the state or federal courts located in Ramsey County, Minnesota. Although out-of-state forum-selection clauses are void and unenforceable in North Carolina, *see* N.C. Gen. Stat. § 22B-3, the St. Jude defendants averred that the contract was not formed in this State.

The trial court granted the St. Jude defendants' motion to dismiss for improper venue. The court concluded that the agreement was formed in Texas, rather than North Carolina, because Boettiger's signature was the "the last essential act." As such, N.C. Gen. Stat. § 22B-3 did not apply and the forum-selection clause was valid, reasonable, and enforceable.

1. The St. Jude defendants also moved to dismiss plaintiff's wrongful discharge and libel claims pursuant to Rule 12(b)(6).

The court also concluded that requiring plaintiff to prosecute her claims in Minnesota "is not seriously inconvenient" and would not effectively deprive her of her day in court. Plaintiff timely appeals.

II. Discussion

A. Jurisdiction

[1] We first address whether plaintiff has vested jurisdiction in this Court to review her appeal on the merits. "An order . . . granting a motion to dismiss certain claims in an action, while leaving other claims in the action to go forward, is plainly an interlocutory order." *Pratt v. Staton*, 147 N.C. App. 771, 773, 556 S.E.2d 621, 623 (2001). "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) (citation omitted). "Generally, there is no right of immediate appeal from interlocutory orders or judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). An appeal may be taken only from those "judgments and orders as are designated by the statute regulating the right of appeal." *Veazey*, 231 N.C. at 362, 57 S.E.2d at 381; *see, e.g.*, N.C. Gen. Stat. § 1-277 (2015); *id.* § 1A-1, Rule 54(b); *id.* § 7A-27(b).

Plaintiff appeals from an interlocutory order dismissing her claims against the St. Jude defendants while allowing her other claims to move forward against defendants Cole, Delissio, Duke, and Dr. Weber. While the order was "a final judgment as to one or more but fewer than all of the claims or parties," N.C. Gen. Stat. § 1A-1, Rule 54(b), the trial court did not certify the order for immediate appellate review. By virtue of the substantial right doctrine, however, plaintiff has provided an alternative basis to appeal the interlocutory order.

First, as plaintiff correctly notes, "our case law establishes firmly that an appeal from a motion to dismiss for improper venue based upon a jurisdiction or venue selection clause dispute deprives the appellant of a substantial right that would be lost." *Mark Grp. Int'l, Inc. v. Still*, 151 N.C. App. 565, 566 n.1, 566 S.E.2d 160, 161 n.1 (2002) (citations omitted), *quoted in Cable Tel Servs., Inc. v. Overland Contracting, Inc.*, 154 N.C. App. 639, 641, 574 S.E.2d 31, 33 (2002); *see also US Chem. Storage, LLC v. Berto Constr., Inc.*, No. COA16-628, slip op. at 5 (N.C. Ct. App. May 2, 2017) ("[T]he validity of a forum selection clause constitutes a substantial right." (citing *Cox v. Dine-A-Mate, Inc.*, 129 N.C. App. 773, 776, 501 S.E.2d 353, 355 (1998))). Prior decisions have applied this principle to review the denial of a motion to dismiss for improper venue.

See, *e.g.*, *Hickox v. R&G Grp. Int'l*, *Inc.*, 161 N.C. App. 510, 511, 588 S.E.2d 566, 567 (2003) ("Although a denial of a motion to dismiss is an interlocutory order, where the issue pertains to applying a forum selection clause, our case law establishes that defendant may nevertheless immediately appeal the order because to hold otherwise would deprive him of a substantial right." (citation omitted)). The same substantial right is implicated by the court's partial dismissal in this case because an "order denying a party the right to have the case heard in the proper court would work an injury to the aggrieved party which could not be corrected if no appeal was allowed before the final judgment." *DesMarais v. Dimmette*, 70 N.C. App. 134, 136, 318 S.E.2d 887, 889 (1984).

Second, "[a] party has a substantial right to avoid two trials on the same facts in different forums where the results would conflict." *Clements v. Clements ex rel. Craige*, 219 N.C. App. 581, 585, 725 S.E.2d 373, 376 (2012) (citing *Hamby v. Profile Prods.*, *L.L.C.*, 361 N.C. 630, 639, 652 S.E.2d 231, 237 (2007)), *quoted in Callanan v. Walsh*, 228 N.C. App. 18, 21, 743 S.E.2d 686, 689 (2013). Plaintiff's claims against defendants arise out of the same set of factual circumstances surrounding her termination. The libel claim against Cole and Delissio is pending in Mecklenburg County Superior Court but the libel claim against the St. Jude defendants, alleged on the theory of *respondeat superior*, was dismissed for improper venue. Dismissing the appeal and allowing plaintiff to prosecute the same claims in different forums "creat[es] the possibility of inconsistent verdicts." *Estate of Harvey v. Kore-Kut*, *Inc.*, 180 N.C. App. 195, 198, 636 S.E.2d 210, 212 (2006). Because plaintiff has shown that the interlocutory order affects a substantial right that would be jeopardized absent review prior to a final judgment on the merits, *Goldston*, 326 N.C. at 726, 392 S.E.2d at 736, we have jurisdiction over plaintiff's appeal.

B. Dismissal for Improper Venue

1. Claims "Relating to" the Employment Agreement

[2] Plaintiff first argues that the trial court erred in dismissing the complaint under Rule 12(b)(3) because her tort claims against the St. Jude defendants are not "related to" the employment agreement and are not subject to the forum-selection clause.

Under our choice-of-law principles, "the interpretation of a contract is governed by the law of the place where the contract was made." *Tanglewood Land Co. v. Byrd*, 299 N.C. 260, 262, 261 S.E.2d 655, 656 (1980). But if "parties to a contract have agreed that a given jurisdiction's substantive law shall govern the interpretation of the contract,

such a contractual provision will be given effect." *Id.*; *see, e.g.*, *Tohato, Inc. v. Pinewild Mgmt., Inc.*, 128 N.C. App. 386, 390, 496 S.E.2d 800, 803 (1998) (applying Texas law to determine enforceability of arbitration clause where choice-of law provision stipulated contract "shall be governed by and construed under the laws of the State of Texas"). By virtue of the choice-of law provision in the agreement, this issue involves the application of Minnesota law.

Whether a forum-selection clause applies to a plaintiff's claim is a question of law, reviewed by the Minnesota courts *de novo*. *Alpha Sys. Integration, Inc. v. Silicon Graphics, Inc.*, 646 N.W.2d 904, 907 (Minn. Ct. App. 2002) (citation omitted). "Whether tort claims are to be governed by forum selection provisions depends upon the intention of the parties reflected in the wording of particular clauses and the facts of each case." *Terra Int'l, Inc. v. Miss. Chem. Corp.*, 119 F.3d 688, 693 (8th Cir. 1997) (citation omitted) (internal quotation marks omitted), *cited with approval in Alpha Sys. Integration, Inc.*, 646 N.W.2d at 907, 908 (examining language of contract to determine whether forum-selection clause applied to claims arising out of agreement).

The forum-selection clause at issue is broadly worded to encompass "all actions or proceedings *relating to*" the agreement. (Emphasis added.) "Relating to" implies merely "some connection or relation." Webster's New World College Dictionary 1225 (5th ed. 2014). While plaintiff's claims may sound in tort, they still have "some connection" to the employment agreement. Plaintiff's wrongful discharge claim directly implicates the employer-employee relationship created by the agreement. The same can be said of the libel claim, in which plaintiff alleged that "to instigate the termination of plaintiff from St. Jude Medical S.C.," Cole and Delissio published "false and defamatory statements" implying plaintiff was incompetent. As additional evidence of its breadth, the clause provides: "Employee understands that Employee is surrendering the right to bring litigation against SJMSC outside the state of Minnesota." Such language indicates that *all* claims by an employee against the employer are subject to the forum-selection clause whether in contract, tort, or otherwise. Because the clause reflects an intention to litigate plaintiff's claims in Minnesota, the trial court did not err in finding implicitly that the claims are subject to the forum-selection clause.

2. Forum-Selection Clause

[3] Next, plaintiff argues that the forum-selection clause is void and unenforceable pursuant to N.C. Gen. Stat. § 22B-3, which provides in relevant part:

> Except as otherwise provided in this section, any provision in a contract entered into in North Carolina that requires the prosecution of any action . . . that arises from the contract to be instituted or heard in another state is against public policy and is void and unenforceable.

N.C. Gen. Stat. § 22B-3 (2015). Plaintiff maintains that the employment agreement was "entered into in North Carolina" because her signature was the last act necessary to the formation of the contract. She contends, therefore, that the forum-selection clause is void and enforceable as a matter of law, and that venue in Mecklenburg County was proper.

As previously noted, plaintiff and the St. Jude defendants agreed that the contract "will be governed by the laws of the state of Minnesota." Nevertheless, our courts have not honored choice-of-law provisions in contracts when

> "application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which . . . would be the state of applicable law in the absence of an effective choice of law by the parties."

Cable Tel Servs., Inc., 154 N.C. App. at 643, 574 S.E.2d at 34 (quoting Restatement (Second) of Conflict of Laws § 187 (1971), *cited with approval in Behr v. Behr*, 46 N.C. App. 694, 696, 266 S.E.2d 393, 395 (1980), *and Torres v. McClain*, 140 N.C. App. 238, 241, 535 S.E.2d 623, 625 (2000)). Because the application of Minnesota law would be contrary to a fundamental policy of this state, which has a materially greater interest in determining the validity of the forum-selection clause, we apply North Carolina law to decide the place of contract formation. *See Szymczyk v. Signs Now Corp.*, 168 N.C. App. 182, 186, 606 S.E.2d 728, 732 (2005) (applying North Carolina law in reviewing place of contract formation to resolve validity of out-of-state forum-selection clause).

As a "determination requiring the . . . application of legal principles," *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (citations omitted), the place of contract formation is a conclusion of law, reviewed *de novo* on appeal, *see, e.g.*, *Goldman v. Parkland of Dallas, Inc.*, 277 N.C. 223, 227, 176 S.E.2d 784, 787 (1970).

"The essence of any contract is the mutual assent of both parties to the terms of the agreement . . . ." *Snyder v. Freeman*, 300 N.C. 204, 218, 266 S.E.2d 593, 602 (1980) (citing *Pike v. Wachovia Bank & Trust Co.*,

274 N.C. 1, 161 S.E.2d 453 (1968)); *see also* Restatement (Second) of Contracts § 17 (1981) ("[T]he formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange . . . ."); *id.* § 3 ("An agreement is a manifestation of mutual assent on the part of two or more persons.").

Mutual assent of the parties "is operative only to the extent that it is manifested." Restatement (Second) of Contracts § 18 cmt. a. The manifestation of mutual assent "requires that each party either make a promise or begin or render a performance," *id.* § 18, and "is normally accomplished through the mechanism of offer and acceptance," *Snyder*, 300 N.C. at 218, 266 S.E.2d at 602; *see also Normile v. Miller*, 313 N.C. 98, 103, 326 S.E.2d 11, 15 (1985) ("[A]ssent . . . requires an offer and acceptance in the exact terms."); *T.C. May Co. v. Menzies Shoe Co.*, 184 N.C. 150, 152, 113 S.E. 593, 593 (1922) ("[T]he mutual assent of the parties . . . generally results from an offer on the one side and acceptance on the other."). As the Restatement instructs:

> Ordinarily one party, by making an offer, assents in advance; the other, upon learning of the offer, assents by accepting it and thereby forms the contract. The offer may be communicated directly or through an agent; but information received by one party that another is willing to enter into a bargain is not necessarily an offer. The test is whether the offer is so made as to justify the accepting party in a belief that the offer is made to him.

Restatement (Second) of Contracts § 23 cmt. a; *see also T.C. May Co.*, 184 N.C. at 152, 113 S.E. at 593–94 ("The offer . . . is a mere proposal to enter into the agreement, . . . but when it is communicated, and shows an intent to assume liability, and is understood and accepted by the party to whom it is made, it becomes at once equally binding upon the promisor and the promisee."); 1 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 4:3 (4th ed. 2007) ("[I]t is typically the case that one making an offer assents in advance to the proposed bargain, after which all that is required to complete the mutual assent necessary is the assent of the offeree." (footnote omitted)).

The manifestation of mutual assent is judged by an objective standard:

> The apparent mutual assent of the parties, essential to the formation of a contract, must be gathered from the language employed by them. The undisclosed intention is immaterial in the absence of mistake, fraud, and the like,

> and the law imputes to a person an intention corresponding to the reasonable meaning of his words and acts. It judges of his intention by his outward expressions and excludes all questions in regard to his unexpressed intention. If his words or acts, judged by a reasonable standard, manifest an intention to agree in regard to the matter in question, that agreement is established, and it is immaterial what may be the real but unexpressed state of his mind on the subject, as mental assent to the promises in a contract is not essential. . . . The question whether a contract has been made must be determined from a consideration of the expressed intention of the parties—that is, from a consideration of their words and acts. . . . [T]he test of the true interpretation of an offer or acceptance is not what the party making it thought it meant or intended it to mean, but what a reasonable person in the position of the parties would have thought it meant.

Howell v. Smith, 258 N.C. 150, 153, 128 S.E.2d 144, 146 (1962) (citations omitted) (internal quotation marks omitted); *see also* Restatement (Second) of Contracts § 2 cmt. b ("The phrase 'manifestation of intention' adopts an external or objective standard for interpreting conduct . . . . A promisor manifests an intention if he believes or has reason to believe that the promisee will infer that intention from his words or conduct."); Williston & Lord, *supra*, § 4:1 ("In the formation of contracts, however, it was long ago settled that secret, subjective intent is immaterial, so that mutual assent is to be judged only by overt acts and words rather than by the hidden, subjective or secret intention of the parties."); *id.* § 4:2 ("As long as the conduct of a party is volitional and that party knows or reasonably ought to know that the other party might reasonably infer from the conduct an assent to contract, such conduct will amount to a manifestation of assent.").

"Under North Carolina law, a contract is made in the place where the last act necessary to make it binding occurred." *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 318 N.C. 361, 365, 348 S.E.2d 782, 785 (1986); *see also Thomas v. Overland Exp., Inc.*, 101 N.C. App. 90, 97, 398 S.E.2d 921, 926 (1990) (noting that our courts employ the "last act" test to determine where a contract was made) (citing *Fast v. Gulley*, 271 N.C. 208, 155 S.E.2d 507 (1967)).

The last act necessary to contract formation usually occurs at the place of acceptance. In *Goldman*, the defendant, a Texas corporation with its principal office in Dallas, sent the plaintiff, a North Carolina

resident, a letter detailing the terms of a proposed employment contract. 277 N.C. at 225–26, 176 S.E.2d at 786. Upon receipt, the plaintiff signed the contract in Greensboro and mailed it to the defendant in Dallas. *Id.* at 226, 176 S.E.2d at 786. Our Supreme Court determined that the contract was made in North Carolina: "The letter . . . constituted an offer. The final act necessary to make it a binding agreement was its acceptance, which was done by the plaintiff by signing it in Greensboro . . . and there depositing it in the United States mail properly addressed to defendant." *Id.* at 226–27, 176 S.E.2d at 787.

Relying on *Goldman*, our Supreme Court reached a similar conclusion in *Tom Togs*, 318 N.C. at 365, 348 S.E.2d at 785. The defendant, a clothing distributor incorporated in New Jersey with its principal place of business in New York City, submitted to the plaintiff, a clothing manufacturer in North Carolina, a purchase order for shirts. *Id.* at 362–63, 348 S.E.2d at 784. The plaintiff accepted the order "by sending the shirts to defendant within the time specified." *Id.* at 363, 348 S.E.2d at 784. Resolving the jurisdictional issue in a subsequent breach of contract claim, filed by the plaintiff in Wake County Superior Court, the Supreme Court concluded that the contract was "made in this State" because the plaintiff's acceptance in North Carolina was the "last act necessary" to form a binding contract. *Id.* at 365, 348 S.E.2d at 785.

In some instances, a contract may not be formed until the offeror manifests assent through a counter-signature. In *Parson v. Oasis Legal Finance, LLC*, 214 N.C. App. 125, 715 S.E.2d 240 (2011), the plaintiff entered into an agreement with the defendant for an advance of funds to pay the plaintiff's legal fees. *Id.* at 126, 715 S.E.2d at 241. The plaintiff completed a funding application and faxed it to the defendant. *Id.* at 130, 715 S.E.2d at 243. On the same day, the defendant faxed the plaintiff an unsigned draft agreement for a $3,000 advance. *Id.* Notably, the agreement asked how the plaintiff would like to receive his requested amount, i.e., "by check or as requested by the purchaser," and included a release allowing the defendant to receive a copy of the plaintiff's credit report. *Id.* at 130, 715 S.E.2d at 244. The plaintiff signed the agreement and faxed it back to the defendant. *Id.* Upon receipt, the defendant's representative signed the agreement in Illinois and then mailed the plaintiff a check for $2,972. *Id.* Under the circumstances, the Court concluded: "The last act essential to . . . affirming the mutual assent of both parties to the terms of the agreement was the signing of the agreement by [the defendant's] representative." *Id.* Because the defendant's representative signed the agreement in Illinois, the Court determined that the contract was made in Illinois. *Id.* at 130–31, 715 S.E.2d at 244 (citing

Bundy v. Comm. Credit Co., 200 N.C. 511, 157 S.E. 860 (1931); *Szymczyk*, 168 N.C. App. at 187, 606 S.E.2d at 733).

Other decisions have distinguished between acts which are necessary to form a binding obligation and those which are merely administrative. In *Murray v. Ahlstrom Industrial Holdings, Inc.*, 131 N.C. App. 294, 506 S.E.2d 724 (1998), this Court determined that the defendant made an offer of employment when it telephoned the plaintiff at his home in North Carolina. *Id.* at 296–97, 506 S.E.2d at 726. Upon the plaintiff's acceptance, the defendant informed him that he "was hired and that he should report to work in Corinth, Mississippi immediately." *Id.* at 297, 506 S.E.2d at 726. Despite the incomplete employment paperwork, the Court concluded:

> At this point the contract for employment was complete. Relying upon this employment contract, plaintiff packed up his family and moved to Mississippi for the duration of the project. Although the paperwork filled out by plaintiff was required before he could begin work, this seems to be, and in fact was admitted by [the defendant] to be, mostly administrative. The paperwork appears to be more of a consummation of the employment relationship than the "last act" required to make it a binding obligation.

Id. at 297, 506 S.E.2d at 726–27 (citing *Warren v. Dixon & Christopher Co.*, 252 N.C. 534, 114 S.E.2d 250 (1960)). Because the plaintiff's acceptance was the last act necessary to form a binding obligation, the Court concluded that the contract was made in North Carolina. *Id.* at 297, 506 S.E.2d at 727; *cf. Szymczyk*, 168 N.C. App. at 187, 606 S.E.2d at 733 (concluding that franchise agreement was made in Florida because once terms were discussed with the defendant's representatives and form agreement was signed by the plaintiffs in North Carolina, agreement was returned to Florida where it was signed by the defendant's president).

Analogizing to *Goldman* and *Tom Togs*, we agree with plaintiff that the contract in this case was made in North Carolina. By presenting the employment agreement to plaintiff on her first day at work, St. Jude Medical S.C. undeniably signaled a willingness to enter into a bargain, offering plaintiff employment under the terms set forth in the agreement. *See* Restatement (Second) of Contracts § 24 ("An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it."). In contrast to *Parson*, where the plaintiff had to sign a release of his credit report and indicate on the draft agreement

his desired method to receive funds, here plaintiff was only required to sign the proposed agreement. There were no terms left to negotiate. *Cf.* Restatement (Second) of Contracts § 33 ("The fact that one or more terms of a proposed bargain are left open or uncertain may show that a manifestation of intention is not intended to be understood as an offer or as an acceptance."). Because plaintiff did not propose amended or additional terms, her signature and delivery constituted acceptance.

Defendant maintains that its blank signature line on the last page of the agreement is evidence that plaintiff's acceptance would not conclude the deal; the agreement required further assent by defendant. Based on the language in the agreement and the conduct of the parties, however, defendant's signature was merely a "consummation of the employment relationship," as the Court concluded in *Murray*, 131 N.C. App. at 297, 506 S.E.2d at 727, instead of the last act necessary to form a binding agreement. The agreement contains no clause similar to the one in *Bundy*, 200 N.C. at 513, 157 S.E. at 862, which provided: "This agreement shall not become effective until accepted by its duly authorized officers of [the defendant] at Baltimore, Md." The fact that plaintiff worked for nearly two weeks before Boettiger signed the agreement, moreover, indicates that defendant intended to be bound when plaintiff reported to work and executed the agreement. Defendant's manifestation of assent is found in its proposal of the agreement to plaintiff which, upon acceptance, became binding upon both parties. On these facts, we conclude that the contract was made in North Carolina and the forum-selection clause is void and unenforceable under N.C. Gen. Stat. § 22B-3.

III. Conclusion

The trial court erred in dismissing plaintiff's claims against the St. Jude defendants pursuant to Rule 12(b)(3) of the North Carolina Rules of Civil Procedure. The last act necessary to the formation of the employment agreement was plaintiff's signature and delivery in North Carolina rather than Boettiger's signature in Texas, which can be more aptly described as a "consummation of the employment relationship." Because the contract was "entered into in North Carolina," the Minnesota forum-selection clause is void and unenforceable pursuant to N.C. Gen. Stat. § 22B-3. We reverse the court's order dismissing plaintiff's claims against the St. Jude defendants for improper venue.

REVERSED.

Judge DILLON concurs.

Judge ARROWOOD concurs by separate opinion.

ARROWOOD, Judge, concurring by separate opinion.

I concur in the majority opinion that the Minnesota forum-selection clause is void and unenforceable pursuant to N.C. Gen. Stat. § 22B-3 because the contract was entered into in North Carolina, and therefore, that the trial court's order dismissing plaintiff's complaint must be reversed. However, I reach that result by a somewhat different analysis. I believe that the contract was entered into in North Carolina for the following reasons: When defendant made its offer of employment to plaintiff, the proposed Employment Agreement contained the following language:

> C. Modification Prior to Full Execution. No modifications may be made to the terms of this Agreement prior to the full execution of the Agreement without the prior approval of an authorized representative of SJMSC.

The Employment Agreement also provided that:

> TO WITNESS THEIR AGREEMENT THE PARTIES HAVE SIGNED BELOW AS OF THE FIRST DAY WRITTEN ABOVE.

The "first day written above" was designated as 4 September 2012.

"The question whether a contract has been made must be determined from a consideration of the expressed intention of the parties – that is from a consideration of their words and acts." *Normile v. Miller*, 313 N.C. 98, 107, 326 S.E.2d 11, 17 (1985) (citation omitted). Here, it is undisputed that plaintiff failed to challenge any terms of the Employment Agreement or propose any additional terms. In addition, there does not appear to be any dispute in the record that plaintiff commenced work on the date set forth in the Agreement and that the parties operated under the terms of the proposed Employment Agreement for more than a week prior to the signing of the Employment Agreement by defendant's representative. The outward expressions of both plaintiff and defendant demonstrated that a mutual agreement had been established as of 4 September 2012. In conclusion, I believe that the non-negotiable language of the Employment Agreement, when combined with the Agreement's effective date language and the actions of both parties, shows that the contract was formed no later than when plaintiff commenced work and that the last act necessary for formation of the contract occurred in North Carolina.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; PUBLIC STAFF – NORTH CAROLINA UTILITIES COMMISSION; DUKE ENERGY CAROLINAS, LLC; DUKE ENERGY PROGRESS, LLC; SOUTHERN ALLIANCE FOR CLEAN ENERGY, APPELLEES

v.

NORTH CAROLINA SUSTAINABLE ENERGY ASSOCIATION, APPELLANT

No. COA16-1067

Filed 1 August 2017

Utilities—declaratory ruling—topping cycle combined heat and power system—energy efficiency

The Utilities Commission erred by issuing a declaratory ruling that a topping cycle combined heat and power system (CHP) did not constitute an energy efficiency measure under N.C.G.S. § 62-133.8(a)(4), except to the extent that the waste heat component was used and met the definition of an energy efficiency measure. The Commission misread the plain language of N.C.G.S. § 62-133.8 and found an ambiguity where none existed. Further, the statute includes the entire topping cycle CHP system and not just their individual components.

Appeal by appellants from order entered 6 June 2016 by the North Carolina Utilities Commission. Heard in the Court of Appeals 3 May 2017.

Staff Attorney David T. Drooz, for Appellee Public Staff – North Carolina Utilities Commission.

Troutman Sanders, LLP, by Brian L. Franklin and Molly McIntosh Jagannathan, for Appellee Duke Energy Carolinas, LLC.

Nadia L. Luhr and Gudrun Thompson, for Appellant North Carolina Sustainable Energy Association and Appellee Southern Alliance for Clean Energy.

Peter H. Ledford, for Appellant North Carolina Sustainable Energy Association.

MURPHY, Judge.

Appellant North Carolina Sustainable Energy Association ("NCSEA") appeals from a ruling from the North Carolina Utilities Commission (the

"Commission") that "a topping cycle CHP system does not constitute an energy efficiency measure under [N.C.G.S. §] 62-133.8(a)(4), except to the extent that the . . . waste heat component is used and meets the definition of [an] energy efficiency measure in [N.C.G.S. §] 62-133.8(a)(4)." We disagree and hold that, for the purposes of classifying a topping cycle CHP as an energy efficiency measure, N.C.G.S. § 62-133.8(a)(4) (2015) is unambiguous. A plain reading of the statute at issue includes the entire topping cycle CHP system.

I. Background

Combined heat and power ("CHP") systems generate both electricity and useable thermal energy in contrast to conventional power generation in which electricity is purchased from a central power plant, which is less efficient. Conventional power generation based on amount of fuel used to produce electricity and useful thermal energy is 45 % to 50% efficient, while CHP systems are typically 60% to 80% efficient.

Topping cycle CHP systems burn fuel to generate electricity, and then some of the resulting waste heat is recovered and used as thermal energy. As of 7 August 2013, there were 62 topping cycle CHP systems in North Carolina.

On 1 June 2015, NCSEA filed a Request for Declaratory Ruling asking the Commission to issue a declaratory ruling that:

> A new topping cycle combined heat and power . . . system-including such a system that uses non-renewable energy resources-that both (a) produces electricity or useful, measureable thermal or mechanical energy at a retail electric customer's facility and (b) results in less energy being used to perform the same function or provide the same level of service at the retail electric customer's facility constitutes an "energy efficiency measure" for purposes of [N.C.G.S] § 62-133.9 and Commission Rule R8-67.

It also asked that, "if deemed necessary or helpful," the Commission issue a complementary declaratory ruling that:

> It is inconsistent with the clear and unambiguous language of the [N.C.G.S] §§ 62-133.8 and 62-133.9 to recognize *only* the heat recovery component of a new topping cycle CHP system as an "energy efficiency measure."

After hearing comments from NCSEA, Appellees Duke Energy Carolinas, LLC and Duke Energy Progress, LLC (collectively "Duke"),

and Appellee Public Staff – North Carolina Utilities Commission (the "Public Staff"), the Commission issued its Order, stating:

> 1. That a topping cycle CHP system does not constitute an energy efficiency measure under [N.C.G.S. §] 62-133.8(a)(4), except to the extent that the secondary component, the waste heat component is used and meets the definition of energy efficiency measure in [N.C.G.S. §] 62-133.8(a)(4); and
>
> 2. That the Commission has jurisdiction under its rulemaking authority to determine and clarify this issue.

NCSEA filed a timely Notice of Appeal and Exceptions.

II. Analysis

A. Standard of Review

The case before us is one of statutory interpretation, and is thus a question of law to be reviewed de novo. *Dare Cty. Bd. of Educ. v. Sakaria*, 127 N.C. App. 585, 588, 492 S.E.2d 369, 371 (1997). Agencies must give effect to the intent of the legislature when "the legislature unambiguously expressed its intent in the statute." *Charlotte-Mecklenburg Hosp. Auth. v. N.C. HHS*, 201 N.C. App. 70, 73, 685 S.E.2d 562, 565 (2009). Courts will not defer to an agency's interpretation when that interpretation is in direct conflict with the clear intent and purpose of the legislature's act. *High Rock Lake Partners, LLC v. N.C. Dept. of Transp.*, 366 N.C. 315, 319, 735 S.E.2d 300, 303 (2012).

Appellees argue that the Commission should receive deference as to the interpretation of N.C.G.S. § 62-133.8(a) because it is a highly technical matter and the law is vague. However, the statute is in fact quite clear in its definition of an energy efficient measure, which includes "energy produced from a combined heat and power *system*," N.C.G.S. § 62-133.8(a)(4) (emphasis added), and is further defined as "a *system* that uses waste heat to produce electricity or useful, measureable thermal or mechanical energy at a retail customer's facility," N.C.G.S. § 62-133.8(a)(1) (emphasis added).

B. Plain Language

The Commission interpreted the language of N.C.G.S. § 62-133.8(a)(1) and (a)(4) to mean that only the waste heat recovery component of a topping cycle system constitutes an energy efficient measure under the statute, rather than the system as a whole. In doing so, the Commission was in error as it went against the plain language of the statute.

N.C.G.S. § 62-133.8(a)(1) defines a "combined heat and power *system*" as "a system that uses waste heat to produce electricity or useful, measureable thermal or mechanical energy at a retail electric customer's facility." (Emphasis added). N.C.G.S. § 62-133.8(a)(4) then defines an "energy efficient measure" as "an equipment, physical or program change implemented after January 1, 2007 that results in less energy used to perform the same function." An "energy efficient measure" includes "energy produced from a combined heat and power *system* that uses nonrenewable energy resources". N.C.G.S. § 62-133.8(a)(4) (emphasis added)

A statute that is clear and unambiguous must be given its "plain and definite meaning." *In re Banks*, 295 N.C. 236, 239, 244 S.E.2d 386, 388-89 (1978) (citing *State v. Camp*, 286 N.C. 148, 152, 209 S.E.2d 754, 756 (1974)); *see also State ex rel. Utils Comm'n v. Env't Def. Fund*, 214 N.C. App. 364, 366, 716 S.E.2d 370, 372 (2011). The statutory language of N.C.G.S. § 62-133.8(a)(1) is clear and unambiguous. A plain reading of the statute shows that it is the CHP system as a whole that is the energy efficient measure. An energy efficient measure includes not only the waste heat recovery part of a CHP system, but rather the system in its entirety. The Commission, however, found that "for the purposes of being deemed an energy efficient measure, the electricity or useful, measurable thermal or mechanical energy must be produced from waste heat." This limitation cannot be found anywhere in N.C.G.S. § 62-133.8.

The Commission's argument ignores the fact that the legislature plainly states that an " 'Energy efficiency measure' includes, but is not limited to, energy produced from a combined heat and power system that uses nonrenewable energy resources." N.C.G.S. § 62-133.8(a)(4). It is a CHP system that is noted by the law, not just the waste heat component of the system. If the legislature had intended only for the waste heat component of a CHP system to qualify as an energy efficiency measure, it was within the power of the legislature to write N.C.G.S. § 62-133.8(a)(4) in that way, but that is not the law as written by our General Assembly.

Furthermore, this Court cannot "delete words used or insert words not used" in a statute. *Lunsford v. Mills*, 367 N.C. 618, 623, 766 S.E.2d 297, 301 (2014). By interpreting "energy efficient measure" to include only the waste heat component of a topping cycle CHP system instead of the system as a whole, the language of N.C.G.S. § 62-133.8(a)(4) is rendered unnecessary and creates surplusage.

III. Conclusion

The Commission has misread the plain language of N.C.G.S. § 62-133.8 and has found an ambiguity where none exists. N.C.G.S. § 62-133.8

governs the treatment of CHP systems, and not just their individual components, as energy efficient measures. Accordingly, we reverse the decision of the Commission.

REVERSED.

Judges CALABRIA and DIETZ concur.

STATE OF NORTH CAROLINA
v.
CHARLES MACK ANDERSON, JR.

No. COA16-767

Filed 1 August 2017

1. Sexual Offenders—sex offender on premises of daycare—sufficiency of evidence—parking lot shared by other businesses

The trial court erred by denying defendant's motion to dismiss the charge of being a sex offender on the premises of a daycare where the evidence was insufficient to prove that defendant's presence as a sex offender in the parking lot shared by a daycare and other businesses was a location governed by N.C.G.S. § 14-208.18(a)(1).

2. Appeal and Error—writ of certiorari—plea agreement—unconstitutionally overbroad statute

The Court of Appeals exercised its inherent power under N.C. R. App. P. 2 and granted defendant's writ of certiorari to address the validity and enforceability of a plea agreement. Defendant's sentence was imposed partially based on violation of N.C.G.S. § 14-208.18(a)(2). which had been held unconstitutionally overbroad by the Fourth Circuit.

3. Sexual Offenders—sex offender on premises of daycare—plea agreement—statute ruled unconstitutional—direct appeal pending

A sex offender's conviction following a guilty plea to unlawfully being within 300 feet of a daycare was vacated where a Fourth Circuit opinion ruled N.C.G.S. § 14-208.18(a)(2) was unconstitutional while defendant's direct appeal was pending and where the State offered no contrary argument.

4. Criminal Law—plea agreement—portion vacated—remaining convictions set aside

After a sex offender's guilty plea for unlawfully being within 300 feet of a daycare was vacated, the entire plea agreement was set aside and the remaining convictions for failure to report a new address and three counts of obtaining habitual felon status were set aside and remanded to the trial court.

Appeal by defendant from judgments entered 3 February 2016 by Judge Marvin P. Pope Jr. in Graham County Superior Court. Heard in the Court of Appeals 7 March 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Lauren Tally Earnhardt, for the State.

Appellate Defender G. Glenn Gerding, by Assistant Appellate Defender Daniel Shatz, for defendant-appellant.

BRYANT, Judge.

Where the evidence was insufficient to prove that defendant's presence as a sex offender in the parking lot shared by a daycare and other businesses was a location governed by N.C.G.S. § 14-208.18(a)(1), the trial court erred by denying defendant's motion to dismiss, and we reverse the judgment of the trial court as to the conviction in file no. 14 CRS 50721. Where the Fourth Circuit has ruled that subsection (a)(2) of N.C.G.S. § 14-208.18 is unconstitutionally overbroad in violation of the First Amendment, and the State asserts no argument to the contrary, we adopt the analysis of the Fourth Circuit's ruling and vacate defendant's conviction in file no. 14 CRS 50703. Where one conviction is reversed and another vacated, the essential and fundamental terms of defendant's plea agreement have become "unfulfillable," and we set aside the entire plea agreement and remand.

In June 2006, defendant Charles Mack Anderson Jr. pled guilty to the felony offense of lewd and lascivious molestation and was placed on sex offender probation. When defendant relocated to Graham County, he registered with the Graham County Sheriff's Department on 25 October 2014 pursuant to the North Carolina Sex Offender and Public Protection Registration Programs codified within Chapter 14 of our General Statutes. When registering, defendant signed an acknowledgment that persons registered under the act were prohibited from the

> premises of any place intended primarily for the use, care, or supervision of minors, including . . . child care centers, nurseries and playgrounds; . . . [and] [w]ithin 300 feet of any location intended primarily for the use, care, or supervision of minors when the place is located on premises that are not intended primarily for the use, care, or supervision of minors . . . .

On 19 December 2014, Danny Millsaps, Sheriff of Graham County, was on routine patrol on Patton Street, which ran behind the Eagle Knob Learning Center, a daycare supervising approximately fifty-five children, from newborns to five-year-olds. At "the first residence behind the learning center," Sheriff Millsaps observed defendant outside chopping wood. By searching a police database, Sheriff Millsaps determined that defendant was a registered sex offender in visual and "close" proximity to a child care center. Sheriff Millsaps then informed defendant that he could not be at the residence due to its proximity to the child care center (hereinafter "daycare"). That afternoon, a law enforcement officer standing in the yard of the Patton Street residence observed two or three children playing on the daycare playground.

During the evening of 28 December 2014, a Sunday, Sergeant Cody George was on routine patrol on southbound Highway 129, passing in front of the Eagle Knob daycare center, when he observed defendant's green SUV in the parking lot. Sergeant George testified that he was familiar with defendant, having seen him some eight to ten times before, and was familiar with defendant's SUV. Sergeant George recognized defendant as the driver and testified that defendant was approximately seventy-five feet from the daycare. On cross-examination at trial, Sergeant George acknowledged that the daycare was not open when he observed defendant in the parking lot, and that the other businesses adjacent to the daycare in the shopping mall, a tax preparation service and a hair salon, were also closed at the time. Sergeant George testified he believed a stand-alone restaurant, which also shared the parking lot, was closed on Sundays as well. When Sergeant George determined that defendant was prohibited from being on the premises of the daycare at all times and not just during business hours, he obtained a warrant for defendant's arrest.

On 23 March 2015, a grand jury convened in Graham County Superior Court indicted defendant for being a sex offender unlawfully within 300 feet of a location intended primarily for the use, care, or supervision of minors (file no. 14 CRS 50703 (for being a sex offender within

300 feet of a daycare)),[1] and for being a sex offender unlawfully on premises intended primarily for the use, care, or supervision of minors (14 CRS 50721 (for being a sex offender on the premises of a daycare)).[2] On 1 September 2015, defendant was indicted for failure to report a new address as required by the Sex Offender Registry Programs statutes, N.C. Gen. Stat. §§ 14-208.5 *et seq.* (15 CRS 50072), and three counts of attaining habitual felon status (15 CRS 250–52). The matter came on to be heard before a jury in Graham County Superior Court during the 11 January 2016 criminal session, the Honorable Marvin P. Pope, Jr., Judge presiding. The State proceeded to trial by jury only on the charge under file no. 14 CRS 50721, being a sex offender on the premises of a daycare. The remaining charges were held in abeyance.

At trial, defendant moved to dismiss the charge, arguing that the parking lot in which defendant was observed was shared by the daycare, a tax preparation service, and a hair salon, and that the State had failed to present evidence that the parking lot was a part of the daycare or that defendant was knowingly on the property of the daycare. Specifically, defendant argued that the State "failed to produce any evidence at all of . . . defendant *actually being on the premises* of [the] day care." (Emphasis added). Defendant also argued that the State did not "produce[] any witness or define[] in any way that that parking lot was part of that premises of that day care, when that's a shared parking lot with the tax place, the haircutting place, the diner, the day care . . . ." The trial court denied defendant's motion. The jury returned a verdict of guilty.

After the jury verdict, the State was allowed, without objection, to amend the indictment against defendant charging failure to report a new address as a sex offender (15 CRS 50072). Defendant then pled guilty to the remaining charges: being a sex offender within 300 feet of a daycare (14 CRS 50703); failure to report a new address as a sex offender (15 CRS 50072); and three counts of attaining habitual felon status (15 CRS 250–52).

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1. For ease of reading and to distinguish the primary offenses, we hereinafter refer to 14 CRS 50703 as "being a sex offender within 300 feet of a daycare" and 14 CRS 50721 as "being a sex offender on the premises of a daycare." We use the term "daycare" as the only location or premises "intended primarily for the use, care, or supervision of minors" in the instant case is, in fact, a child daycare center.

2. The indictments in file nos. 14 CRS 50703 and 50721 each described the indicted offense as "in violation of 14-208.18[(a)]," but neither indictment listed under which *subsection*—(1), (2), or (3)—of G.S. § 14-208.18(a) defendant was specifically indicted. However, because the indictment in file no. 14 CRS 50721 tracks the language of subsection (1) and the indictment in file no. 14 CRS 50703 tracks the language of subsection (2), it can be presumed that the indictments were related to those respective subsections.

In accordance with the jury verdict and guilty pleas, the trial court entered two judgments—one on the charge of being a sex offender on the premises of a daycare, combined with one count of attaining habitual felon status; and a second judgment on the charges of being a sex offender within 300 feet of a daycare, failure to report a new address, and two counts of attaining habitual felon status. For each judgment, defendant was sentenced to concurrent terms of 84 to 113 months. Defendant appealed from the judgment entered following the jury verdict on the charge of being a sex offender on the premises of a daycare (14 CRS 50721).

On appeal, defendant challenges his conviction for being a sex offender on the premises of a daycare and petitions this Court for a writ of certiorari to review the remaining convictions to which defendant pled guilty.

I. Appeal of Right—Conviction for Violation of N.C. Gen. Stat. § 14-208.18(a)(1)

[1] Defendant first argues the trial court erred in failing to grant his motion to dismiss the charge of being on the premises of a daycare (14 CRS 50721), in violation of N.C.G.S. § 14-208.18(a)(1) (2015). More specifically, defendant contends the State failed to present sufficient evidence that the parking lot shared by adjacent businesses was part of the premises of the daycare and thus, failed to establish the crime charged in the indictment. We agree.

"We review denial of a motion to dismiss criminal charges *de novo*, to determine whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Spruill*, 237 N.C. App. 383, 385, 765 S.E.2d 84, 86 (2014) (quoting *State v. Mobley*, 206 N.C. App. 285, 291, 696 S.E.2d 862, 866 (2010)). "Evidence is substantial if it is relevant and adequate to convince a reasonable mind to accept a conclusion." *State v. Trogdon*, 216 N.C. App. 15, 25, 715 S.E.2d 635, 642 (2011) (citation omitted). "We must consider evidence in a light most favorable to the State and give the State the benefit of every reasonable inference from the evidence." *Mobley*, 206 N.C. App. at 291, 696 S.E.2d at 866 (citing *State v. Parker*, 354 N.C. 268, 278, 553 S.E.2d 885, 894 (2001)).

Pursuant to North Carolina General Statutes, section 14-208.18(a),

> [i]t shall be unlawful for any person required to register under [the Sex Offender and Public Registration Programs],

if the offense requiring registration is described in subsection (c) of this section, to knowingly be at any of the following locations:

(1) On the premises of any place intended primarily for the use, care, or supervision of minors, including, but not limited to . . . child care centers, nurseries, and playgrounds.

(2) Within 300 feet of any location intended primarily for the use, care, or supervision of minors when the place is located on premises that are not intended primarily for the use, care, or supervision of minors, including, but not limited to, places described in subdivision (1) of this subsection that are located in malls, shopping centers, or other property open to the general public.

(3) At any place where minors gather for regularly scheduled educational, recreational, or social programs.

N.C. Gen. Stat. § 14-208.18(a)(1)–(3) (2011), *amended* by N.C. Sess. Laws 2016-102, § 2, eff. Sept. 1, 2016.[3]

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3. The current (2016) version of N.C.G.S. § 14-208.18 amended subsection (3) and added a subsection (4) to read as follows:

> (3) At any place where minors frequently congregate, including, but not limited to, libraries, arcades, amusement parks, recreation parks, and swimming pools, when minors are present.
>
> (4) On the State Fairgrounds during the period of time each year that the State Fair is conducted, on the Western North Carolina Agricultural Center grounds during the period of time each year that the North Carolina Mountain State Fair is conducted, and on any other fairgrounds during the period of time that an agricultural fair is being conducted.

N.C.G.S. § 14-208.18(a)(3)–(4) (2016).

The Session Laws provided that the 2016 amendments would be repealed and the original 2011 statute would go back into effect if the orders of the United States District Court for the Middle District of North Carolina finding subsections (a)(2) and (a)(3) unconstitutional were stayed or overturned by a higher court on appeal). N.C. Sess. Laws 2016-102, § 2, eff. Sept. 1, 2016; *see Does v. Cooper*, 148 F. Supp. 3d 477, 496–97 (M.D.N.C. 2015) (hereinafter *Doe I*) (holding N.C.G.S. § 14-208.18(a)(3) unconstitutionally vague and permanently enjoining its enforcement); *Does v. Cooper*, 1:13CV711, 2016 WL 1629282, at **12–13 (M.D.N.C. Apr. 22, 2016) (hereinafter *Doe II*) (holding N.C.G.S. § 14-208.18(a)(2) unconstitutionally overbroad in violation of the First Amendment and enjoining defendants from enforcing N.C.G.S. § 14-208.18(a)(2) against the plaintiffs "and all other persons similarly situated").

Defendant argues that because section 14-208.18(a)(1) is violated only by a sex offender's trespass on the premises of a place intended primarily for the use, care, or supervision of minors, the State failed to meet its burden of proof where the evidence showed only that defendant was in the parking lot of a strip mall containing a daycare and other businesses not intended primarily for the use, care, or supervision of minors. The crux of defendant's challenge regards the meaning of the word "premises" within section 14-208.18(a)(1), specifically whether the shared parking lot of a daycare center, adjoining businesses, and a stand-alone restaurant constitutes the "premises" of the daycare center.

"Statutory interpretation properly begins with an examination of the plain words of the statute." *State v. Braxton*, 183 N.C. App. 36, 41, 643 S.E.2d 637, 641 (2007) (quoting *Correll v. Div. of Soc. Servs.*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992)). "In interpreting statutory language, 'it is presumed the General Assembly intended the words to have the meaning they have in ordinary speech.' " *Id.* (quoting *Nelson v. Battle Forest Friends Meeting*, 335 N.C. 133, 136, 436 S.E.2d 122, 124 (1993)). "When the plain meaning of a word is unambiguous, a court is to go no further in interpreting the statute than its ordinary meaning." *Id.* (citation omitted). "But where a statute is ambiguous, judicial construction must be used to ascertain the legislative will." *Id.* at 41–42, 643 S.E.2d at 641 (quoting *Burgess v. Your House of Raleigh*, 326 N.C. 205, 209, 388 S.E.2d 134, 136–37 (1990)); *see State v. Largent*, 197 N.C. App. 614, 617, 677 S.E.2d 514, 517 (2009) ("The paramount objective of statutory interpretation is to give effect to the intent of the legislature." (quoting *In re Proposed Assessments v. Jefferson-Pilot Life Ins. Co.*, 161 N.C. App. 558, 559–60, 589 S.E.2d 179, 180–81 (2003)).

To begin, the term "premises" as used in N.C.G.S. § 14-208.18 is not defined in the statute or in N.C.G.S. § 14-208.6, which defines various terms as used in N.C.G.S. Chapter 14, Article 27A governing the Sex Offender Registration Program generally. *See* N.C.G.S. §§ 14-208.5 *et seq.* *Black's Law Dictionary* provides the following definition, among others: "A house or building, along with its grounds; esp., the buildings and land that a shop, restaurant, company, etc. uses <smoking is not allowed on these premises>." *Premises*, Black's Law Dictionary (10th ed. 2014).

On 30 November 2016, the United States Court of Appeals for the Fourth Circuit decided *Doe v. Cooper*, 842 F.3d 833 (4th Cir. 2016) (hereinafter *Doe III*), affirming the judgment of the district court, which "permanently enjoined enforcement of section 14-208.18(a)(2) and section 14-208.18(a)(3)." *Id.* at 838; *see infra* Section III–VI (discussing the application of the Fourth Circuit's decision in *Doe III* to defendant Anderson's conviction under section 14-208.18(a)(2)).

However, *Doe I* (in which the U.S. District Court for the Middle District of North Carolina determined, *inter alia*, that subsection (a)(1) was not unconstitutionally vague, *id.* at 492[4]), offers an illuminating comparison of subsections (a)(1) and (a)(2), *see Carver v. Carver*, 310 N.C. 669, 674, 314 S.E.2d 739, 742 (1984) ("It is, of course, a fundamental canon of statutory construction that statutes which are *in pari materia*, *i.e.*, which relate or are applicable to the same matter or subject, . . . must be construed together in order to ascertain legislative intent." (citations omitted)), particularly regarding "premises":

> All three subsections of § 14-208.18(a) relate to defining the restricted zones and therefore should be construed together as part of a single legislative framework. In this way, the first two subsections can be read as covering single-use properties (subsection (a)(1)) and mixed-use properties (subsection (a)(2)). . . .
>
> Specifically, subsection (a)(1) covers single-use or *stand-alone* facilities which are intended primarily for the use, care, or supervision of minors. The best examples are those included in the statute itself: "schools, children's museums, child care centers, nurseries, and playgrounds." N.C. Gen. Stat. § 14-208.18(a)(1). The entire grounds ("premises") upon which these specific facilities ("place") are located are off-limits under subsection (a)(1). In other words, for example, a restricted sex offender is prohibited from not only a school building itself, *but also the parking lot of the school* or a storage shed outside the school, *so long as those areas are on the school premises*.

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4. *Doe I* determined that subsection (a)(2) was not unconstitutionally vague but left open for determination at trial whether (a)(2) was unconstitutionally overbroad. *See id.* at 481, 492, 505 ("[S]ubsections (a)(1) and (a)(2) provide sufficient notice to those subject to the law regarding where they are prohibited to go. The existence of a few marginal cases where the precise reach of the law is unclear does not make subsections (a)(1) and (a)(2) vague."); *see also Doe III*, 842 F.3d at 842 n.4 ("The State's appeal of the district court's final judgment came after briefing on its earlier interlocutory appeal regarding subsection (a)(3) was completed. The State's two appeals were consolidated for purposes of this proceeding, with the issue of subsection (a)(2)'s overbreadth addressed through supplemental briefing."). However, the memorandum opinion and order issued about four months later, *Doe II*, held that subsection (a)(2) is unconstitutionally overbroad in violation of the First Amendment, leaving subsection (a)(1) (the only remaining subsection), intact. 2016 WL 1629282, at *12. Thus, even though subsection (a)(2) has been determined to be unconstitutionally overbroad, the analysis and comparison as laid out in *Doe I* between subsections (a)(1) and (a)(2) is highly illustrative in terms of defendant's argument on appeal of his conviction for violating subsection (a)(1).

In the ordinary case, restricted sex offenders will not have a legitimate reason for being in these locations.

In contrast, subsection (a)(2) is focused on mixed-use facilities and locations intended primarily for the use, care, or supervision of minors when the location is not on property that is primarily intended for the use, care, or supervision of minors. In the ordinary case, restricted sex offenders may have very legitimate reasons for being on properties that include smaller portions dedicated to minors. Such reasons might include shopping, eating, exercising, attending religious services, or any other of the myriad activities in which humans engage. By drawing this distinction and including the 300-foot buffer zone, the General Assembly addressed the competing interests of allowing restricted sex offenders to go to locations where they have reason to be and keeping restricted sex offenders away from locations dedicated to minors. Restricted sex offenders are therefore permitted to go on premises that may have portions dedicated to the use, care, or supervision of minors, but they can only go on those parts of the premises which are at least 300 feet away from those portions dedicated to minors.

. . . .

In summary, subsection (a)(1) applies where the *place and premises* in question are *both* primarily intended for the use, care, or supervision of minors. Restricted sex offenders are barred from the *entire premises* under subsection (a)(1). However, subsection (a)(2) applies where the premises in question is *not* intended primarily for the use, care, or supervision of minors, *but a portion of that premises* (the "place") is intended primarily for the use, care, or supervision of minors. *Restricted sex offenders can go onto the premises, but they cannot go within 300 feet of the portion of the property intended primarily for the use, care, or supervision of minors* (*i.e.*, the "place").

Because subsection (a)(2) includes the 300-foot buffer zone but subsection (a)(1) does not, a restricted sex offender needs to be able to distinguish between (a)(1) and (a)(2) locations. Otherwise, the sex offender might believe that he or she is properly within 300 feet of an

> (a)(1) location (which is permitted) when in fact he or she is impermissibly within an (a)(2) 300-foot buffer zone. *Though there will be marginal cases where the distinction will be difficult to make*, most instances will clearly fall within the ambit of either (a)(1) or (a)(2). Subsection (a)(2) also clarifies that "places" which are on "premises" which constitute a "mall[ ], shopping center[ ], or other property open to the public" will be considered (a)(2) places with their corresponding 300-foot buffer zone.

Doe I, 148 F. Supp. at 488–90 (alterations in original) (emphasis added) (footnote omitted).

We must acknowledge that "*ordinarily*, this Court is not bound by the [rulings] of the United States Circuit Courts" nor the rulings of other federal courts. *Haynes v. State*, 16 N.C. App. 407, 410, 192 S.E.2d 95, 97 (1972) (Mallard, C.J., concurring); *see also Hyman v. Efficiency, Inc.*, 167 N.C. App. 134, 137, 605 S.E.2d 254, 257 (2004) ("We are not bound by decisions of the Federal circuit courts *other than those of the United States Court of Appeals for the Fourth Circuit arising from North Carolina law*." (emphasis added) (citing *Haynes*, 16 N.C. App. at 409–10, 192 S.E.2d at 97)). However, in this instance, where the North Carolina federal courts—district and appellate—have spoken directly on the issue at hand (determining a North Carolina statute unconstitutional), and our own State legislature has acknowledged the effect of the federal court rulings on this statute, *see supra* note 3, we will herein adopt the Fourth Circuit ruling and be guided by the analysis of the lower federal courts on this important issue. *See Shepard v. Ocwen Fed. Bank, FSB*, 172 N.C. App. 475, 479, 617 S.E.2d 61, 64 (2005) ("Although we are not bound by federal case law, we may find their analysis and holdings persuasive.").

In the instant case, the evidence at trial tended to show that Eagle Knob daycare is located in a strip mall of various businesses. Next door to the daycare, on the right, is a hair salon, and next to the hair salon is a tax preparation business. All three businesses share a single building as well as a common parking lot. There is also a restaurant in a separate, freestanding building that shares the same parking lot. While parents use the parking lot to drop off and pick up their children, none of the parking spaces in the lot are specifically reserved or marked as intended for the daycare. The daycare, including the playground area to the side of the building, is surrounded by a chain-link fence, with some privacy screening attached.

On Sunday, 28 December 2014, two officers were on patrol around lunchtime when they drove by Eagle Knob, which was closed at the time. As they drove by, they saw a green SUV slow almost to a stop in the parking lot about seventy-five feet from the daycare and let out a female passenger. The SUV then proceeded through the parking lot past the daycare and exited the parking lot. One of the officers recognized defendant as the driver of the SUV based on a distinctive tattoo on the right side of his neck and the blond highlights in his hair. The officers did not immediately arrest defendant, but rather conducted research first to determine whether defendant was allowed to be where he was within the vicinity of the daycare, and subsequently took out a warrant and arrested him.

Though this is arguably one of those "marginal cases where the distinction [is] difficult to make," *see Doe I*, 148 F. Supp. 3d at 490, based on this evidence, we believe defendant "[was] *properly* within 300 feet of an (a)(1) location (which is permitted [as there is no buffer zone]) when in fact he . . . [was also] impermissibly within an (a)(2) 300-foot buffer zone," *see id.* at 489–90 (emphasis added), when he stopped his car in the parking lot shared by the daycare and other businesses, about seventy-five feet away from the daycare, and allowed a female passenger to exit his vehicle. In other words, the evidence at trial was insufficient to prove that defendant was in violation of *subsection (a)(1)* of N.C. Gen. Stat. § 14-208.18, which states that a defendant must knowingly be "*[o]n the premises* of any place intended primarily for the use, care, or supervision of minors . . . ." *Id.* § 14-208.18(a)(1). Instead, the evidence shows only that—before the subsection was deemed unconstitutionally overbroad, *see Doe II*, 2016 WL 1629282, at *12—defendant would have been in violation of subsection (a)(2) of N.C. Gen. Stat. § 14-208, which "applie[d] where the premises in question is *not* intended primarily for the use, care, or supervision of minors, but a portion of that premises (the "place") is intended primarily for the use, care, or supervision of minors[.]" *Doe I*, 148 F. Supp. at 489 (emphasis added). As noted in *Doe I*, "(a)(1) applies where the place and premises in question are both primarily intended for the use, care, or supervision of minors" and serves to restrict sex offenders from the *entire* premises. *See id.* In this case, the shared parking lot is located on premises that are not intended primarily for the use, care, or supervision of minors. Therefore, we conclude that a parking lot shared with other businesses (especially with no designation(s) that certain spaces "belong" to a particular business) cannot constitute "premises" as set forth in subsection (a)(1) of the statute.

Accordingly, where the evidence was insufficient to prove that defendant's presence as a sex offender in the parking lot shared by the daycare and other businesses was a location governed by N.C.G.S. § 14-208(a)(1), the trial court erred by denying defendant's motion to dismiss, and we reverse the judgment of the trial court as to his conviction in 14 CRS 50721.

II. Petition for Writ of Certiorari

[2] The remaining issues in defendant's brief and petition of writ of certiorari address the validity and enforceability of defendant's plea agreement. We first review defendant's petition for writ of certiorari.

> 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.

N.C. R. App. P. 21(a)(1) (2017). However, "Appellate Rule 21 does not address guilty pleas . . . . It does not provide a procedural avenue for a party to seek appellate review by certiorari of an issue pertaining to the entry of a guilty plea." *State v. Biddix*, ___ N.C. App. ___, ___, 780 S.E.2d 863, 870 (2015).

Under Appellate Rule 2, our appellate courts have the discretion to suspend the Rules of Appellate Procedure to prevent manifest injustice to a party. N.C. R. App. P. 2; *Biddix*, ___ N.C. App. at ___, 780 S.E.2d at 868. Furthermore, this court may invoke Rule 2 "either 'upon application of a party' or upon its own initiative.' " *Biddix*, ___ N.C. App. at ___, 780 S.E.2d at 868 (quoting *Bailey v. North Carolina*, 353 N.C. 142, 157, 540 S.E.2d 313, 323 (2000)). "This Court has previously recognized the Court may implement Appellate Rule 2 to suspend Rule 21 and grant certiorari, where the three grounds listed in Appellate Rule 21 to issue the writ do not apply." *Id.*; *see also State v. Campbell*, ___ N.C. ___, ___, ___ S.E.2d ___, ___, No. 252PA14-2, 2017 WL 2492588, at *3 (2017) (reversing and remanding because this Court failed to conduct "an *independent determination* of whether the *specific circumstances* of defendant's case warranted invocation of Rule 2" (emphasis added)) ("In simple terms, precedent cannot create an automatic right to review via Rule 2. Instead, whether an appellant has demonstrated that his matter is the rare

case meriting suspension of our appellate rules is always a discretionary determination to be made on a case by case basis." (citations omitted)).

In the instant case, "an independent determination of . . . the specific circumstances of defendant's case" reveals that this case is one of the rare " 'instances' appropriate for Rule 2 review" in that defendant's "substantial rights are . . . affected." *See id.* at ___, ___ S.E.2d at ___, 2017 WL 2492588, at *3 (quoting *State v. Hart*, 361 N.C. 309, 316, 644 S.E.2d 201, 205 (2007)). Here, a federal district court and a federal appeals court have both determined that subsection (a)(2) of N.C.G.S. § 14-208.18, under which defendant pled guilty, is unconstitutionally overbroad in violation of the First Amendment. *See Doe III*, 842 F.3d at 838; *Doe II*, 2016 WL 1629282, at *12. The State has not sought further appellate review of these decisions and, in this case, has offered no argument contrary to these decisions. As a result of defendant's guilty plea for, *inter alia*, violating subsection (a)(2) of N.C.G.S. § 14-208.18, defendant was sentenced to 84 to 113 months imprisonment. Because that sentence was imposed, in part, for defendant's violation of a statute which has been held unconstitutionally overbroad, in order to "prevent manifest injustice to a party," N.C. R. App. P. 2, we recognize "the discretion inherent in the 'residual power of our appellate courts[,]' " *Campbell*, ___ N.C. at ___, ___ S.E.2d at ___, 2017 WL 2492588, at *3 (quoting *Steingress v. Steingress*, 350 N.C. 64, 66, 511 S.E.2d 298, 299–300 (1999)), and hereby invoke Rule 2 to suspend the requirements of Rule 21 and issue the writ of certiorari to reach the merits of defendant's remaining arguments.

As a further threshold matter, we also address the State's "Motion to Strike Issues II–VI Raised in Defendant's Brief," filed 16 November 2016, and subsequent "Motion to File Substitute Brief and Substitute Response to Petition for Writ of Certiorari," filed 6 March 2017. In the State's substitute brief, the State acknowledges the Fourth Circuit's opinion in *Doe III*, which affirmed the judgment of the lower court, holding N.C. Gen. Stat. § 14-208.18(a)(2) "unconstitutionally overbroad in violation of the First Amendment." *Doe II*, 2016 WL 1629282, at *12, *aff'd by Doe III*, 842 F.3d at 838, 847–48. Accordingly, we deny the State's Motion to Strike Issues II–VI, and grant the State's Motion to File Substitute Brief and Substitute Response to Petition for Writ of Certiorari.

Having granted defendant's petition for writ of certiorari, we now review the following issues raised by defendant: (III) whether defendant's conviction following his guilty plea to unlawfully being within

300 feet of a daycare can be vacated due to a federal court ruling the statute (N.C.G.S. § 14-208.18(a)(2)) unconstitutional, *see Doe III*, 842 F.3d at 838, 847–48; *Doe II*, 2016 WL 1629282, at *12; (IV) whether the indictment in 14 CRS 50703 was insufficient; (V) whether the factual basis for defendant's plea in 14 CRS 50703 was insufficient; (VI) whether the court erred in allowing the State to amend the indictment in 15 CRS 50072 for unlawful failure to report a new address within three business days; and (VII) whether judgment on all of defendant's guilty pleas is to be vacated should any one conviction be reversed.

III–VI

[3] Defendant contends his conviction following his guilty plea to unlawfully being within 300 feet of a daycare must be vacated due to the Fourth Circuit's opinion ruling N.C. Gen. Stat. § 14-208.18(a)(2) unconstitutional. *See Doe III*, 842 F.3d at 838, 847–48. We agree and thus vacate defendant's subsection (a)(2) conviction in file no. 14 CRS 50703.

In *Doe II*, the federal district court concluded as follows:

> Subsection (a)(2) punishes a wide range of First Amendment activity for a significant number of individuals compared to the statute's plainly legitimate sweep. . . . [T]he plainly legitimate sweep consists of subsection (a)(2)'s application to minor-victim offenders. . . . [5] Subsection (a)(2) greatly interferes with restricted sex offenders' ability to be present at public parks, libraries, movie theaters, and houses of worship, among other places associated with significant First Amendment activity. Furthermore, restricted sex offenders may be unable to enter some governmental buildings at all . . . because they lie inside (a)(2) buffer zones.
>
> . . . .

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5. Regarding the statute's "plainly legitimate sweep," the court in *Doe II* began its analysis as follows:

> The fact that subsection (a)(2) is not narrowly tailored with respect to adult-victim offenders, however, does not end the analysis. Before the Court can hold subsection (a)(2) to be unconstitutionally overbroad, it must determine if subsection (a)(2) punishes a substantial amount of protected free speech, judged in relation to the statute's *plainly legitimate sweep*. For the reasons discussed below, the Court concludes that subsection (a)(2) is unconstitutionally overbroad.

2016 WL 1692982, at *11 (emphasis added) (citation omitted).

> Here . . . restricted sex offenders are prohibited from even being present at a wide variety of places closely associated with First Amendment activities. Hence, while the law is not specifically addressed to speech, its reach is so vast as to encompass a wide range of First Amendment activity . . . . Mem. Op. & Order [Doc. #71], at 15–16 ("[R]estricted sex offenders may have very legitimate reasons for being on properties that include smaller portions dedicated to minors. Such reasons might include shopping, eating, exercising, attending religious services, or any of the other myriad activities in which humans engage."). Therefore, holding subsection (a)(2) to be overbroad in this instance, even though the law is not specifically targeted at speech, is still appropriate.
>
> For the foregoing reasons, the Court holds that N.C. Gen. Stat. § 14-208.18(a)(2) is unconstitutionally overbroad in violation of the First Amendment.

2016 WL 1629282, at *11–12 (internal citations omitted). In affirming the federal district court opinion, the Fourth Circuit noted as follows:

> Subsection (a)(2) burdens the First Amendment rights of all restricted sex offenders "by inhibiting the[ir] ability . . . to go to a wide variety of places associated with First Amendment activity." For example, subsection (a)(2) potentially impedes the ability of restricted sex offenders to access public streets, parks, and other public facilities.
>
> . . . .
>
> While all parties agree North Carolina has a substantial interest in protecting minors from sexual crimes, it was incumbent upon the State to prove subsection (a)(2) was appropriately tailored to further that interest.

Doe III, 842 F.3d at 845, 847 (alteration in original) (citations omitted).

In the instant case, defendant was indicted and pled guilty in 14 CRS 50703 to violating N.C.G.S. § 14-208.18(a)(2), which prohibits certain persons from being within 300 feet a location intended primarily for the use, care, or supervision of minors, when such places are located in malls, shopping centers, and other properties open to the general public. Accordingly, where defendant was indicted and convicted based on a statute deemed to be "unconstitutionally overbroad in violation of the

First Amendment," *Doe II*, 2016 WL 1629282, at *12, *aff'd by Doe III*, 842 F.3d at 838, 847–48, while his direct appeal was pending, and where the State offers no contrary argument, we adopt the Fourth Circuit's analysis and ruling, and we vacate defendant's conviction for violating N.C.G.S. § 14-208.18 (a)(2). As a result, we need not address defendant's remaining arguments IV–VI regarding the sufficiency of the indictment and the factual basis for his plea in 14 CRS 50703 and the challenge to the amendment of the indictment in 15 CRS 50072.

VII

[4] Defendant argues that judgment on all of his guilty pleas should be vacated should any one conviction be reversed. Specifically, defendant contends that because the plea agreement between defendant and the State expressly contemplated a complete disposition of all pending substantive charges against defendant, should any of those convictions be vacated or reversed, then "essential and fundamental terms of the plea agreement" will become "unfulfillable." We agree.

If "essential and fundamental terms of the plea agreement [are] unfulfillable," then "[t]he entire plea agreement must be set aside[.]" *State v. Rico*, 218 N.C. App. 109, 122, 720 S.E.2d 801, 809 (Steelman, J., dissenting), *rev'd for reasons stated in the dissenting opinion*, 366 N.C. 327, 734 S.E.2d 571 (2012) (per curiam); *see State v. Myers*, 238 N.C. App. 133, 139–40, 766 S.E.2d 690, 694 (2014) (citing *Rico*, 218 N.C. App. at 109, 110, 720 S.E.2d at 801, 802) (setting aside the defendant's plea agreement where the defendant successfully challenged the factual bases for aggravating factors as set out in his plea agreement).

In the instant case, defendant pled guilty based on a negotiated plea arrangement to being a sex offender unlawfully within 300 feet of a daycare (14 CRS 50703, *see* Section III–VI, *supra*), failure to report a new address pursuant to N.C.G.S. § 14-208.11 (15 CRS 50072), and three counts of attaining habitual felon status (15 CRS 250–52), after the jury convicted him of being a sex offender on the premises of a daycare (14 CRS 50721).

Having determined that defendant's guilty plea with regard to violating N.C.G.S. § 14-208.18(a)(2) (14 CRS 50703) must be vacated, it is apparent that the "essential and fundamental terms of the plea agreement" have become "unfulfillable." *See Rico*, 218 N.C. App. at 122, 720 S.E.2d at 809 (Steelman, J., dissenting). Accordingly, the entire plea agreement must be set aside.

The conviction in 14 CRS 50721 is reversed, and the conviction in 14 CRS 50703 is vacated. The remaining convictions entered pursuant to the plea agreement—failure to report a new address (15 CRS 50072), and three counts of obtaining habitual felon status (15 CRS 250–52) are set aside and remanded to the trial court for further proceedings.

VACATED IN PART; REVERSED IN PART; AND REMANDED.

Judges STROUD and INMAN concur.

STATE OF NORTH CAROLINA
v.
JAMES EDWARD ARRINGTON

No. COA16-761

Filed 1 August 2017

1. Appeal and Error—writ of certiorari

The Court of Appeals exercised its discretion in an assault case and granted defendant's petition for writ of certiorari as to the merits of his appeal.

2. Criminal Law—plea agreement—invalid stipulation of law

The trial court erred in an assault case by accepting defendant's plea agreement based upon an invalid stipulation of law that resulted in an incorrect calculation of his prior record level. Defendant's stipulation went beyond a factual admission and stipulated to the treatment of an old conviction, which required a legal analysis.

Judge BERGER dissenting.

Appeal by defendant from judgment entered 14 September 2015 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 26 January 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Tracy Nayer, for the State.

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

DAVIS, Judge.

This case requires us to revisit the question of which types of issues may be the subject of a valid stipulation by a defendant in connection with a plea agreement. James Edward Arrington ("Defendant") appeals from his convictions for assault with a deadly weapon inflicting serious injury, felony failure to appear, and attaining the status of a habitual felon. Because we conclude that the trial court improperly accepted Defendant's stipulation as to an issue of law, we vacate its judgment and remand for further proceedings.

Factual and Procedural Background

On 5 May 2014, Defendant was indicted for assault with a deadly weapon inflicting serious injury and attaining the status of a habitual felon. On 3 November 2014, he was also charged with felony failure to appear in connection with that assault charge. He was subsequently charged on 3 August 2015 with an additional count of attaining the status of a habitual felon.

Defendant and the State entered into a plea agreement whereby it was agreed that (1) he would plead guilty to assault with a deadly weapon inflicting serious injury, felony failure to appear, and attaining the status of a habitual felon; and (2) the State would dismiss the second habitual felon charge. The plea agreement also reflected that Defendant would be sentenced as a habitual felon in the mitigated range and that he "stipulated that he ha[d] 16 points and [was] a Level V for Habitual Felon sentencing purposes."

In connection with this plea agreement, the parties submitted to the trial court a prior record level worksheet for Defendant containing a stipulation as to the existence of six prior convictions generating prior record level points. One of the convictions listed was a second-degree murder conviction from 1994 (the "1994 Conviction"), which was designated in the worksheet as a Class B1 offense. The 1994 Conviction gave rise to 9 of the 16 total prior record level points reflected on the worksheet pursuant to N.C. Gen. Stat. § 15A-1340.14(b)(1a).

A plea hearing was held in Buncombe County Superior Court before the Honorable Alan Z. Thornburg on 14 September 2015. During the hearing, Defendant's counsel stipulated to Defendant's designation as a Level V offender as stated on the prior record level worksheet. Defendant then pled guilty to assault with a deadly weapon inflicting serious injury, felony failure to appear, and attaining the status of a habitual felon. The second habitual felon charge was dismissed. The trial court consolidated

Defendant's convictions and sentenced him as a habitual felon to 96 to 128 months imprisonment.

Analysis

I. Appellate Jurisdiction

[1] As an initial matter, we must address whether we have jurisdiction over the present appeal. Defendant's sole argument is that the trial court erred by accepting his plea agreement because it was based upon an invalid stipulation of law that resulted in an incorrect calculation of his prior record level. As a result, Defendant argues, he was improperly sentenced as a Level V offender rather than a Level IV offender. Pursuant to N.C. Gen. Stat. § 15A-1444, a defendant who pleads guilty to a criminal offense in superior court is entitled to an appeal as a matter of right regarding the issue of whether the sentence imposed "[r]esult[ed] from an incorrect finding of the defendant's prior record level . . . ." N.C. Gen. Stat. § 15A-1444(a2)(1) (2015).

Defendant, however, did not file a notice of appeal that strictly conformed to Rule 4 of the North Carolina Rules of Appellate Procedure. He instead submitted a letter to the Buncombe County Clerk of Court on 21 September 2015 expressing his dissatisfaction with his plea agreement. Because of his failure to comply with Rule 4, Defendant's appeal is subject to dismissal. However, Defendant has filed a petition for writ of *certiorari* requesting that we consider his appeal notwithstanding his violation of Rule 4.

Pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure, this Court may, in its discretion, grant a petition for writ of *certiorari* and review an order or judgment entered by the trial court "when the right to prosecute an appeal has been lost by failure to take timely action[.]" N.C. R. App. P. 21(a)(1). In our discretion, we elect to grant Defendant's petition for writ of *certiorari* and reach the merits of his appeal.

II. Validity of Defendant's Stipulation

[2] Before imposing a sentence for a felony conviction, the trial court must determine the defendant's prior record level, N.C. Gen. Stat. § 15A-1340.13(b) (2015), which is calculated by adding together the points assigned to each of the defendant's qualifying prior convictions, N.C. Gen. Stat. § 15A-1340.14(a). Points are assessed based upon the classification of the prior offense, and "the classification of a prior offense is the classification assigned to that offense *at the time the offense for which the offender is being sentenced is committed*[,]" N.C.

Gen. Stat. § 15A-1340.14(c) (emphasis added), rather than at the time the prior offense was committed.

"The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists[,]" *State v. Alexander*, 359 N.C. 824, 827, 616 S.E.2d 914, 917 (2005) (citation and quotation marks omitted), and may — as a general matter — establish the existence of the defendant's prior convictions through any of the following means:

> (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).

While a sentencing worksheet alone is insufficient to satisfy the State's burden of establishing a defendant's prior record level, "a sentencing worksheet coupled with statements by counsel may constitute a stipulation by the parties to the prior convictions listed therein." *State v. Hinton*, 196 N.C. App. 750, 752, 675 S.E.2d 672, 674 (2009). Notably, however, we have held that

> [w]hile a stipulation by a defendant is sufficient to prove the *existence* of the defendant's prior convictions, which may be used to determine the defendant's prior record level for sentencing purposes, the trial court's assignment of defendant's prior record level is a question of law. *Stipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts, either trial or appellate.*

State v. Wingate, 213 N.C. App. 419, 420, 713 S.E.2d 188, 189 (2011) (internal citation and quotation marks omitted and emphasis added). This principle is premised upon the longstanding doctrine in North Carolina that, "[g]enerally, stipulations as to matters of law are not binding upon courts." *State v. McLaughlin*, 341 N.C. 426, 441, 462 S.E.2d 1, 8 (1995); *see also Quick v. United Benefit Life Ins. Co.*, 287 N.C. 47, 56, 213 S.E.2d 563, 569 (1975) ("[T]he stipulation was one of law and therefore not binding upon the court." (citation omitted)).

Here, Defendant purported to stipulate in his prior record level worksheet and during his plea colloquy both to the existence of several prior convictions, which resulted in the assessment of 16 prior record level points, and to his designation as a Level V offender. *See* N.C. Gen. Stat. § 15A-1340.14(c)(5) (providing that defendant with between 14 and 17 prior record level points is a Level V offender). As reflected in his prior record level worksheet, one of the convictions contributing to his total of 16 prior record level points was the 1994 Conviction, which Defendant stipulated was a Class B1 felony.

On appeal, Defendant argues that the calculation of his prior record level was incorrect because the 1994 Conviction should have instead been counted as a Class *B2* felony, for which only six prior record level points would have been assessed, *see* N.C. Gen. Stat. § 15A-1340.14(b)(2).[1] He contends his stipulation that the 1994 Conviction was a Class B1 felony was invalid because it concerned a *legal* issue and thus should not have been accepted by the trial court. The State, conversely, argues that Defendant's stipulation pertained to a *factual* issue and was therefore valid. For the reasons set out below, we agree with Defendant that the stipulation was invalid.

At the time of Defendant's 1994 Conviction, North Carolina's murder statute, N.C. Gen. Stat. § 14-17, placed *all* second-degree murder convictions in the same felony class. *See* 1981 N.C. Sess. Laws 957, 957, ch. 662, § 1 (designating second-degree murder as Class C felony). However, between 1994 and the date on which the Defendant committed the offenses giving rise to the present appeal, the General Assembly amended this statute by dividing the offense of second-degree murder into two classes — B1 and B2 — which were distinguished based upon the type of malice present in the commission of the offense. *See* N.C. Gen. Stat. § 14-17(b) (2015).[2] Therefore, at the time Defendant committed the

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1. Had the 1994 Conviction been classified as a Class B2 felony, this would have resulted in Defendant having a total of only 13 prior record level points and thus being designated as a Level IV offender rather than a Level V offender. *See* N.C. Gen. Stat. § 15A-1340.14(c)(4) (providing that defendant possessing between 10 and 13 prior record level points is Level IV offender).

2. The revised statute provides that all second-degree murders are now designated as Class B1 felonies *except* that they are Class B2 felonies in the following two circumstances:

> (1) The malice necessary to prove second degree murder is based on an inherently dangerous act or omission, done in such a reckless and wanton manner as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief.

offenses from which the current appeal arises, the amended version of N.C. Gen. Stat. § 14-17, which created two classes of second-degree murder, controlled the classification of the 1994 Conviction for prior record level purposes.

Accordingly, Defendant's stipulation in connection with his guilty plea went beyond a factual admission that the 1994 Conviction existed. Instead, it constituted a stipulation as to the issue of whether the 1994 Conviction should be treated as a Class B1 or Class B2 felony — a question that required the retroactive application of a distinction in classifications that *did not exist* at the time of Defendant's conviction in 1994 and thus required a legal analysis as to how the 1994 Conviction would be classified under the new statutory scheme. Therefore, because Defendant's stipulation involved a question of law, it should not have been accepted by the trial court and is not binding on appeal. *See State v. Hanton*, 175 N.C. App. 250, 253, 623 S.E.2d 600, 603 (2006) ("Stipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts, either trial or appellate[.]" (citation and quotation marks omitted)).

Although our Supreme Court has yet to address this precise issue, our conclusion is consistent with the Court's decisions in this general context. *Alexander* articulates the basic rule that a defendant may stipulate to the existence of a prior conviction. In that case, the defendant pled guilty to assault with a deadly weapon with intent to kill inflicting serious injury. *Alexander*, 359 N.C. at 825, 616 S.E.2d at 915. In connection with his plea, the defendant submitted a prior record level worksheet that contained a conviction described as "Class A1 or 1 Misdemeanor Conviction" next to which appeared the numeral one to represent the number of prior record level points to be assessed for that conviction. *Id.* at 826, 616 S.E.2d at 916. During sentencing, the defendant's counsel stated that "up until this particular case [the defendant] had no felony convictions, as you can see from his worksheet." *Id.* (quotation marks omitted). The trial court proceeded to sentence the defendant as a Level II offender because he possessed one prior record level point. *Id.*

> (2) The murder is one that was proximately caused by the unlawful distribution of opium or any synthetic or natural salt, compound, derivative, or preparation of opium, or cocaine or other substance described in G.S. 90-90(1)d., or methamphetamine, and the ingestion of such substance caused the death of the user.

N.C. Gen. Stat. § 14-17(b).

On appeal, the defendant argued that the State had failed to carry its burden of establishing his prior record level because "the State offered no court records or other official records in support of its assertion that defendant had one prior Class A1 misdemeanor conviction." *Id.* at 827, 616 S.E.2d at 917 (quotation marks and brackets omitted). The Supreme Court rejected the defendant's challenge, explaining that his prior record level worksheet, in conjunction with his counsel having "specifically directed the trial court to refer to the worksheet . . ." constituted a valid stipulation as to the existence of the prior conviction on the worksheet, thus satisfying the State's burden under N.C. Gen. Stat. § 15A-1340.14(f). *Id.* at 830, 616 S.E.2d at 918.

Accordingly, *Alexander* stands for the proposition — which Defendant here does not contest — that the State may establish a prior conviction by the defendant's stipulation to the existence of that conviction through (1) the presentation of a prior record level worksheet (2) that his counsel in some manner references or adopts at sentencing. As we stated in *Hinton*, "a sentencing worksheet coupled with statements by counsel may constitute a stipulation by the parties *to the prior convictions* listed therein." *Hinton*, 196 N.C. App. at 752, 675 S.E.2d at 674 (emphasis added).

Thus, the principal issue in *Alexander* was whether the particular statement of counsel regarding the worksheet was sufficient to constitute a stipulation as to the existence of a prior conviction. There was no legal ambiguity — as there is in the present case — regarding the *classification* of the prior conviction. Moreover, the defendant in *Alexander* never challenged the accuracy of the information (including the offense classification) contained in the worksheet, whereas Defendant makes such a challenge here.

The Supreme Court's recent decision in *State v. Sanders*, 367 N.C. 716, 766 S.E.2d 331 (2014), illustrates how *legal* questions related to the determination of a prior record level are for the trial court to resolve. *Sanders* dealt with the issue of whether an out-of-state conviction was "substantially similar" to a North Carolina offense for purposes of assessing prior record level points under N.C. Gen. Stat. § 15A-1340.14(e). The Court explained that the "determination of whether the out-of-state conviction is substantially similar to a North Carolina offense is a question of law involving comparison of the elements of the out-of-state offense to those of the North Carolina offense." *Id.* at 720, 766 S.E.2d at 334.

The Supreme Court cited the *Hanton* line of cases for this proposition. *Id.* In *Hanton*, we concluded that a defendant could not stipulate

to the substantial similarity of two offenses because such a comparison presents legal questions, and "[s]tipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts, either trial or appellate. This rule is more important in criminal cases, where the interests of the public are involved." *Hanton*, 175 N.C. App. at 253, 623 S.E.2d at 603.

Given our Supreme Court's determination in *Sanders* that a comparison of the elements of an out-of-state offense to the corresponding elements of a North Carolina offense for purposes of determining substantial similarity is a question of law, we can discern no logical basis for reaching a contrary conclusion regarding how a prior conviction would be classified under a statute *that was not in existence* at the time the prior offense was committed. Both situations involve matters of pure legal interpretation that must be addressed by the trial court rather than resolved through a stipulation between the parties.

In reaching a contrary conclusion, the dissent seeks to rely on *Wingate*. In *Wingate* the defendant stipulated in connection with his guilty plea that he had previously been convicted of "one count of conspiracy to *sell or deliver* cocaine and two counts of *selling or delivering* cocaine" and that these three convictions were Class G felonies. *Wingate*, 213 N.C. App. at 420, 713 S.E.2d at 189 (emphasis added).

On appeal, the defendant argued that "there was insufficient proof to establish whether he had previously been convicted of one count of conspiracy to *sell* cocaine and two counts of *selling* cocaine, which are Class G felonies, *or* whether he was convicted of one count of conspiracy to *deliver* cocaine and two counts of *delivery* of cocaine, which are Class H felonies." *Id.* The defendant contended that the ambiguity regarding whether these prior convictions involved selling offenses or delivering offenses involved an issue of law rather than of fact. Thus, he contended, the trial court erred by accepting his stipulation that these prior convictions were Class G felonies. *Id.* at 419, 713 S.E.2d at 189.

We disagreed, holding that because the defendant had "stipulated that the three convictions at issue were Class G felonies[, t]he trial court could, therefore, rely on this factual stipulation in making its calculations and the State's burden of proof was met." *Id.* at 421, 713 S.E.2d at 190. We emphasized that the "defendant does not assert that he was, in fact, convicted of one count of conspiring to *deliver* cocaine and two counts of *delivering* cocaine, as opposed to one count of conspiring to *sell* cocaine and two counts of *selling* cocaine. In other words, defendant does not dispute the accuracy of his prior conviction level or his

prior record level." *Id.* We summarized our holding by characterizing the defendant's stipulation as constituting "sufficient proof *of his prior convictions*." *Id.* (emphasis added).

It is important to note that in *Wingate* (unlike in the present case) there was no relevant change in the statute at issue — N.C. Gen. Stat. § 90-95(b) — between the time of the defendant's prior convictions and the commission of the offense giving rise to his sentencing. Rather, the statute at all relevant times placed the sale of cocaine and the delivery of cocaine into two distinct classes. Therefore, when the defendant in *Wingate* stipulated to having been convicted of "one count of conspiracy to *sell* or *deliver* cocaine and two counts of *selling* or *delivering* cocaine" and then stipulated that these were, in fact, Class G offenses, he was simply resolving the *factual* question of whether he been convicted of the selling offenses or the delivering offenses.

The dissent's overly broad characterization of *Wingate* as holding that the classification assigned to a prior conviction is always a factual determination is at odds with the actual language of that decision. We held in *Wingate* that "*in this case*, the class of felony for which defendant was previously convicted was a question of fact, to which defendant could stipulate, and was not a question of law requiring resolution by the trial court." *Id.* at 420, 713 S.E.2d at 190 (emphasis added). This was so because under the particular facts of *Wingate* the defendant's stipulation that the prior convictions were Class G felonies was related to a factual determination — i.e., that the defendant actually had been convicted of one count of conspiracy to sell cocaine and two counts of selling cocaine. No legal analysis was required to make that determination. Accordingly, *Wingate* stands for the proposition that a stipulation regarding the offense class of a prior conviction is permissible when the stipulation resolves a *factual* ambiguity regarding the specific prior offense for which the defendant had actually been convicted. That is simply not the case here.

We wish to emphasize that the present case constitutes a narrow exception to the general rule regarding a defendant's ability to stipulate to matters in connection with his prior record level. A stipulation as to the classification of a prior conviction is permissible so long as it does not attempt to resolve a question of law. In the great majority of cases in which a defendant makes such a stipulation, the stipulation will be valid because it does not concern an issue requiring legal analysis.

The present case falls within a small minority of cases in which the stipulation did concern a question of law. Here, because Defendant's

purported stipulation that his prior conviction was a B1 felony went beyond a factual admission that the 1994 Conviction existed and instead constituted a stipulation as to the legal issue of how that conviction should be treated under the current version of N.C. Gen. Stat. § 14-17, the stipulation should not have been accepted by the trial court and is not binding on appeal. The dissent does not (and cannot) explain how the proper classification of the 1994 Conviction under the new version of the statute could be retroactively ascertained without engaging in a legal analysis — absent the type of invalid stipulation that occurred here.

Having determined that Defendant's stipulation was invalid, the only remaining question is the effect of our holding on Defendant's guilty plea. Both the State and Defendant agree in their briefs that in the event we determine the trial court erred in accepting Defendant's stipulation, we should vacate the judgment and set aside his plea agreement. We agree. *See*, *e.g.*, *State v. Rico*, 218 N.C. App. 109, 122, 720 S.E.2d 801, 809 (Steelman, J., dissenting) (concluding that judgment should be vacated and guilty plea set aside and that case must be remanded for disposition of original charges where trial court erroneously imposed aggravated sentence based solely on defendant's guilty plea and stipulation as to aggravating factor), *rev'd per curiam for reasons stated in dissent*, 366 N.C. 327, 734 S.E.2d 571 (2012).

Accordingly, the judgment entered by the trial court upon Defendant's guilty plea must be vacated and his plea agreement set aside. We remand to the trial court for disposition of the charges against him.

Conclusion

For the reasons stated above, we vacate the trial court's judgment, set aside Defendant's plea agreement, and remand for further proceedings not inconsistent with this opinion.

VACATED AND REMANDED.

Chief Judge McGEE concurs.

Judge BERGER dissents by separate opinion.

BERGER, Judge, dissenting.

Defendant contends in his brief that he was "sentenced as a Level V offender when his prior record supported only a Level IV sentence." The majority agrees with Defendant and vacates his guilty plea and sentence. I respectfully dissent from the majority opinion.

On September 14, 2015, Defendant pleaded guilty in Buncombe County Superior Court to assault with a deadly weapon inflicting serious injury, felony failure to appear, and having attained habitual felon status. Pursuant to a plea arrangement, the State dismissed a separate habitual felon indictment against Defendant. The parties agreed to the following terms:

> The defendant stipulates that he has 16 points and is a Level V for Habitual Felon sentencing purposes.
>
> The State agrees that [the felony failure to appear charge] will be consolidated for sentencing purposes into [the assault with a deadly weapon inflicting serious injury charge]. The defendant will be sentenced as an Habitual Felon in the mitigated range.

In conjunction with his plea of guilty, Defendant stipulated to his prior convictions and their classifications on his "Worksheet Prior Record Level for Felony Sentencing," which included a 1994 North Carolina conviction for second degree murder. Defendant stipulated that the murder conviction should be classified as a B1 felony. Defendant further stipulated, and the trial court found, that Defendant had sixteen prior record points and was a prior record level V for sentencing purposes. Pursuant to the terms and conditions of the plea agreement, the trial court sentenced Defendant as an habitual felon to an active term of imprisonment for 96 to 128 months.

During sentencing, the State is required to prove a defendant's prior convictions by a preponderance of the evidence, and one method of proof is a "[s]tipulation of the parties." N.C. Gen. Stat. § 15A-1340.14(f) (2015). As this Court has stated, "[t]he existence of a prior conviction . . . requires a factual finding" which may be proven through a stipulation. *State v. Powell*, 223 N.C. App. 77, 80, 732 S.E.2d 491, 493-94 (2012) (citation omitted).

Proof of a prior conviction is necessary for the proper classification of the prior offense. This Court has previously held that the classification assigned to a prior conviction is a factual determination. In *State v. Wingate*, 213 N.C. App. 419, 713 S.E.2d 188 (2011), the defendant stipulated that his prior convictions for one count of conspiracy to sell or deliver cocaine and two counts of selling or delivering cocaine were class G felonies. *Id.* at 420, 713 S.E.2d at 189. On appeal, that defendant argued the State failed to prove whether his convictions were for the class G felonies listed above or the class H felonies of delivery of cocaine. *Id.* at 420, 713 S.E.2d at 189-90. This Court held:

> in this case, *the class of felony* for which defendant was previously convicted was a question of fact, to which defendant could stipulate, and was not a question of law requiring resolution by the trial court. . . . The prior conviction worksheet expressly sets forth the class of offense to which a defendant stipulates and defendant in this case has not cited to any authority, nor have we found any, that requires the trial court to ascertain, as a matter of law, the class of each offense listed.

Id. at 420-21, 713 S.E.2d at 190 (emphasis added). *See also State v. Wilson*, 232 N.C. App. 523, 757 S.E.2d 526 (2014) (unpublished) (holding that the labeling of a criminal conviction and its punishment classification is a question of fact); *State v. Edgar*, ___ N.C. App. ___, ___, 777 S.E.2d 766, 769 (2015) (defendant's stipulation to prior offense and out-of-state classification "did not implicate any conclusions or questions of law")[1]; and *State v. Brown*, 221 N.C. App. 670, 729 S.E.2d 127 (2012) (unpublished) (holding no error in assignment of points based upon parties' stipulations).

The majority correctly states that prior to imposing a sentence, the trial court determines a defendant's prior record level pursuant to N.C. Gen. Stat. § 15A-1340.13. Determination of a defendant's prior record level, however, differs from determination of the existence of prior convictions and classification thereof. A defendant's "*prior record level . . .* is determined by calculating the sum of the points assigned to each of the offender's prior convictions." N.C. Gen. Stat. § 15A-1340.14(a) (2015) (emphasis added). Thus, the calculation of the sum of points used to determine a defendant's prior record level is a legal question undertaken by the trial court. *See Wingate*, 213 N.C. App. at 420, 713 S.E.2d at 189 ("[T]he trial court's assignment of defendant's prior record level is a question of law." (citation omitted)); *State v. Williams*, 200 N.C. App. 767, 771, 684 S.E.2d 898, 901 (2009) ("[T]he trial court's assignment of a prior record level is a conclusion of law . . . ." (citation and quotation marks omitted)); *State v. Bohler*, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 (2009) ("The

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1. *State v. Edgar* addressed a question of the substantial similarity of an out-of-state conviction pursuant to N.C. Gen. Stat. § 15A-1340.14(e). The defendant in *Edgar* stipulated to the default Class I classification for out-of-state felonies, so the legal question of substantial similarity under the statute was not implicated.

Here, however, there is no statute or controlling authority that requires any such comparison of prior in-state convictions for which the parties have stipulated. Certainly, a hearing could be held, and the State put to its proof, if a defendant objected to a prior conviction or its classification.

determination of an offender's prior record level is a conclusion of law that is subject to *de novo* review on appeal." (citation omitted)).

Here, Defendant stipulated to the 1994 North Carolina conviction for second-degree murder listed on his prior record level worksheet. In addition, defense counsel was asked in open court during the sentencing hearing if Defendant stipulated "to the contents of the sentencing worksheet." Defendant did not question any item set forth on the worksheet, nor did he or his counsel object to the offenses or classifications set forth thereon. Instead, defense counsel responded, "We will stipulate to the sentencing sheet." Defense counsel also informed the court during sentencing, "There's nothing I can deny about [Defendant's] record, absolutely nothing."

Classification of prior offenses is determined "at the time the offense for which the offender is being sentenced is committed." N.C. Gen. Stat. § 15A-1340.14(c) (2015). When Defendant was convicted of second degree murder, that offense was classified as a B2 felony. Based upon a change to N.C. Gen. Stat. § 14-17 in 2012, however, second degree murder can now be classified as either a B1 or B2 felony. *See* 2012 N.C. Sess. Laws 781, 782, ch. 165, § 1. Defendant expressly stipulated to the classification of his second degree murder conviction as a B1 felony, consistent with N.C. Gen. Stat. § 14-17(b) (2015).

Prior convictions which are classified as B1 felonies are assigned nine prior record points. N.C. Gen. Stat. § 15A-1340.14(b)(1a) (2015). The sentencing worksheet, to which Defendant stipulated, properly assigned nine points to Defendant's B1 felony classification. The trial court accurately calculated Defendant's assigned points and specifically found, "the prior convictions, prior record points[,] and the prior record level of the defendant to be as shown herein."

The trial court designated Defendant as having a prior record level V. The assignment of nine points based upon the classification of the prior offense as a B1 felony is not inconsistent with N.C. Gen. Stat. § 15A-1340.14(b), and the calculations involved in designating Defendant as a prior record level V offender for sentencing are not inconsistent with N.C. Gen. Stat. § 15A-1340.14(c). It cannot be said that the trial court incorrectly calculated Defendant's prior record level.

Defendant entered into a valid stipulation regarding the classification of his prior murder conviction and was properly sentenced as a level V offender. I would affirm the trial court's judgment.

STATE OF NORTH CAROLINA
v.
GARY WILLIAM CANNON, DEFENDANT

No. COA16-1059

Filed 1 August 2017

1. Aiding and Abetting—larceny—motion to dismiss—sufficiency of evidence—vehicle parked for easy escape—car contained stolen goods—absurd statements to law enforcement

The trial court did not err by denying defendant's motion to dismiss the charge of aiding and abetting larceny where the evidence was sufficient to show that defendant's vehicle was parked in a manner to allow for an easy escape, defendant's car contained stolen goods from Wal-Mart and a large quantity of other goods that were a greater quantity than one person would use, and defendant made absurd statements to law enforcement regarding why he would travel from Gastonia to Denver solely to shop at Wal-Mart.

2. Sentencing—habitual felon status—stipulation—failure to submit to jury

The trial court erred by sentencing defendant as a habitual felon where defendant only stipulated to habitual felon status and the issue was not submitted to the jury as required by N.C.G.S. § 14-7.5.

Judge DIETZ concurring in separate opinion.

Judge CALABRIA dissenting.

Appeal by defendant from judgment entered 13 May 2016 by Judge Daniel A. Kuehnert in Lincoln County Superior Court. Heard in the Court of Appeals 5 April 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Thomas J. Campbell, for the State.

William D. Spence for defendant-appellant.

MURPHY, Judge.

Gary William Cannon ("Defendant") appeals from his judgment for aiding and abetting larceny and attaining habitual felon status. On

appeal, he contends: (1) that the trial court erred in denying his motion to dismiss the charge of aiding and abetting larceny; and (2) that the trial court erred in sentencing Defendant as a habitual felon when the issue was not submitted to the jury as required by N.C.G.S. § 14-7.5 (2015). After careful review, we hold that the trial court did not err in denying Defendant's motion to dismiss. However, we agree with Defendant that the trial court erred in sentencing Defendant as a habitual felon when the issue was not submitted to the jury. We affirm Defendant's conviction for aiding and abetting larceny, vacate the habitual felon enhancement, and remand for a new sentencing hearing.

I. Background

On 14 May 2015, Shawn Sanbower ("Sanbower"), a loss prevention officer at a Wal-Mart store in Denver, North Carolina, observed Amanda Eversole ("Eversole") remove several items of clothing from store shelves and attempt to leave the store without paying. Sanbower apprehended Eversole, and then reviewed surveillance tapes. He discovered that Eversole had been in the store with William Black ("Black"), who had taken a number of items from store shelves without paying. Law enforcement was contacted. Sanbower went out to the store parking lot and saw Black, along with several law enforcement officers. Black was in the rear passenger seat of a green SUV, which was filled with goods from the Wal-Mart with a total value of $1,177.49. At the vehicle, Sanbower also observed Defendant speaking with the officers.

Deputy Ken Davis ("Deputy Davis"), from the Lincoln County Sheriff's Office, was one of the officers present, having arrived in response to the store's call. Deputy Davis testified that he had approached Black's vehicle and found it was full of stolen goods. Defendant then approached the vehicle and asked Davis and other officers what they were doing. Deputy Davis asked Defendant how he knew Black, and Defendant replied that he had only just met "them," and that he was paid $50.00 to drive "him" to this Wal-Mart in Denver from Gastonia. Defendant further confirmed that he owned the vehicle.

On 9 November 2015, the Lincoln County Grand Jury indicted Defendant on the charges of felony larceny, conspiracy to commit felony larceny, and aiding and abetting larceny. Defendant was also indicted for attaining habitual felon status. This matter went to trial on 12 May 2016. At the close of the State's evidence, Defendant moved to dismiss all of the charges. This motion was denied. Defendant declined to put on evidence. During the jury charge conference, the trial court dismissed the felony larceny charge on its own motion.

The jury found Defendant not guilty of conspiracy to commit larceny, but guilty of aiding and abetting larceny. The State then amended the habitual felon indictment without objection, and submitted sentencing worksheets by stipulation. Defendant "stipulated" to habitual felon status. The trial court sentenced Defendant to an active minimum sentence of 80 months to a maximum of 108 months imprisonment. The trial court waived court costs, and awarded attorney's fees as a civil judgment.

Defendant appeals.

II. Motion to Dismiss

Defendant contends that the trial court erred in denying his motion to dismiss the charge of aiding and abetting larceny. We disagree.

A. Standard of Review

"This Court reviews the trial court's denial of a motion to dismiss de novo." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (emphasis omitted). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (quotation omitted).

The State is entitled to every reasonable inference that may be made from the evidence presented at trial. *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 387-88 (1984). "The trial court does not weigh the evidence, consider evidence unfavorable to the State, or determine any witnesses' credibility . . . . Ultimately, the court must decide whether a reasonable inference of defendant's guilt may be drawn from the circumstances." *State v. Blizzard*, 169 N.C. App. 285, 289-90, 610 S.E.2d 245, 249 (2005).

B. Analysis

[1] Defendant contends that the trial court erred in denying his motion to dismiss the charge of aiding and abetting larceny, on the grounds that the State failed to present sufficient evidence of all of the essential elements of the charge. We disagree.

"The essential elements of aiding and abetting are as follows: (1) the defendant was present at the scene of the crime; (2) the defendant intended to aid the perpetrator in the crime; and (3) the defendant communicated his intent to aid to the perpetrator." *State v. Capps*, 77 N.C. App. 400, 402, 335 S.E.2d 189, 190 (1985) (citation omitted).

Defendant's vehicle was parked on the far side of the parking lot, far from the store or any other cars, which would make an escape easy. Further, in addition to the goods stolen from the Wal-Mart, officers found a large quantity of Atkins drinks and cosmetics in Defendant's vehicle, which Sanbower contended were a greater quantity than one person would use. As the Dissent notes, this evidence standing alone would not withstand a motion to dismiss. However, we consider this evidence in light of Defendant's statements to law enforcement.

The State is entitled to every reasonable inference that may be made from the evidence presented at trial, *Bullard*, 312 N.C. at 160, 322 S.E.2d at 387-88, and we consider the reasonable inferences that may be drawn from Defendant's statement that he had just met the principals and the absurdity that a person would travel from Gastonia to Denver solely to shop at Wal-Mart for an otherwise valid purpose.

The evidence shows that Defendant claims to have been paid $50.00 to travel from Gastonia to the Wal-Mart in Denver. There is nothing in the record that suggests a need for the principals to travel to this specific Wal-Mart over any of the other Wal-Marts in Gastonia or along the myriad of routes from Gastonia to Denver. While not explicitly requested to do so by the State, we take judicial notice of the geographic distance and commercial nature of the routes between Gastonia and Denver in considering the circumstances present in this case. "Judicial notice may be taken at any stage of the proceeding." N.C.G.S. § 8C-1, Rule 201(f) (2015). Our Supreme Court has held it is appropriate to take judicial notice of the placing of towns. *State v. Saunders*, 245 N.C. 338, 342-43, 95 S.E.2d 876, 879 (1957); *see State v. Brown*, 221 N.C. App. 383, 387, 732 S.E.2d 584, 587-88 (2012) (taking judicial notice of the driving distance between Mebane and Durham in reviewing the sufficiency of evidence on appeal).

There is a strong case for taking such judicial notice "when almost every town in the country is connected by a ribbon of concrete or asphalt over which a constant stream of traffic flows." *Saunders*, 245 N.C. at 343, 95 S.E.2d at 879. "[S]o complete and so general is the common knowledge of places and distances that the court may be presumed to know the distances between important cities and towns in this State[.]" *Id.* at 343, 95 S.E.2d at 879.

We take judicial notice of the distance from Gastonia to Denver because the impracticality of traveling this distance and through areas with other Wal-Mart stores creates a reasonable inference of an improper purpose that, along with other incriminating aspects of the evidence,

demonstrates the intent of Defendant to aid and abet larceny. Such considerations that are not pronounced in the record are exactly why we give great deference to trial judges and local juries in making ultimate findings of fact, and they are proper for us to consider by judicial notice in a de novo review of the cold record.

Trial courts and jurors are free to consider the geographic distance between cities, the modes of travel between cities, the commercial aspects of their local area, and the ubiquitous nature of Wal-Mart stores. *See Saunders*, 245 N.C. at 342, 95 S.E.2d at 879; *State v. S. Ry. Co.*, 141 N.C. 846, 851, 54 S.E. 294, 296 (1906); *Brown*, 221 N.C. App. at 387, 732 S.E.2d at 587-88; *Hinkle v. Hartsell*, 131 N.C. App. 833, 836, 509 S.E.2d 455, 457-58 (1998) (providing a laundry list of situations where judicial notice is appropriate). The trial court here likely did consider these things due to the obvious and reasonable inference of guilt that the trial court was free to draw. Given the location of the vehicle in the parking lot, the items found in the vehicle, and the reasonable inference that can be made based on the geographic distance and commercial nature of the routes between Gastonia and Denver, the State met its low burden at the motion to dismiss stage.

We hold that the State presented evidence of every element of the offense of aiding and abetting larceny, and that the trial court therefore did not err in denying Defendant's motion to dismiss.

III. Habitual Felon

[2] Defendant argues, and the State concedes, that the trial court should not have sentenced Defendant as a habitual felon when the issue was not submitted to the jury and the trial court did not accept a formal plea from Defendant.

Under Section 14-7.5 of the North Carolina General Statutes, whether a defendant is a habitual felon is submitted to the jury, or, in the alternative, the defendant may enter a guilty plea to the charge of being a habitual felon. *State v. Gilmore*, 142 N.C. App. 465, 471, 542 S.E.2d 694, 698-99 (2001). Therefore, since Defendant only stipulated to habitual felon status, the conviction must be vacated and remanded for resentencing.

IV. Conclusion

For the reasons stated above, we affirm Defendant's conviction for aiding and abetting larceny, and vacate the habitual felon enhancement and remand for a new sentencing hearing.

AFFIRMED IN PART; VACATED IN PART; REMANDED FOR A NEW SENTENCING HEARING.

Judge DIETZ concurs by separate opinion.

Judge CALABRIA dissents by separate opinion.

DIETZ, Judge, concurring.

I agree that the trial court properly denied Cannon's motion to dismiss. In a criminal case, the trial court must deny a motion to dismiss if the State has presented substantial evidence that the defendant committed each element of the charged offense. "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).

Here, law enforcement found Cannon near his SUV in a Walmart parking lot. Cannon's SUV contained more than $1,000 worth of razors stolen from inside the Walmart. The SUV also contained separate bags containing a large number of unopened makeup packages and diet food packages. A Walmart employee testified that the makeup and diet food packages were not purchased or stolen from that Walmart.

Law enforcement asked Cannon about the stolen razors and the other goods found in his SUV. Cannon told law enforcement that he had no idea how the goods got there and that he did not have anything to do with it. He explained that he had just met Amanda Eversole and William Black when they offered to pay him $50 to drive them from Gastonia to the Walmart in Denver.

Something in this story was a lie. If Cannon had simply driven Black and Eversole from Gastonia to the Walmart in Denver—at which point Black and Eversole stole the razors without Cannon's knowledge—where did the other goods come from?

The jury, having heard Cannon's statements to the police, reasonably could have inferred that Cannon lied about taking Black and Eversole to other stores before going to Walmart because he knew Black and Eversole had stolen the makeup and diet food packages from those other stores, and Cannon did not want to implicate himself (or Black and Eversole) in those crimes, or provide law enforcement with information about where those crimes occurred.

This, combined with the details discussed in the majority opinion, such as the unusual distance traveled and the decision to park far away from the Walmart (and thus far away from security cameras or potential witnesses) is sufficient for the jury to infer that Cannon knew Eversole and Black intended to steal goods from the Walmart and that he agreed to assist them by acting as their driver. Thus, the State presented relevant evidence that a "reasonable mind might accept as adequate" to support all the elements of aiding and abetting. *Smith*, 300 N.C. at 78–79, 265 S.E.2d at 169. Accordingly, the trial court properly denied Cannon's motion to dismiss.

CALABRIA, Judge, dissenting.

For the following reasons, I respectfully dissent.

Defendant was charged with aiding and abetting larceny, and moved to dismiss the charge on the ground that the State had failed to present sufficient evidence of each essential element of the charge. The majority opinion holds, however, that Defendant's statement to law enforcement, that Eversole and Black paid him to transport them from Gastonia to Denver, was sufficient evidence of Defendant's guilt. Specifically, the majority observes that "the impracticality of traveling this distance and through areas with other Wal-Mart stores creates a reasonable inference of an improper purpose that, along with other incriminating aspects of the evidence, demonstrates the intent of Defendant to aid and abet larceny."

Distance traveled, alone, is insufficient evidence to support the guilt of a defendant. The existence of taxis, and services such as Uber and Lyft, demonstrates that there are people willing to pay others to drive them long distances, and others who are willing to drive them distances for money. The majority's opinion would render such individuals guilty of aiding and abetting simply on the premise that it is "impractical[]" to drive such a distance, and that accepting money to do so is somehow evidence of an improper purpose.

The State's evidence established that Eversole and Black paid Defendant to drive them from Gastonia to the Wal-Mart, entered the Wal-Mart, and stole merchandise. The State had the burden of showing that Defendant was present at the scene of the crime, that Defendant intended to aid Eversole and Black, and that Defendant communicated his intent to do so. *See State v. Capps*, 77 N.C. App. 400, 402, 335 S.E.2d 189, 190 (1985).

Even assuming *arguendo* that Defendant's presence in the parking lot satisfied the element of presence, the fact that Defendant was willing to accept money to transport two individuals from Gastonia to Denver, a distance of roughly twenty-six miles, for a purpose not explicitly criminal does not satisfy the remaining two elements. It does not demonstrate that Defendant intended to aid Eversole and Black in any criminal endeavor, nor that he expressed that intent at any time, nor should it be construed to do so. I disagree with the majority that Defendant should have realized that Eversole and Black had an improper purpose in paying him fifty dollars to drive them to a Wal-Mart. Absent any evidence that Defendant was aware of their criminal aims, the State's case should not have gone to the jury.

In *Capps*, the evidence showed that the defendant drove his girlfriend, Debbie Hubbard, and friend, Sammy Miller, to a nightclub. Miller told the defendant that he wanted to get his clothes out of a car, and once out of the defendant's sight, Miller broke into a vehicle. The defendant was subsequently indicted for aiding and abetting Miller in the offenses of felonious breaking or entering a motor vehicle and felonious larceny, and the trial court denied the defendant's motion to dismiss.

On appeal, this Court first examined the impact of the defendant's presence at the scene of the crime. We observed that

> While the State's evidence does indicate the defendant was present at the scene of the crime, the State has failed to present substantial evidence that the defendant intended to aid Miller or communicated such intent to Miller. A defendant's mere presence at the scene of the crime does not make him guilty of felonious larceny even if he sympathizes with the criminal act and does nothing to prevent it.

Capps, 77 N.C. App. at 402-03, 335 S.E.2d at 190. This Court concluded that "defendant's presence at the scene of the crime, without more, does not show intent to aid." *Id.* at 403, 335 S.E.2d at 191.

We then further examined the defendant's conduct, in an attempt to find evidence of the defendant's intent to aid Miller. We held that

> The evidence in this case shows only that Miller told defendant he was going to get *his* clothes. There is no evidence that (1) defendant drove Miller to [the nightclub] with the purpose of aiding and abetting him in the commission of the larceny; (2) defendant observed Miller commit the crime; (3) defendant handled the stolen items; or

> (4) defendant participated in any discussions about the crime. There is no evidence from which the jury could infer that the defendant gave active encouragement to Miller, or that he made it known to Miller that he was ready to render assistance, if necessary.

Id. We concluded that, "[a]lthough there are circumstances which point suspicion toward defendant, insufficient evidence exists from which intent to aid can be inferred. The State's evidence fails to show that defendant intended to aid Miller in the crime or that defendant communicated intent to aid to Miller." *Id.*

I respectfully submit that the facts in this case mirror those in *Capps*. The State's evidence demonstrated merely that Defendant was present at the scene of the crime. It demonstrated that Defendant's intent was to drive Eversole and Black to the Wal-Mart for money. There is no evidence that (1) Defendant drove Eversole and Black to the Wal-Mart with the purpose of aiding and abetting them in the commission of the larceny; (2) Defendant observed Eversole and Black committing the crime; (3) Defendant handled the stolen goods; or (4) Defendant participated in any discussions about the crime. As in *Capps*, there is no evidence from which the jury could infer that Defendant gave active encouragement to Eversole and Black, or that he made it known to Eversole and Black that he was ready to render assistance, if necessary.

For these reasons, I would argue that the State failed to present substantial evidence of each element of aiding and abetting larceny. Therefore, I would argue that the trial court erred in denying defendant's motion to dismiss.

STATE v. FITTS

[254 N.C. App. 803 (2017)]

STATE OF NORTH CAROLINA
v.
RASHAND NICHOLAS FITTS, DEFENDANT

No. COA16-1106

Filed 1 August 2017

Homicide—felony murder—failure to instruct on self-defense—no intent to kill

The trial court did not err in a felony murder case, with the underlying felony being discharging a firearm into an occupied vehicle, by declining to instruct on self-defense where defendant's own testimony indicated that he did not shoot with the intent to kill. A defendant's testimony that he did not shoot to kill prevents the jury from hearing a self-defense instruction.

Appeal by defendant from judgment entered 7 October 2015 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 19 April 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General I. Faison Hicks, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Wyatt Orsbon, for defendant-appellant.

MURPHY, Judge.

Rashand Nicholas Fitts ("Defendant") was convicted of felony murder, the underlying felony being discharging a firearm into an occupied vehicle. On appeal, he contends the trial court improperly refused to instruct the jury on self-defense despite there being evidence from which a jury could reasonably conclude that he acted in perfect self-defense. After careful review, we conclude the trial court did not err in declining to instruct on self-defense.

Background

On 24 May 2014, Defendant rode with his cousin, Archie Huff ("Huff"), in Huff's Tahoe SUV ("Tahoe") to a nearby service station. Huff went into the convenience store, leaving his handgun in a holster on the console, while Defendant waited in the Tahoe. When Huff attempted to make a purchase, he realized he had left his wallet at home. Defendant and Huff then left to retrieve the wallet.

While Defendant and Huff were gone, Travis Rhodes ("Rhodes"), Donte Alston ("Alston"), Devonte Tillery ("Tillery"), and Telvin arrived at the service station to sell liquid Phencyclidine ("PCP") in the service station's parking lot. Alston and Telvin rode in Alston's Chrysler sedan, while Rhodes and Tillery arrived in a black Mustang. The four were sitting together in Alston's sedan, socializing and smoking PCP, when Defendant and Huff returned to the service station.

Huff again entered the store, while Defendant remained outside. Rhodes and Tillery got out of Alston's sedan and approached Defendant. Defendant rolled down the window and Rhodes offered to sell him "high grade marijuana." Defendant responded that he already had some marijuana, but asked to see Rhodes' selection and said he would take Rhodes' cell phone number in case he needed to buy from Rhodes in the future.

Rhodes and Tillery returned to the Mustang with Rhodes in the driver's seat and Tillery in the passenger seat. Defendant exited the Tahoe with Huff's gun in his back pocket, and walked over to the Mustang. Defendant took Huff's gun with him because Huff asked Defendant not to leave it on the console if he left the car. Defendant looked at Rhodes' marijuana and told Rhodes that when Huff came out of the store he would use Huff's phone to get Rhodes' phone number. In response, Rhodes complained: "Man . . . you doing all this like you want to buy some weed, and you don't want to buy no weed," then drove off.

Defendant found Rhodes' behavior strange and returned to the Tahoe. Huff returned from the store and noticed Defendant appeared "concerned," but did not inquire further. Huff pulled out of the service station, driving north on Capital Boulevard toward the Starmount shopping center intersection. The north-bound side of the intersection has three lanes running straight through it and one left-turn lane. As Defendant and Huff approached the light, the Mustang stopped in the second straight lane from the left. Huff pulled into the leftmost lane at Defendant's direction and the Tahoe stopped parallel to the Mustang.

The events at the stoplight are disputed by Defendant and the State. For purposes of our inquiry, Defendant maintains as follows. As the Tahoe pulled alongside the Mustang, Defendant heard Rhodes shout: "what's up with y'all niggers? What you think, this is a game?" Rhodes then demanded Tillery "pass [him] the motherfucking gun." Tillery reached towards the back seat with both hands, while Rhodes left one hand on the steering wheel and reached into the back seat with his other hand.

Observing Rhodes and Tillery, Defendant "was scared" and "thought they [were] going to shoot in the [Tahoe.]" In response, Defendant grabbed Huff's gun from the console and opened the Tahoe's passenger door. He stepped out of the Tahoe, started to move away from the Mustang, then reached across his body to fire once at Rhodes, as he looked in the opposite direction. Defendant explained that he fired the gun "so [Rhodes would not] shoot me or Archie." Defendant returned to the Tahoe, and Huff drove away, through the intersection.

The bullet hit Rhodes in the torso, causing him to crash the Mustang into another car before jumping the median and striking a sign on the far side of the southbound lane. Tillery exited the Mustang. An off-duty police officer saw the crash, radioed dispatch, and approached the car to investigate. He found Rhodes unconscious. When on-duty law enforcement officers arrived and searched the Mustang, they found three cell phones and three grams of marijuana. No weapons, shell casings, or bullet holes were found in the Mustang. Law enforcement did, however, find a single spent shell casing on the street.

Defendant was charged with first-degree murder based on premeditation and deliberation and first-degree felony murder based on discharging a firearm into an occupied vehicle. Months before trial, Defendant filed a Motion of Intent to Rely Upon Self-Defense and Defense of Others. On the last day of trial, he filed a written request for jury instructions, requesting an instruction on self-defense based on Defendant and Huff's testimony of the events that took place at the intersection. The trial court denied this request and did not instruct on self-defense.

On the second day of its deliberation, the jury asked the trial court: "Is 'just cause' a component for our consideration in the first-degree felony murder rule." Defendant requested that the trial court respond by instructing the jury that "just cause" applies to felony murder, but the trial court refused. Instead, the trial court instructed the jury that "just cause is not a term used in the court's instruction" and that they were bound to follow the instructions provided by the trial court.

Defendant was convicted of first-degree felony murder and sentenced to life in prison without the possibility of parole. He gave notice of appeal in open court.

Analysis

On appeal, Defendant argues he was entitled to a jury instruction on self-defense and that the trial court's failure to so instruct was

prejudicial error. He contends that a reasonable jury could find the shooting constituted perfect self-defense based on the testimony given at trial. We disagree.[1]

We review a trial court's jury instructions de novo. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009) (citations omitted). "It is the duty of the [trial] court to charge the jury on all substantial features of the case arising on the evidence without special request . . . . [All] defenses presented by defendant's evidence are substantial features of the case." *State v. Dooley*, 285 N.C. 158, 163, 203 S.E.2d 815, 818 (1974) (citations omitted).

Perfect self-defense is a complete defense to felony murder if it would be a complete defense to the underlying felony. *State v. Richardson*, 341 N.C. 658, 668, 462 S.E.2d 492, 499 (1995). It exists when, at the time of the homicide: (1) the defendant believes he is in imminent danger of death or serious bodily injury; (2) that belief is reasonable; (3) the defendant is not the aggressor in the dispute or altercation creating the threat; and (4) the defendant's use of force is not more than is reasonably necessary to protect himself or another person from death or serious bodily harm. *State v. Revels*, 195 N.C. App. 546, 550, 673 S.E.2d 677, 681 (2009). Merely reaching or appearing to reach for a deadly weapon is sufficient to satisfy elements (1) and (2). *State v. Spaulding*, 298 N.C. 149, 157, 257 S.E.2d 391, 396 (1979). If appropriate, perfect self-defense would provide a complete defense to the underlying offense here, discharging a firearm into an occupied vehicle. *State v. Juarez*, ___ N.C. ___, ___, 794 S.E.2d 293, 298 (2016).

However, testimony by a defendant that he attempted to use or threaten non-lethal force is evidence that he did not believe that deadly force was necessary to escape danger. *State v. Lyons*, 340 N.C. 646, 662, 459 S.E.2d 770, 778 (1995) (finding that no self-defense instruction was required for a defendant who claimed that he intended to fire a warning shot at people entering his home who he thought were burglars but were in fact police officers). Instead, " '[p]erfect self-defense' is available only if 'it appeared to defendant that he believed it to be necessary to kill the attacker in order to save himself from death or great bodily harm[.]' " *State v. Cook*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___,

1. Defendant further argues the trial court "compounded" the purported error by its response to the jury's question on the second day of its deliberations. However, as we do not find error with the trial court declining to instruct on self-defense, we do not address whether such an error was "compounded" by the trial court's response to the jury's question.

2017 WL 2644848, at *2, 2017 N.C. App. LEXIS 454, at *5 (2017) (holding that a defendant was not entitled to a self-defense instruction when he testified that he did not have the intent to kill when he fired through a closed door at an unidentified person breaking into his bedroom) (quoting *State v. Williams*, 342 N.C. 869, 872, 467 S.E.2d 392, 394 (1996)) (emphasis omitted).

Under our case law, as recently and exhaustively considered in *Cook*, the use of a firearm that a defendant describes as something other than an aimed, deliberate attempt to kill the victim cannot support a finding of perfect self-defense, and a defendant's testimony that he did not shoot to kill will prevent the jury from hearing a self-defense instruction "even if there is, in fact, other evidence from which a jury could have determined that the defendant did intend to kill the attacker." *Cook*, 2017 WL 2644848, at *2, 2017 N.C. App. LEXIS 454, at *5 (emphasis omitted). This results in Defendants who are on trial for firing poorly aimed warning shots being unable to receive jury instructions on self-defense. *See Williams*, 342 N.C. at 873-74, 467 S.E.2d at 394-95 (finding no error where the defendant testified that he fired into the air to scare off his alleged attackers and did not receive a self-defense instruction); *State v. Reid*, 335 N.C. 647, 671-72, 440 S.E.2d 776, 789-90 (1994) (upholding conviction and failure to provide self-defense instruction when the defendant claimed that he shot at the ground near the victim without ever intending to hit him); *State v. Hinnant*, 238 N.C. App. 493, 495-97, 768 S.E.2d 317, 319-20 (2014) (finding a defendant's testimony that the victim reached for a gun and the defendant intended to fire a warning shot did not require a self-defense instruction).

A trial court must provide a perfect self-defense instruction to the jury if the evidence presented tends to show all four elements of perfect self-defense existed at the time of the killing. *State v. Gappins*, 320 N.C. 64, 70-71, 357 S.E.2d 654, 659 (1987). To determine whether there was evidence of self-defense, we construe evidence in the light most favorable to the defendant. *State v. Webster*, 324 N.C. 385, 391, 378 S.E.2d 748, 752 (1989) (citation omitted).

Viewing the facts before us in the light most favorable to Defendant, the first three elements of self-defense were present when he shot Rhodes: (1) Defendant testified he believed Rhodes and Tillery were about to shoot him or Huff; (2) a reasonable person could conclude from the evidence that Rhodes and Tillery were reaching for guns to shoot Defendant or Huff; and (3) until the moment Defendant fired at Rhodes, Defendant had not attacked or threatened Rhodes in any way.

Defendant's own testimony, however, indicates that he did not shoot to kill. In his direct examination, he did not specify what he was aiming at or what his intent was when he fired. He simply testified that he "[pulled] the gun out [of] the holster and fire[d] one time," in order to ensure that "[Rhodes] wouldn't shoot me or Archie." Defendant described the event in more detail during his cross examination:

> [THE STATE]: How about this, what direction were you facing when you fired the gun?
>
> [DEFENDANT]: I was facing the rear of the truck. I was trying to flee.
>
> [THE STATE]: Okay. And so would that put the Mustang to your side?
>
> [DEFENDANT]: Well, the Mustang would be to my left now –
>
> [THE STATE] Okay.
>
> [DEFENDANT]: [W]hen I fired the shot.
>
> [THE STATE]: Did you fire over your shoulder?
>
> [DEFENDANT]: No, ma'am, like this.
>
> [THE STATE]: Are you right handed or left handed?
>
> [DEFENDANT]: Right handed.
>
> [THE STATE]: So where was the gun?
>
> THE COURT: You can stand up and demonstrate.
>
> [DEFENDANT]: If I'm sitting in the truck like this, and I open the door trying to run this way, that would leave the Mustang right here. I pulled the gun out of the holster, I fired one time.
>
> [THE STATE]: Okay. So, basically, you're not you're facing away?
>
> [DEFENDANT]: Yes, ma'am.

Defendant makes clear he was not looking at the car when he fired, and he had to reach across his body to fire the gun behind him while running in the opposite direction. Like the defendant in *Cook*, who testified that he fired through a closed door at someone that he could not see, Defendant's testimony as to the circumstances in which he shot Rhodes

demonstrates that he did not intend for his use of force to kill the victim. Such an intent is required for a trial court to instruct a jury on perfect self-defense. Significantly, had Defendant testified that he shot Rhodes with the intent to kill, he would have been entitled to a self-defense instruction. This may not be "what most citizens would believe our law to be and what I believe self-defense law *should be* in our state[,]"*Cook*, 2017 WL 2644848, at *3, 2017 N.C. App. LEXIS 454, at *9 (Murphy, J., concurring) (emphasis in original); nevertheless, we are bound by precedent to rule that Defendant was not entitled to an instruction on self-defense.

Conclusion

Defendant's own testimony makes clear that he did not have the intent to kill and was not entitled to an instruction on self-defense. We find no error and affirm Defendant's conviction.

AFFIRMED.

Judges CALABRIA and DIETZ concur.

STATE OF NORTH CAROLINA
v.
CLARENCE JOSEPH TRENT

No. COA16-839

Filed 1 August 2017

1. Probation and Parole—probation revocation—willfully absconded from supervision—oral findings of fact—standard of proof

The trial court did not abuse its discretion in a probation revocation case by making oral findings of fact without explicitly stating the legal standard of proof where the totality of the court's statements indicated that defendant willfully violated N.C.G.S. § 15A-1343(b)(3a) by avoiding supervision or by making his whereabouts unknown, but that he did not violate N.C.G.S. § 15A-1343(b)(3) regarding failure to notify of a change of address.

2. Probation and Parole—probation revocation—willfully absconded from supervision—findings of fact—failure to be at residence at pertinent time

The trial court did not abuse its discretion by revoking defendant's probation based on its finding that he willfully absconded

from supervision where the trial court found that defendant failed to be at his residence during two unannounced visits by his supervising officer. Although defendant contended that his wife misinformed the officer in his absence, defendant failed to notify the officer that he had to travel for eight days for a painting job as required by N.C.G.S. § 15A-1343(b)(3a), and further failed to notify the officer once he returned.

3. Criminal Law—remand—clerical errors

Although the Court of Appeals affirmed the trial court's judgments revoking defendant's probation and activating his suspended sentences, it remanded for the limited purpose of correcting two clerical errors within the findings section of the court's judgments.

Appeal by defendant from judgments entered 6 June 2016 by Judge Michael R. Morgan in Randolph County Superior Court. Heard in the Court of Appeals 22 February 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Carole Biggers, for the State.

Yoder Law PLLC, by Jason Christopher Yoder, for defendant-appellant.

CALABRIA, Judge.

Clarence Joseph Trent ("defendant") appeals from judgments revoking his probation and activating his suspended sentences. After careful review, we affirm the trial court's judgments but remand for correction of clerical errors.

I. Background

On 10 March 2016 in Guilford County Superior Court, defendant pleaded guilty to two counts of obtaining property by false pretenses (15 CRS 80278-79) and two counts of conspiring to obtain property by false pretenses (15 CRS 81150-51). The trial court consolidated 15 CRS 80278 and 15 CRS 81150 into one judgment, and 15 CRS 80279 and 15 CRS 81151 into another. The court sentenced defendant to serve two consecutive terms of 8 to 19 months in the custody of the North Carolina Division of Adult Correction. The trial court suspended both sentences, placed defendant on 36 months of supervised probation, and ordered him to serve a 30-day active term as a condition of special probation in 15 CRS 80278. Defendant's probation supervision was transferred to Randolph County.

On 18 March 2016, defendant met with his new supervising officer ("Officer Russell") to review the conditions of his probation. Defendant told Officer Russell that he and his wife ("Kim") were in the process of being evicted from their residence at 3550 Holly Ridge Drive in Trinity. Officer Russell instructed defendant to provide an update whenever his address changed. When defendant next met with Officer Russell on 12 April 2016, he provided his new address as 150 U.S. Highway 311, Lot 9 in Randleman. At the conclusion of the meeting, Officer Russell scheduled defendant's next appointment for 9 May 2016.

On 24 April 2016, Officer Russell made an unannounced visit to defendant's home in Randleman. Defendant was not home, and Kim was "very upset." Kim told Officer Russell that she had not seen defendant since the previous day, when he took her car and bank card without permission and left the residence. Kim also told Officer Russell that it was defendant's "normal pattern . . . to go out and be gone for days on drugs." Officer Russell informed Kim that if defendant did not come home within a few days, she would consider him to be absconding. When Officer Russell revisited the residence on 5 May 2016, Kim said that defendant still had not returned, and she did not know where he was.

On 9 May 2016, Officer Russell filed reports in both cases alleging that defendant had committed the following willful violations of his probation[1]:

> 1. Regular Condition of Probation: "Not to abscond, by willfully avoiding supervision or by willfully making the supervisee's whereabouts unknown to the supervising probation officer" in that,
>
> THE DEFENDANT LEFT HIS RESIDENCE AT 150 US HWY 311, LOT 9, RANDLEMAN ON OR ABOUT 04/23/2016, AFTER TAKING HIS WIFE'S CAR AND BANK CARD AND HAS FAILED TO RETURN TO THE RESIDENCE SINCE THAT TIME. HIS WHEREABOUTS ARE UNKNOWN.
>
> 2. Condition of Probation " . . . obtain prior approval from the officer for, and notify the officer of, any change in address . . . " in that
>
> THE DEFENDANT HAS FAILED TO NOTIFY HIS PROBATION OFFICER OF ANY CHANGE IN ADDRESS AND DID NOT HAVE PERMISSION TO MOVE.

1. At that time, case numbers 15 CRS 80278 and 15 CRS 81150 were renamed 16 CRS 96, and case numbers 15 CRS 80279 and 15 CRS 81151 were renamed 16 CRS 97.

Defendant did not appear for his scheduled appointment with Officer Russell that afternoon. On 10 May 2016, Officer Russell learned that defendant had been arrested in Guilford County the previous day. Defendant was subsequently transferred to the Randolph County jail, where he remained in custody until his probation violation hearing on 6 June 2016.

At the hearing, Officer Russell testified for the State and recommended that the trial court revoke defendant's probation. After the State presented evidence, defendant testified that during Officer Russell's unscheduled visits to his residence, he was working in Raleigh on an eight-day painting job. According to defendant's testimony, Kim agreed to inform Officer Russell that he was away. However, when defendant returned home on 6 or 7 May 2016, he discovered that Kim had been "lying" to Officer Russell and "was trying to get [him] locked up" because she was having an affair. During cross-examination by the State, defendant admitted that despite knowing that Officer Russell had visited his residence while he was away, he did not contact her at any time after he returned from Raleigh.

At the hearing's conclusion, the trial court found that the State had proven that defendant absconded from supervision, but not that he failed to notify Officer Russell of a change to his address. Based on its finding that defendant willfully absconded from supervision, the court revoked defendant's probation and activated both of his suspended sentences. Defendant appeals.

II. Analysis

On appeal, defendant contends the trial court erred in revoking his probation based on its finding that he willfully absconded from supervision. We disagree.

A. Standard of Review

> 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.

State v. Young, 190 N.C. App. 458, 459, 660 S.E.2d 574, 576 (2008) (citation and quotation marks omitted). "[O]nce the State has presented competent evidence establishing a defendant's failure to comply with

the terms of probation, the burden is on the defendant to demonstrate through competent evidence an inability to comply with the terms." *State v. Talbert*, 221 N.C. App. 650, 652, 727 S.E.2d 908, 910-11 (2012) (citation and quotation marks omitted).

We review the trial court's decision to revoke a defendant's probation for abuse of discretion. *State v. Murchison*, 367 N.C. 461, 464, 758 S.E.2d 356, 358 (2014). "Abuse of discretion occurs when a ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Id.* (citation, quotation marks, and brackets omitted).

B. Probation Revocation

N.C. Gen. Stat. § 15A-1343(b) (2015) provides the regular conditions of probation which "apply to each defendant placed on supervised probation unless the presiding judge specifically exempts the defendant from one or more of the conditions in open court and in the judgment of the court." *E.g.*, N.C. Gen. Stat. §§ 15A-1343(b)(2), (4), (7) (requiring a probationer to: "[r]emain within the jurisdiction of the court unless granted written permission to leave"; "[s]atisfy child support and other family obligations"; and "[r]emain gainfully and suitably employed or faithfully pursue a course of study or of vocational training").

Violations of these statutory conditions can have various consequences. *See* N.C. Gen. Stat. § 15A-1344(a) (stating that "probation may be reduced, terminated, continued, extended, modified, or revoked"). However, the trial court is only authorized to revoke probation under circumstances where the defendant: (1) commits a new criminal offense, in violation of N.C. Gen. Stat. § 15A-1343(b)(1); (2) absconds "by willfully avoiding supervision or by willfully making the defendant's whereabouts unknown to the supervising probation officer," in violation of N.C. Gen. Stat. § 15A-1343(b)(3a); or (3) violates any condition of probation after previously serving two periods of confinement in response to violations, pursuant to N.C. Gen. Stat. § 15A-1344(d2). N.C. Gen. Stat. § 15A-1344(a). For all other violations, the trial court may either modify the conditions of the defendant's probation or impose a 90-day period of imprisonment pursuant to N.C. Gen. Stat. § 15A-1344(d2). *Id.*

In the instant case, the State alleged violations of N.C. Gen. Stat. §§ 15A-1343(b)(3) and 15A-1343(b)(3a). *See* N.C. Gen. Stat. § 15A-1343(b)(3) (providing that a defendant must, *inter alia*, "obtain prior approval from the [supervising] officer for, and notify the officer of, any change in address or employment"). At the hearing, before delivering its ultimate

findings, the trial court offered a recitation of the evidence presented by both parties:

> THE COURT: Upon reviewing my notes concerning the evidence that has been received, I'm ready at this time to address the two allegations that have been lodged against the probationer. The first allegation as to probation violation is that the defendant absconded his probation by willfully avoiding supervision or by willfully making his whereabouts unknown to the supervising probation officer in that defendant left his residence at 150 U.S. Highway 311, Lot 9, Randleman, on or about 4-23-2016, that's April 23, 2016, after taking his wife's car and bank card and has failed to return to the residence since that time. His whereabouts are unknown.
>
> The evidence of the State on that allegation is that, in terms of what is salient at least for this determination, that on March 18, 2016 the probationer reported for his first visit with the probation officer. On April 16, 2016, he reported again to the probation officer saying that he was going to be moving to another address, and another appointment was set for May 9th, 2016, which the probationer did not keep.
>
> Along the way on April 24, 2016 an unannounced visit was made by the probation officer to the residence at which the probationer was expected to be. Probation officer talked to the wife. The probationer was not there. The wife was upset because the probationer had, according to the wife, taken her car and left. On May 5, 2016, a Thursday, probation officer again went to the residence at which probationer was supposed to be. Probationer was not there. Probation officer talked to the wife and was told that the probationer had not returned to the home. The probation officer found that on May 10, 2016 that the probationer was incarcerated.
>
> On those pertinent issues the probationer has testified that he needed money and his brother-in-law offered him some work. The wife told the probationer to go ahead and go to work and that she would tell the probation officer that the probationer was at work. It's the probationer's understanding that his wife was having an affair. He went

> to his mother's home for a couple days but did not contact his probation officer to say where he was and that, if it wasn't for the domestic squabble between him and his wife concerning a vehicle, that this whole probation violation matter would not even be occurring.
>
> I do find that the State by the appropriate standard of evidence has proven the existence of the first allegation of probation violation in that he failed to be at the residence at the time that he was to be there. As a result, that has been proven.
>
> On the second allegation of probation violation the allegation is that the defendant had failed to notify his probation officer of any change in address and did not have permission to move. The pertinent dates upon which the probation officer has made that determination for the probation violation report are the unannounced visits of April 24, 2016 and May 5, 2016, a period of a couple of weeks. The court does not find that a two-week absence is sufficient at least in this case to equate to a change in address or a move especially in light of the probationer's testimony that he still had items of value at the residence including his clothing and pet or some animal dear to him.
>
> So I do not find that allegation No. 2 has been proven by the appropriate standard of evidence, but I do find that, as to the absconding in allegation 1, that has been proven.

1. Standard of Proof

[1] Defendant first argues that the trial court abused its discretion by making its oral findings of fact without explicitly stating the legal standard of proof, as demonstrated by the following statement:

> THE COURT: I do find that the State by the appropriate standard of evidence has proven the existence of the first allegation of probation violation in that he failed to be at the residence at the time that he was to be there. As a result, that has been proven.

This Court has held that a trial court's failure to state the standard of proof underlying its findings may constitute reversible error where certain protected interests are involved. *See, e.g.*, *State v. Phillips*, 230 N.C. App. 382, 386, 750 S.E.2d 43, 46 (2013) (holding that "the trial court's failure to indicate that he applied 'beyond a reasonable doubt' as the

standard of proof in finding facts" rendered the criminal contempt order fatally deficient, because N.C. Gen. Stat. § 5A-15(f) specifically instructs that "[t]he facts must be established beyond a reasonable doubt"), *disc. review improvidently allowed*, 367 N.C. 715, 766 S.E.2d 340 (2014). However, we have never held so in the context of a probation hearing, and we decline to do so now.

A probation revocation proceeding "is not a criminal prosecution and is often regarded as informal or summary." *Murchison*, 367 N.C. at 464, 758 S.E.2d at 358 (citation and quotation marks omitted). "The Supreme Court of the United States has observed that revocation of probation 'deprives an individual . . . only of the conditional liberty' dependent on the conditions of probation." *Id.* at 463, 758 S.E.2d at 358 (quoting *Gagnon v. Scarpelli*, 411 U.S. 778, 781, 36 L. Ed. 2d 656, 661 (1973), *superseded by statute*, Parole Commission and Reorganization Act, Pub. L. No. 94-233, 90 Stat. 228 (1976)). Furthermore, "the alleged violation of a valid condition of probation need not be proven beyond a reasonable doubt." *Id.* at 464, 758 S.E.2d at 358 (citation and quotation marks omitted). Rather, all that is required is "that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation . . . ." *Young*, 190 N.C. App. at 459, 660 S.E.2d at 576.

Although the trial court failed to employ the best practice and explicitly state the legal standard of proof, the totality of the court's statements indicate that the court was "reasonably satisfied," in light of all of the evidence presented, that defendant had willfully violated N.C. Gen. Stat. § 15A-1343(b)(3a), but not § 15A-1343(b)(3). *Id.* Accordingly, we conclude that the trial court's oral finding did not constitute an abuse of discretion.

2. Absconding

[2] Defendant next argues that the trial court's finding that "he failed to be at the residence at the time that he was to be there" does not support that he willfully absconded from supervision. Specifically, defendant contends, "there was no evidence presented that [he] was required to be at home during [Officer Russell's] two unscheduled visits." However, the State was not required to present such evidence. As a regular condition of probation, defendant consented to unannounced visits from his supervising officer. *See* N.C. Gen. Stat. § 15A-1343(b)(3) (requiring a defendant to "[r]eport as directed by the court or his probation officer to the officer at reasonable times and places and in a reasonable manner, *permit the officer to visit him at reasonable times*, answer all

reasonable inquiries by the officer and obtain prior approval from the officer for, and notify the officer of, any change in address or employment" (emphasis added)).

Defendant is correct that his probation could not be revoked based on a violation of this condition alone. *See* N.C. Gen. Stat. § 15A-1344(a). Nevertheless, in relying on our decisions in *State v. Johnson*, __ N.C. App. __, 783 S.E.2d 21 (2016) and *State v. Williams*, __ N.C. App. __, 776 S.E.2d 741 (2015), defendant overlooks key facts that distinguish those cases from the instant case.

In *State v. Johnson*, the defendant told his probation officer that he would be unable to attend their appointment the following morning because he did not have a car or a ride. __ N.C. App. at __, 783 S.E.2d at 23. He asked whether they might reschedule for later that day, but the officer declined his request. *Id.* After the defendant failed to attend his appointment, the officer filed violation reports for absconding, and the trial court subsequently revoked his probation. *Id.* On appeal, we determined that the defendant's "actions, while clearly a violation of N.C. Gen. Stat. § 15A-1343(b)(3), . . . do not rise to 'absconding supervision' in violation of N.C. Gen. Stat. § 15A-1343(b)(3a)." *Id.* at __, 783 S.E.2d at 25. We explained that

> a defendant informing his probation officer he would not attend an office visit the following day and then subsequently failing to report for the visit, does not, without more, violate N.C. Gen. Stat. § 15A-1343(b)(3a) when these *exact actions* violate the explicit language of a wholly separate regular condition of probation which does not allow for revocation and activation of a suspended sentence.
>
> To hold otherwise would render portions of N.C. Gen. Stat. § 15A-1344(a) superfluous. Allowing actions which explicitly violate a regular or special condition of probation other than those found in N.C. Gen. Stat. § 15A-1343(b)(1) or N.C. Gen. Stat. § 15A-1343(b)(3a) to also serve, without the State showing more, as a violation of N.C. Gen. Stat. § 15A-1343(b)(1) or N.C. Gen. Stat. § 15A-1343(b)(3a) would result in revocation of probation without following the mechanism the General Assembly expressly provided in N.C. Gen. Stat. § 15A-1344(d2).

Id. at __, 783 S.E.2d at 26 (internal citations omitted). Furthermore, because the defendant had also been ordered to submit to house arrest with electronic monitoring as a special condition of probation, *id.* at __,

783 S.E.2d at 22, his supervising officer "was able to monitor and keep continuous track of [his] locations and movements through the use of the electronic monitoring device [he] wore." *Id.* at __, 783 S.E.2d at 27. Therefore, the defendant's whereabouts were never unknown to his probation officer. *Id.*

Similarly, in *State v. Williams*, the probation officer alleged that the defendant had violated seven conditions of his probation, including N.C. Gen. Stat. § 15A-1343(b)(3a). __ N.C. App. at __, 776 S.E.2d at 742. At the violation hearing, the State presented evidence that the defendant had missed multiple scheduled appointments with his supervising officer; was traveling "back and forth from North Carolina to New Jersey" without permission; and had "never really lived" at his reported address. *Id.* The trial court found each violation alleged and revoked the defendant's probation. *Id.* On appeal, we explained that "[a]lthough the report alleged that [the d]efendant's actions constituted 'absconding supervision,' this wording cannot convert violations of N.C. Gen. Stat. §§ 15A-1343(b)(2) and (3) into a violation of N.C. Gen. Stat. § 15A-1343(b)(3a)."*Id.* at __, 776 S.E.2d at 745. Furthermore, the probation officer had testified that she had several telephone conversations with the defendant regarding his missed appointments and was even able to contact him during his travels to New Jersey. *Id.* at __, 776 S.E.2d at 742. Because there was insufficient evidence to support the trial court's finding of willful absconding, we reversed the judgment revoking the defendant's probation. *Id.* at __, 776 S.E.2d at 746.

The instant case is distinguishable from *Johnson* and *Williams* for the simple, but significant, fact that Officer Russell was never aware of defendant's whereabouts after he left Randleman on 23 April 2016. When defendant accepted an eight-day painting job in Raleigh, he failed to notify Officer Russell of his employment opportunity prior to traveling. As a result, Officer Russell was unaware that defendant would not be in Randleman when she made her first unscheduled visit to his residence on 24 April 2016. Upon her arrival, Officer Russell met defendant's wife, Kim, who was "very upset." Kim told Officer Russell that she had not seen defendant since the previous day, when he took her car and bank card without permission and left the residence. These allegations prompted Officer Russell's second unscheduled visit less than two weeks later. When Officer Russell revisited the residence on 5 May 2016, Kim said that defendant still had not returned, and she did not know where he was. Consequently, on 9 May 2016, Officer Russell filed violation reports.

Unlike the officer in *Johnson*, however, Officer Russell did not have the benefit of tracking defendant's movements via electronic monitoring device. *Contra* __ N.C. App. at __, 783 S.E.2d at 27. Moreover, unlike in

Williams, Officer Russell had absolutely no means of contacting defendant during his unauthorized trip to Raleigh. *Contra* __ N.C. App. at __, 776 S.E.2d at 742.

Defendant asserts that Officer Russell made a "premature" determination that he absconded, because she "did not testify that she attempted to contact [defendant] by telephone, by mail or by any other means . . . [or] that she contacted any relatives or associates other than his wife listed in [his] file." As previously explained, however, once the State presented competent evidence establishing defendant's failure to comply with the terms of his probation, the burden was on *defendant* to demonstrate through competent evidence his inability to comply with those terms. *Talbert*, 221 N.C. App. at 652, 727 S.E.2d at 910-11. Defendant was given ample opportunity to do so at the hearing, but instead, he attempted to deflect the blame for his actions:

> A. So basically it boils down to the fact that [Kim]'s a liar, she's a manipulator, she doesn't get her way, and she's come down here on three different occasions before and she's filed 50B, she's filed assault on a females, had me locked up. As soon as the magistrate assigns me a bond, in 24, 48 hours she's down here crying, "I'm sorry," she gets people over at Shell Bonding to come and get me out.
>
> And so, basically, I'm thinking that she's taking care of the change of address with my probation officer. And I come to find out when I get back that she's been having an affair and that I'm not allowed to be at that trailer park anymore. And now I find out that she's been in contact – my probation officer's been in contact with the disgruntled wife, and the whole time the disgruntled wife's been telling her I did this and I did that. And my Maltese, Trixie, is like my child. My dog is still at that trailer. Every stick of clothes that I own is still at that trailer. Everything I own is still at that trailer. I haven't changed address. I haven't absconded. She's listening to this vindictive and deceitful individual who is telling me one thing and she's going back telling her another.
>
> And what it boils down to is she was trying to get me locked up so that she didn't have to deal with the confrontation when I found out . . . That's what it boils

> down to. I haven't absconded. I've still – I still lived at that address I thought until I come back and found out somebody else had took my place.

Despite defendant's accusation that Kim misinformed Officer Russell in his absence, during cross-examination by the State, defendant admitted that he failed to contact Officer Russell even after he returned from Raleigh:

> Q. Okay. And when you found [out on May] the 6th or 7th about [Officer Russell's unscheduled visits], did you contact your probation officer?
>
> A. No, I didn't. I didn't have a phone. I didn't have anything.
>
> . . .
>
> . . .
>
> A. – to answer your question, no, I didn't contact her immediately. I wasn't in any shape to do anything. I went to my mother's and I stayed in the bed for five days. I couldn't eat or anything so…
>
> Q. So you had an opportunity to call her then but you just didn't, correct?
>
> A. Yeah, but, I mean, I thought it was – I thought it was already taken care of. And, I mean, I wasn't –
>
> . . .
>
> Q. I'm sorry. But when your wife kicked you out of the place you just said on the . . . 6th or the 7th of May you were told to leave. Now, if you left that place, wouldn't you have contacted your probation officer then since you went to your mother's?
>
> A. Well, because I was only going to my mother's for a couple days. I wasn't – I wasn't moving. I was giving her a couple days to get over her little ole thing, and then as usual she gets her – you know, her feather – she gets her feathers ruffled and I go to jail for two days. In 48 hours they set me a bond, she comes and bonds me out, and then we continue the zoo as usual, I mean.
>
> Q. So my point is you knew that you were getting kicked out of that residence but you didn't contact the probation

> officer until you were arrested basically but you had several days to do that, correct?
>
> A. Yes, I guess you could look at it in that perspective, but I was looking at it from the – from a homeowner and a renter's – renter's rights perspective. And I still don't consider myself of being left there and moved as you're trying to allude to. I didn't move from there. Everything I own is still in that trailer.

Despite the fact that he did not have a phone, it was defendant's responsibility to keep his probation officer apprised of his whereabouts. During defendant's testimony, he never explained how he tried to borrow anyone else's phone in order to let Officer Russell know that he was working. Indeed, defendant admitted that he made *no* attempt to contact Officer Russell. He never contacted her before he left home, while he was in Raleigh, or after he returned to Randleman on 6 or 7 May 2016. Even after learning about Officer Russell's unscheduled visits during his travels, defendant still did not contact her to correct any allegedly inaccurate information that Kim may have communicated. Instead, defendant claimed that he went to stay at his mother's house "for a couple days" until he was arrested in Greensboro on 9 May 2016.

"Probation or suspension of sentence comes as an act of grace to one convicted of, or pleading guilty to, a crime." *Murchison*, 367 N.C. at 463, 758 S.E.2d at 358 (citation and quotation marks omitted). According to the plea transcript, defendant could have been sentenced to a maximum of 126 months' imprisonment based on his underlying offenses and prior record level. Although defendant received a favorable plea arrangement with suspended sentences, as the trial court stated, "[u]nfortunately, probation is not the priority he chose."

We hold that there was sufficient competent evidence to establish defendant's willful violation of N.C. Gen. Stat. § 15A-1343(b)(3a), a valid condition of his probation. Therefore, the trial court did not abuse its discretion in finding that defendant willfully absconded from supervision, or in revoking his probation on that basis. *Young*, 190 N.C. App. at 459, 660 S.E.2d at 576.

III. Clerical Errors

[3] Although we affirm the revocation of defendant's probation, we nevertheless must remand to the trial court for correction of two clerical errors appearing within the Findings section of the court's judgments. First, the trial court failed to select box 2a, which would have indicated

that the court was "reasonably satisfied in its discretion that the defendant violated" the absconding condition of probation, as the court found at the hearing. Instead, the trial court selected box 2b, erroneously indicating that defendant "waived a violation hearing and admitted that he . . . violated each of the conditions of his . . . probation . . . ." Second, box 3a of the judgments inaccurately suggest that the trial court found that defendant violated both of the conditions alleged in the 9 May 2016 violation reports, rather than N.C. Gen. Stat. § 15A-1343(b)(3a) alone.

However, these are clearly clerical errors. In the Conclusion and Order section of the judgments, the trial court included the following additional findings, which accurately reflect the court's statements in open court:

> DENIES VIOLT – STATE HAS PROVED DEF ABSCONDED – STATE HAS NOT PROVED DEF FAILED TO NOTIFY PO OF ADDRESS CHANGE – PROBT REVOK – ACTV SENT – DEF GIVES NOTICE OF APPEAL – BOND SET AT $75,000 SEC

"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." *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) (citation and quotation marks omitted). Accordingly, we affirm the trial court's judgments revoking defendant's probation and activating his suspended sentences, but remand for the limited purpose of correcting these clerical errors.

AFFIRMED; REMANDED FOR CORRECTION OF CLERICAL ERRORS.

Judges HUNTER, JR. and BERGER concur.

TANGLEWOOD PROPERTY OWNERS' ASSOCIATION, INC., PLAINTIFF
v.
BRANDON WAYNE ISENHOUR; ROBERT MALLANEY AND WIFE MARY MALLANEY; VICKIE CORBETT; LARRY SPAINHOUR AND WIFE LINDA SPAINHOUR; FRANK W. REGISTER AND WIFE LINDA FAYE REGISTER; HOMER BEST; BRENDA GLENN; BERT ANTHONY MCGEE AND WIFE DARLENE MCGEE, DEFENDANTS

No. COA17-101

Filed 1 August 2017

1. Associations—property owner association—easement appurtenant—duty to maintain common areas

The trial court erred in a declaratory judgment action by denying plaintiff property owner association's motion for summary judgment regarding defendant homeowners' responsibility to maintain certain common areas within a subdivision (streets, ditches, public areas, intracoastal waterway water access, and boat ramp) where defendants possessed an easement appurtenant over these areas. Defendants were conferred a benefit even if they did not currently use all of the easement areas. The case was remanded to the trial court to calculate the amount owed by the landowners.

2. Appeal and Error—additional arguments—mootness

Plaintiff property owner association's additional arguments regarding the trial court's grant of judgment in favor of defendant homeowners and denial of its untimely amended motion for amended judgment did not need to be addressed where the Court of Appeals already determined that the trial court erred by denying summary judgment in favor of plaintiff.

Appeal by Plaintiff from order entered 11 February 2015, judgment entered 7 March 2016, and order entered 23 August 2016 by Judge Pauline Hankins in Brunswick County District Court. Heard in the Court of Appeals 7 June 2017.

Hodges, Coxe, Potter & Phillips, LLC, by Bradley A. Coxe, for Plaintiff-Appellant.

No brief filed for Defendant-Appellees.

HUNTER, JR., Robert N. Judge.

Tanglewood Property Owners' Association, Inc. ("Plaintiff") appeals an 11 February 2015 order denying Plaintiff's motion for summary judgment and a 7 March 2016 judgment. Plaintiff also appeals a 23 August 2016 order denying Plaintiff's motion for judgment notwithstanding the verdict and to amend judgment.

On appeal, Plaintiff contends the trial court erred in two respects: (1) finding an easement by necessity, limited to the roads required for ingress and egress, because Frank W. Register and Linda Faye Register ("Defendants") possess easements appurtenant in all "streets, ditches, public areas, ICW[1] water access and boat ramp" pursuant to the Tanglewood West plat; and (2) concluding Defendants' pro rata share for the 2013 maintenance of their easements could not be calculated. Plaintiff further contends the 2013 pro rata share per lot for property owners in Tanglewood West totaled $133 per lot and Defendants, accordingly, are responsible for $266 for their two lots.[2] We reverse and remand.

I. Factual and Procedural History

On 20 May 2014, Plaintiff filed a declaratory judgment action seeking declaration of parties'[3] rights and obligations over "the streets, ditches, public areas, ICW water access and boat ramp" located in Tanglewood "pursuant to the plats recorded with the Brunswick County Register of Deeds" and costs attendant thereto. The complaint alleges the cost of maintaining all easements in Tanglewood for 2013 totaled $83,269[4] and each property owner's pro rata share per lot, based upon 652[5]

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1. ICW stands for intracoastal waterway.

2. On appeal, Plaintiff amends its original calculations; thus, the $133 pro rata share per lot differs from that alleged in the complaint.

3. Plaintiff subsequently reached a settlement agreement with Defendants Isenhour, Mallaney, Glenn, and McGee. The trial court entered default judgments against Defendants Spainhour and Best. On 2 November 2015, Judge Thomas Aldridge granted summary judgment in favor of Defendant Corbett, determining as a matter of law, Tanglewood North property owners take pursuant to the Tanglewood North plat *only* and do not possess any easement over "roads, ditch[es], common area[s], boat ramp or ICW access in the subdivisions known as Tanglewood East, Tanglewood West or Windy Point Park" and, therefore, possess no maintenance duty because the Tanglewood North plat does not depict these areas. Thus, Defendants Register are the only parties to this appeal.

4. The $83,269 figure, initially submitted by Plaintiff, reflected the total cost of maintenance for roads and common areas in Tanglewood East, Tanglewood West, and Windy Point Park. This figure does not encompass any cost of maintenance associated with Tanglewood North.

5. The 652 lots included all non-developer lots in Tanglewood East, Tanglewood North, Tanglewood West, and Windy Point Park. Windy Point Park is a separate subdivision,

non-developer lots, totaled $128.[6] In sum, Plaintiff alleged Defendant was liable for $281, which represented their pro rata share, plus a $25 late fee. Plaintiff sought injunctive relief until such time Defendants remitted $281.[7]

On 28 July 2014, Defendants filed an answer, admitting "owner[ship] of the dominant estate over the streets, ditches, public areas, ICW water access and boat ramp" pursuant to the Tanglewood West plat and by prescription. However, Defendants denied any duty to maintain the easements. Defendants pointed to Plaintiff's alleged noncompliance with the North Carolina Planned Community Act. Defendants additionally stated that Plaintiff and other property owners "have not been provided a fair portion for maintenance, upkeep and operation[,]" and further alleged, "[m]embers have more benefits and pay less than this lawsuit is requiring of the Defendants."[8]

On 24 September 2014, Plaintiff moved for summary judgment against Defendants.[9] The trial court held a hearing for the motion for summary judgment on 1 December 2014.

Plaintiff asserted the following arguments: (1) when property is conveyed by deed, referencing a plat depicting common areas, an easement over the common areas is held by the purchaser; 2) in accordance with the acquired easement rights, the easement holder possesses a duty to maintain their easement, which is irrespective of the easement holder's actual use of the easement; (3) the pro rata share of maintenance is then calculated based upon a per lot basis, with the number of lots

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that borders the Tanglewood subdivision. Windy Point Park property owners possess an express easement over Tanglewood West's private roads to gain access to the boat ramp and parking area located in Tanglewood West. In accordance with this agreement, Windy Point Park lots are included in the total number of lots.

6. The $128 pro rata share per lot was calculated by dividing $83,269 by 652.

7. Plaintiff additionally submitted the following arguments in the alternative: (1) Defendants possess an easement by prescription; (2) Defendants do not possess any easement in the identified areas; (3) breach of contract implied by law; and (4) breach of contract implied in fact.

8. Membership in the Tanglewood Property Owners' Association ("TPOA") is voluntary. TPOA was established after the lots within Tanglewood were conveyed, and, thus, membership is not compulsory. Members are assessed annual dues, which encompass maintenance costs, and, therefore, members were not assessed an additional pro rata amount for maintenance.

9. On 23 October 2014, Plaintiff also moved for summary judgment against Defendant Corbett.

determined at the time of conveyance, irrespective of any subsequent lot consolidation; and (4) accordingly, Defendants hold an easement over "the streets, ditches, public areas, intracoastal waterway access, and the boat ramp" pursuant to their deed and possess a duty to maintain their easements based upon ownership of two lots.

Defendants appeared *pro se* and presented the following arguments: (1) with the exception of the roads necessary to gain access to their property, they do not use the easements depicted on the plat; (2) use of some of the alleged easement areas, including the boat ramp and picnic shelter, is restricted to member use; 3) they are willing to contribute to the maintenance of the roads, but as a result of this dispute have been "forced to join an association [they] don't want to be a member of"; (4) members are assessed less and afforded greater benefits within the community, with their dues calculated on a per owner basis and not on a per lot basis; and (5) their two lots were combined into one per the "direction of the Brunswick County Central Permitting[.]"[10]

On 11 February 2015, the trial court denied Plaintiff's motion for summary judgment against Defendants Register and Corbett. The matter proceeded to a bench trial on 16 February 2016.

Plaintiff called one witness, Jeremy Bass, Vice President of TPOA. Bass explained the Tanglewood subdivision encompasses three phases: Tanglewood East, Tanglewood North, and Tanglewood West. TPOA is a voluntary property owners' association, established in 1985 to maintain Tanglewood's common areas and private streets. Following establishment of TPOA, the developer of the Tanglewood subdivision deeded all common areas and private roads to TPOA. While there are some areas within Tanglewood reserved for members only, all property owners may use the boat ramp, parking lot, and private streets.[11]

Tanglewood subdivision encompasses both public roads, maintained by the North Carolina Department of Transportation, and private roads,

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10. Defendant Corbett additionally presented arguments. As stated *supra*, Defendant Corbett subsequently moved for summary judgment, which was later granted by Judge Aldridge on 2 November 2015. Thus, Defendant Corbett is not a party to this appeal. However, it is important to note, at the 1 December 2014 summary judgment hearing, Defendant Corbett argued Tanglewood North property owners take subject to the Tanglewood North plat *only*. While Plaintiff initially disputed this contention, arguing Tanglewood property owners had notice of the other phases, on appeal, Plaintiff has modified its stance, incorporating Judge Aldridge's order. Plaintiff now argues, Defendants Register, as owners of property in Tanglewood West, take subject to the Tanglewood West plat *only*.

11. Only the gazebo and pond are restricted to members only.

maintained by TPOA. Although Plaintiff compiled a list of Tanglewood's roads, some roads, including Lake Peggy Circle, the road Defendant resides on, appears to be missing from the list. Despite this, Lake Peggy Circle is depicted on the Tanglewood West plat.[12]

From 1985 until 2013, Plaintiff paid for the maintenance of all common areas and private streets, and non-members were not required to contribute to maintenance of these areas. However in 2013, the board of TPOA consulted with an attorney to determine "if there was a way to have non-members pay for their fair share[.]" The board acquired a breakdown of the estimated cost of maintaining all common areas and private streets within Tanglewood East, Tanglewood West, and Windy Point Park. The estimated cost of maintaining the easement areas, excluding any areas restricted to member use only, totaled $83,269. The board ascertained the total number of nondeveloper lots, 652, in Tanglewood East, Tanglewood North, Tanglewood West, and Windy Point Park from the original plats, irrespective of any subsequent purchases that may have resulted in lots being combined. Additionally, although members of TPOA were not assessed an additional maintenance fee because their membership dues encompass maintenance costs, the total number of lots included both member and non-member lots. The maintenance cost per lot was then calculated by dividing the total cost of maintenance by the total number of non-developer lots, equaling approximately $128 per lot.[13]

Plaintiff sent a demand letter to all non-member property owners, including Defendant, on or about 31 December 2013, seeking pro rata contribution of $128 per lot owned. Plaintiff assessed Defendants $256 pursuant to their ownership of lots 298 and 299 in Tanglewood West;

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12. On the plat, Lake Peggy Circle is listed as "Peggy Drive."

13. During trial, Bass additionally estimated the pro rata cost of maintenance specific to Tanglewood West, to be $134 per lot. This was calculated by subtracting the cost of maintenance of Windy Point Park ($696) and the cost of maintenance of Tanglewood East ($27,524.33 (one third of $82,573)) from the total cost of maintenance ($83,269). This resulting figure (the transcript states two figures, $54,498 and $54,958) was then divided by the total number of lots in Tanglewood West and Windy Point Park (410). As stated *supra*, on appeal, Plaintiff utilizes this approach, estimating the cost of maintenance to be $133 per lot. Despite Plaintiff's revised approach, Plaintiff's calculations contain mathematical errors. Assuming Plaintiff's submitted estimates for the cost of maintenance are correct, our calculations indicate the pro rata share should be $134.27. This is calculated by taking $83,269 (total cost of maintenance) and subtracting $696 (cost of maintenance of Windy Point Park) to get $82,573. Then, $27,524.33 (cost of maintenance of Tanglewood East–assuming Plaintiff's assertion that Tanglewood East represents 1/3 of the total cost of maintenance of Tanglewood East and West) is subtracted to get $55,048.67. This is then divided by 410 (number of lots in Tanglewood West and Windy Point Park) to get $134.27.

however, Defendants failed to remit payment. A second letter requesting payment went unanswered.

Following Bass's testimony, Plaintiff moved for a directed verdict. Plaintiff argued Defendants possessed an easement pursuant to the Tanglewood West plat and, accordingly, possess a duty to maintain their easement. Plaintiff further contended, if the trial court determined Defendant possessed an easement over Tanglewood East, Tanglewood West, and Windy Point Park, Defendant's pro rata share of maintenance costs would be $148 per lot. Alternatively, if the trial court construed an easement only over Tanglewood West and Windy Point Park, Defendant's pro rata share would be $134 per lot.[14] The trial court denied Plaintiff's motion for directed verdict.

Mr. Register testified for the defense, and largely narrated his testimony. He and Mrs. Register have resided in the Tanglewood subdivision for approximately twenty years. They elected to be members of TPOA for approximately ten years[15]; however, they since withdrew from membership. They did not enter into any agreement regarding any easements or associated duty of maintenance. However, their deed does reference the Tanglewood West plat, which depicts the boat ramp, parking lot, and Lake Peggy Circle. Although they possess easements "over streets, ditches, public areas, intracoastal water access and a boat ramp that are owned by the plaintiff, Tanglewood", he disputed their duty to maintain these areas.

Defendants received Plaintiff's first demand letter, which "said it was for road usage." The letter did not mention easements, and Defendants refused to pay because they were "entitled to the right of way to [their] property." Defendants then received a second demand letter from Plaintiff's attorney, specifically asserting Defendants possessed easements in common areas and the roads in Tanglewood. However, Defendants did not have access to these areas. Defendants maintained their property, and Plaintiff has not provided any maintenance over their property. He believed Plaintiff's actions are "criminal" and he "cannot understand how [Plaintiff] can just come . . . take money . . . for something that [they have] not agreed to or even had any say-so in."

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14. Plaintiff's alternative argument presented at trial provides conflicting information. Plaintiff refers to the alternative approach as encompassing an easement over Tanglewood West *and* Windy Point Park. However, the $134 per lot was the pro rata share specific to maintenance of Tanglewood West only.

15. The record does not establish when exactly Defendants were members, whether it was upon purchase or if they later became members.

On 7 March 2016, the trial court entered judgment and concluded the following: (1) Defendants do not possess any easement "in the private streets, ditches, boat ramp, ICW water access and parking lots in Tanglewood West" pursuant to their general warranty deed or the Tanglewood West plat; (2) Defendants possess an easement by necessity over Lake Peggy Circle and West Tanglewood Drive SW to gain access to their property; (3) Defendants possess "a duty to provide their reasonable pro rata share" for the maintenance of their easement over Lake Peggy Circle and West Tanglewood Drive SW; (4) Defendants do not possess any easement over "any other private street, ditch, boat ramp, ICW water access, parking lot, pier, gazebo, or any other common area including those shown on the plats of Tanglewood West, Tanglewood East, and Windy Point Park" and are, therefore, not liable for maintenance of those areas; (5) based on the evidence presented, Defendants' pro rata share for the 2013 maintenance of their easements cannot be determined and Defendants are, therefore, not liable to Plaintiff for the 2013 maintenance of their easement; and (6) Defendants, or their successors in title, shall pay for their "annual, reasonable pro rata share of the maintenance costs," which shall be calculated based upon the two lots initially conveyed to Defendants, for 2014 and "until such time as Lake Peggy Circle and/or West Tanglewood Dr. SW is owned and maintained by the North Carolina Department of Transportation as a public road."

On 16 March 2016, Plaintiff filed a motion for judgment notwithstanding the verdict. On 31 March 2016, Plaintiff filed a joint motion—an amended motion for judgment notwithstanding the verdict and a motion to amend the judgment. On 23 August 2016, the trial court denied Plaintiff's motions for judgment notwithstanding the verdict and to amend the judgment. Plaintiff timely filed notice of appeal on 1 September 2016.

II. Standard of Review

The issue of denial of summary judgment is reviewed *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). "[S]uch 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.' " *Id.* at 573, 669 S.E.2d at 576 (quoting *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007)).

III. Analysis

A. Summary Judgment

[1] On appeal, Plaintiff contends the trial court erred in denying summary judgment. Specifically, Plaintiff argues Defendants possess easements

"in the streets, ditches, public areas, ICW water access and boat ramp" and, accordingly, as holders of the easements, possess a duty to maintain their easements. We agree.

"An easement is a right to make some use of land owned by another . . . ." *Builders Supplies Co. of Goldsboro, N.C. v. Gainey*, 282 N.C. 261, 266, 192 S.E.2d 449, 453 (1972) (citing *Richfield Oil Co. v. Hercules Gasoline Co.*, 112 Cal. App. 431, 297 P. 73; James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* §§ 270, 309; 25 Am. Jur. 2d *Easements* §§ 2, 4; 28 C.J.S., *Easements*, Black's Law Dictionary). An easement is either appurtenant or in gross. *Davis v. Robinson*, 189 N.C. 589, 598, 127 S.E. 697, 702 (1925). "An appurtenant easement is an easement created for the purpose of benefiting particular land. This easement attaches to, passes with and is an incident of ownership of the particular land." *Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 161, 418 S.E.2d 841, 846 (1992) (citing *Gibbs v. Wright*, 17 N.C. App. 495, 195 S.E.2d 40 (1973)). By contrast, "[a]n easement in gross is not appurtenant to any estate in land and does not belong to any person by virtue of his ownership of an estate in other land, but is a mere personal interest in or right to use the land of another; it is purely personal and usually ends with the death of the grantee." *Shingleton v. State*, 260 N.C. 451, 454, 133 S.E.2d 183, 185 (1963) (citing *Davis*, 189 N.C. at 598, 127 S.E. at 697).

An easement can be created in several ways, including grant, estoppel, way of necessity, implication, dedication, prescription, reservation, and condemnation. *Davis*, 189 N.C. at 598, 127 S.E. at 702 (citation omitted). "Although easements must generally be created in writing, courts will find the existence of an easement by implication under certain circumstances." *Knott v. Wash. Hous. Auth.*, 70 N.C. App. 95, 97, 318 S.E.2d 861, 862-63 (1984) (citing James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 280 at 346 (1971)). Appurtenant easements implied by plat are recognized in North Carolina. *See Hinson v. Smith*, 89 N.C. App. 127, 131, 365 S.E.2d 166, 168 (1988) (holding property owners possess "a private easement over and across all of the property designated as 'Beach' on the recorded plat"). The easement areas must be sufficiently identified on the plat in order to establish an easement, although an express grant is not required. *See Conrad v. West-End Hotel & Land Co.*, 126 N.C. 776, 779-80, 36 S.E. 282, 283 (1900) (holding purchasers' deed reference to plat containing area identified "Grace Court" sufficient to establish purchasers' right to "open space of land"); *Harry v. Crescent Res., Inc.*, 136 N.C. App. 71, 75, 80, 523 S.E.2d 118, 121, 123-24 (1999) (determining remnant parcels depicted on plat and "described by metes and bounds" but not further identified insufficient

to establish an easement); *Hinson*, 89 N.C. App. at 130-31, 365 S.E.2d at 167-68 (finding area designated "Beach" on recorded plat referenced by property owners' deeds sufficient to establish a private easement).

We are further guided by our Supreme Court in *Cleveland Realty Co. v. Hobbs*, 261 N.C. 414, 135 S.E.2d 30 (1964):

> Where lots are sold and conveyed by reference to a map or plat which represents a division of a tract of land into streets, lots, parks and playgrounds, a purchaser of a lot or lots acquires the right to have the streets, parks and playgrounds kept open for his reasonable use, and this right is not subject to revocation except by agreement. It is said that such streets, parks and playgrounds are dedicated to the use of lot owners in the development. In a strict sense it is not a dedication, for a dedication must be made to the public and not to a part of the public. It is a right in the nature of an easement appurtenant. Whether it be called an easement or a dedication, the right of the lot owners to the use of the streets, parks and playgrounds may not be extinguished, altered or diminished except by agreement or estoppel. This is true because the existence of the right was an inducement to and a part of the consideration for the purchase of the lots. Thus, a street, park or playground may not be reduced in size or put to any use which conflicts with the purpose for which it was dedicated.

Id. at 421, 135 S.E.2d at 35-36 (citations omitted).

The general rule governing easement maintenance is: "in the absence of contract stipulation or prescriptive right to the contrary, the owner of an easement is liable for the costs of maintenance and repairs where it exists and is used and enjoyed for the benefit of the dominant estate alone . . . ." *Lamb v. Lamb*, 177 N.C. 150, 152, 98 S.E. 307, 309 (1919). "[T]he owner of the servient tenement is under no duty to maintain or repair it, in the absence of an agreement therefor." *Green v. Duke Power Co.*, 305 N.C. 603, 611, 290 S.E.2d 593, 598 (1982) (citations omitted). This duty of maintenance exists in the context of implied easements, specifically easements implied by plat. *Shear*, 107 N.C. App. at 161, 165, 418 S.E.2d at 846, 848 (holding lot owners possessed an easement appurtenant "to the lake and surrounding undeveloped land" pursuant to their plat and, accordingly, had "the sole responsibility of bearing the cost of maintaining their easement"). Furthermore, an easement holder's share of maintenance may be calculated on a pro rata,

per lot basis.[16] *Lake Toxaway Cmty. Ass'n v. RYF Enters.*, 226 N.C. App. 483, 491-92, 742 S.E.2d 555, 561-62 (2013) (upholding pro rata maintenance amount assessed to a property owner, even though the property owner did not use *all* easements in question and rejecting the property owner's contention that maintenance duty "extend[ed] only to those amenities used by [property owner] in an amount proportional to its use of those amenities").

In *Shear*, defendant developer sought to drain a lake located within the community and develop the surrounding area. 107 N.C. App. at 159, 418 S.E.2d at 844. In response, plaintiff property owners argued they possessed implied easements, pointing to their deeds that referenced a recorded plat "depict[ing] streets, the lake and undeveloped areas surrounding the lake . . . includ[ing] a playground." *Id.* at 156, 418 S.E.2d at 843. Plaintiffs additionally relied on defendant's representations regarding the lake, specifically "they were informed that the lake was for the use and enjoyment of the residents of Cardinal Hills." *Id.* at 157, 418 S.E.2d at 843. While this Court noted the "oral representations and actions" further evidenced the defendant's intent, this Court held, "[t]he contents of this map, and the [defendant's] selling and conveying in reference to this map, *alone* creates an easement to the lake and the surrounding property." *Id.* at 163, 418 S.E.2d at 846 (emphasis added). Additionally, finding "[n]o agreement or intent to the contrary," in accordance with the general rule of easement maintenance, this Court found, "the cost of maintaining the lake and the surrounding undeveloped land should be paid by the [easement holders]." *Id.* at 165, 418 S.E.2d at 848.

At the outset, we note Defendants admitted in their Answer and at trial possession of easements "over the streets, ditches, public areas, ICW water access and boat ramp . . . ."[17] Additionally, there is no dispute over whether the Tanglewood West plat "sufficiently identified" the easement areas in question. *See Conrad*, 126 N.C. at 779-80, 36 S.E. at 283;

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16. In *Sanchez v. Cobblestone Homeowners Ass'n*, ___ N.C. App. ___, ___, 791 S.E.2d 238 (2016), this Court held access to benefits alone was insufficient to meet the requirements set forth in *Lake Toxaway*. *Id.* at ___, 791 S.E.2d at 246. However, *Sanchez* applied *Lake Toxaway* solely in the context of an implied contract.

17. While parties are bound by their pleadings, we note Defendants' admission is a conclusion of law. *Universal C.I.T. Credit Corp. v. Saunders*, 235 N.C. 369, 372, 70 S.E.2d 176, 178 (1952) ("[I]n searching the pleadings to determine the *material facts* which are controverted and those which are taken as true, the rule is that each party is bound by his pleading, and unless withdrawn, amended, or otherwise altered, the allegations contained in a pleading ordinarily are conclusive as against the pleader.") (emphasis added) (citations omitted).

Harry, 136 N.C. App. at 80, 523 S.E.2d at 123-24; *Hinson*, 89 N.C. App. at 131, 365 S.E.2d at 168. The Tanglewood West plat depicts the lots, streets, and common areas located within the boundaries of the Tanglewood West phase of the subdivision.[18] The characterization of the easements as appurtenant is also not in contention, and it is clear the rights in question benefit a specific parcel of property and are "an incident of ownership," *Shear*, 107 N.C. App. at 161, 418 S.E.2d at 846 (citation omitted), and are not personal rights. *Shingleton*, 260 N.C. at 454, 133 S.E.2d at 185 (citation omitted). Therefore, in accordance with the Defendants' deed reference to the Tanglewood West plat, Defendants possess an easement appurtenant over these areas located in Tanglewood West.

Next, we examine Defendants' duty of maintenance. To begin, we observe the language in *Lamb*, specifically the inclusion of "and is *used and enjoyed*[.]" 177 N.C. at 152, 98 S.E. at 309 (emphasis added). We believe Plaintiff's assertion, specifically that an easement holder's duty of maintenance exists *completely irrespective* of use, mischaracterizes *Lake Toxaway*. *Lake Toxaway's* discussion of an easement holder's duty of maintenance cites to *Lamb*. *Lake Toxaway Cmty. Ass'n*, 226 N.C. App. at 492, 742 S.E.2d at 562. *Lamb's* inclusion of "and is *used and enjoyed*" would be rendered meaningless if an easement holder's duty of maintenance exists completely irrespective of use. 177 N.C. at 152, 98 S.E. at 309 (emphasis added). While the Defendants contend they do not use any of the easement areas in question, with the exception of the roads necessary for ingress and egress, we note, similar to *Lake Toxaway*, a portion of Defendants' easement is, indeed, used. Furthermore, although the Defendants may not currently use *some* of the easement areas, as easements appurtenant, Defendants' rights to these areas will run with the land and add value to Defendants' property. *Shear*, 107 N.C. App. at 161, 418 S.E.2d at 846 (citation omitted). Thus, Defendants are conferred a benefit, even if they do not currently use *all* of the easement areas. In accordance with this Court's precedent, we hold Defendants, as property owners in Tanglewood West, possess a duty to maintain their easements located in Tanglewood West.[19]

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18. In contrast, the Tanglewood East and Tanglewood North plats depict the areas encompassed within the boundaries of their respective phases, which does not include these common areas.

19. We note the well-established rule governing enforcement of restrictive covenants imposing affirmative obligations on property owners. *See Allen v. Sea Gate Ass'n, Inc.*, 119 N.C. App. 761, 764, 460, S.E.2d 197, 199 (1995) (citing *Beech Mountain Prop. Ass'n, Inc. v. Seifart*, 48 N.C. App. 286, 295, 269 S.E.2d 178, 183 (1980)) ("Covenants that impose affirmative obligations on property owners are strictly construed and unenforceable unless the obligations are imposed 'in clear and unambiguous language' that is 'sufficiently definite' to

As stated *supra* in footnote 13, Plaintiff's revised calculations contain mathematical errors. Pursuant to our review of the record, Tanglewood West property owners' pro rata share for easements located in Tanglewood West is calculated by ascertaining the total cost of maintenance, specific to the easement areas located in Tanglewood West, and dividing that figure by the total number of lots in Tanglewood West and Windy Point Park.

As easements appurtenant, the rights and duties associated with the easement areas "attach[ ] to, pass[ ] with and [are] an incident of ownership of the particular land." *Shear*, 107 N.C. App. at 161, 418 S.E.2d at 846 (citation omitted). As noted *supra* in footnote 6, pursuant to an agreement between Plaintiff and the developer, lots retained by the developer were not assessed additional maintenance costs and were, therefore, excluded from the total number of lots used to calculate the pro rata maintenance costs. While this issue was not raised on appeal, it would seem this agreement does not alter the easement rights and duties imposed on the lots owned by the developer. Thus, while Plaintiff was free to enter into this agreement with the developer, developer lots should not be excluded from the total number of lots (just as the member lots were not excluded from the total number).

Furthermore, Defendants possess easement rights and duties for each lot owned. *See Claremont Prop. Owners Ass'n v. Gilboy*, 142 N.C. App. 282, 287, 542 S.E.2d 324, 327-28 (2001) (holding a real covenant that "run[s] with the land" and imposes an affirmative obligation to contribute to road maintenance attaches to both lots owned individually, and consolidation of lots into one lot "did not alter or negate the real

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assist courts in its application."). However, *Allen* dealt with restrictive covenants and is thus distinguished from the present case, which is in the context of easements. As previously noted, we are bound by our precedent pertaining to an easement holder's duty of maintenance.

We further note, over twenty years has elapsed during which Plaintiff assumed responsibility for maintaining the easement areas and did not enforce Defendants' duty of maintenance. One might speculate whether such conduct constituted wavier. *See Medearis v. Tr. of Meyers Park Baptist Church*, 148 N.C. App. 1, 12, 558 S.E.2d 199, 206-07 (2001) ("A waiver is implied when a person dispenses with a right 'by conduct which naturally and justly leads the other party to believe that he has so dispensed with the right.'") (quoting *Guerry v. Am. Tr. Co.*, 234 N.C. 644, 648, 68 S.E.2d 272, 275 (1951)). Since this issue was not raised at trial or on appeal, it is unclear whether Defendants, pursuant to the plat, inquired what maintenance duties they would be charged with prior to acquiring their property. Conceivably, they would have been informed that this duty had been assumed by Plaintiff. However, the issue of waiver was not presented to this Court, and, thus, we do not address it. *See* N.C. R. App. P. 28(a) (2016) ("The scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned.").

covenants that had previously attached to each lot"). While *Claremont* was in the context of a *real covenant* that attached to the land and not an *appurtenant easement*, the reasoning applies equally in this context, as both attach to or "run with the land."

In conclusion, the depiction of the streets, ditches, public areas, ICW water access, and boat ramp on the Tanglewood West plat is undisputed, and Plaintiff is entitled to judgment as a matter of law. As such, the trial court erred in denying Plaintiff's motion for summary judgment. We, therefore, remand to the trial court to calculate the amount owed by the landowners, in accordance with our opinion.

B. Judgment and Amended Judgment

[2] Plaintiff finally contends the trial court erred by granting judgment in favor of Defendants and denying its untimely amended motion for amended judgment. Because we hold the trial court erred in denying summary judgment, we need not address these issues on appeal.[20]

IV. Conclusion

For the foregoing reasons we reverse and remand to the trial court to enter an order consistent with this opinion and declare the amount of maintenance costs owed by Defendants to Plaintiff. To achieve this result, the trial court may, if it deems necessary, take additional evidence.

REVERSED AND REMANDED.

Judges DAVIS and MURPHY concur.

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20. We note the trial court properly denied Plaintiff's joint amended motion for judgment notwithstanding the verdict and motion to amend judgment. Pursuant to Rule 59(e), "[a] motion to alter or amend the judgment under section (a) of this rule shall be served not later than 10 days after entry of the judgment." N.C. R. Civ. P. 59(e) (2016). Here, the trial court entered judgment on 7 March 2016. Plaintiff failed to comply with the time constraints pursuant to its amended motion for judgment notwithstanding the verdict and motion for amended judgment, filed 23 days after entry of judgment, on 31 March 2016.

We additionally note, while Plaintiff's notice of appeal references the denial of its motion for judgment notwithstanding the verdict, this issue is not presented in Plaintiff's brief. Once again, pursuant to Rule 28, "[t]he scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned." N.C. R. App. P. 28(a).

Furthermore, the trial court properly denied Plaintiff's motions for directed verdict and judgment notwithstanding the verdict as such motions are improper in nonjury trials. *See Whitaker v. Earnhardt*, 289 N.C. 260, 264, 221 S.E.2d 316, 319 (1976) (citation omitted) ("The motion for judgment n.o.v. must be preceded by a motion for a directed verdict which is improper in non-jury trials.").

VAN-GO TRANSPORTATION, INC., PLAINTIFF
v.
SAMPSON COUNTY, SAMPSON COUNTY BOARD OF COMMISSIONERS AND ENROUTE TRANSPORTATION SERVICES, INC., DEFENDANTS

No. COA16-849

Filed 1 August 2017

1. Penalties, Fines, and Forfeitures—injunction bond—temporary restraining order—voluntary dismissal of lawsuit—wrongful enjoinder—Blatt rule

The trial court did not err in an action regarding the award of a contract for transportation of area Medicaid patients by holding that defendant county and transportation service had been wrongfully enjoined by plaintiff transportation company's temporary restraining order, and thus, plaintiff was not entitled to the return of its $25,000 injunction bond. Plaintiff's voluntary dismissal of its lawsuit was equivalent to a decision by the trial court that plaintiff admitted it wrongfully enjoined defendants. The enjoining party may not avoid operation of the *Blatt* rule, determining when a party is entitled to the return of the bond, simply by asserting that the voluntary dismissal of the action was a business decision.

2. Penalties, Fines, and Forfeitures—injunction bond—wrongful temporary restraining order—lost profits—reasonable degree of certainty

The trial court did not err in an action regarding the award of a contract for transportation of area Medicaid patients by awarding $15,993.57 of a $25,000 injunction bond to defendant transportation service as damages for lost profits resulting from plaintiff transportation company's wrongful temporary restraining order where the evidence provided a reasonable degree of certainty for the amount.

3. Penalties, Fines, and Forfeitures—injunction bond—Medicaid patients transportation services

The trial court did not err in an action regarding the award of a contract for transportation of area Medicaid patients by awarding damages of $9,006.03 under a $25,000 injunction bond to defendant County for the difference between the amount it actually paid plaintiff transportation company and the amount it would have paid defendant transportation service to perform the same services if a temporary restraining order had not been issued. The existence of any obligation the County may have had to reimburse the State

for the $9,006.43 was not relevant to the County's entitlement to seek recovery of taxpayer funds that were wrongfully expended due to plaintiff's wrongful actions.

Appeal by plaintiff from order entered 12 May 2016 by Judge Gale M. Adams in Sampson County Superior Court. Heard in the Court of Appeals 9 February 2017.

The Charleston Group, by R. Jonathan Charleston, Jose A. Coker, and Quintin D. Byrd, for plaintiff-appellant.

Daughtry Woodard Lawrence & Starling, by W. Joel Starling, Jr., for defendant-appellee Sampson County.

Crossley McIntosh Collier Hanley & Edes, PLLC, by Norwood P. Blanchard, III, for defendant-appellee EnRoute Transportation Services, Inc.

DAVIS, Judge.

This appeal requires us to once again examine the issue of when a defendant is entitled to recover on an injunction bond previously posted by the plaintiff after the plaintiff voluntarily dismisses the lawsuit. Plaintiff Van-Go Transportation, Inc. ("Van-Go") appeals from the trial court's order awarding damages to Sampson County (the "County") and EnRoute Transportation Services, Inc. ("EnRoute") (collectively "Defendants"). Because we conclude that the trial court properly ruled that Van-Go's voluntary dismissal was equivalent to an admission that it wrongfully enjoined Defendants, we affirm.

Factual and Procedural Background

From 1997 until 2013, the County contracted with EnRoute for the transportation of area Medicaid patients to and from appointments for medical services. During the period from July 2013 to June 2015, the County contracted with Van-Go to provide these transportation services. In February 2015, the County issued a Request for Proposals ("RFP") seeking bids from vendors to provide these services for the period between July 2015 and June 2017.

Among other requirements, the RFP instructed each bidder to (1) identify its insurer and show that it possessed a certain amount of insurance coverage; and (2) state the fixed cost per mile that it would charge the County for provision of the transportation services. Van-Go and

EnRoute each submitted proposals that the County deemed timely and responsive to the RFP.

Van-Go's bid identified its insurer and level of coverage and stated that its fixed cost per mile of service was $1.74. EnRoute's proposal did not identify its insurance carrier but stated that it would obtain the required insurance coverage if awarded the contract. In addition, it stated that its cost per mile of service was $1.54 "[p]lus a fuel surcharge of $.01 per mile for each $.05 increase over $3.95 per gallon (based on average daily price at Go Gas-Clinton)." On 6 April 2015, the Sampson County Board of Commissioners voted to award the Medicaid transportation services contract (the "Contract") to EnRoute based upon the terms specified in its bid.

On 29 June 2015, Van-Go filed its initial complaint against Defendants in which it requested monetary damages and injunctive relief for alleged violations of N.C. Gen. Stat. § 143-129 (which governs the procedure for awarding public contracts); 5 C.F.R. §§ 2635.101 and 2635.702 (which address conflicts of interest in contracts involving federal monies); and the due process clauses of the federal and state constitutions. These claims were premised upon Van-Go's contentions that the Contract should not have been awarded to EnRoute because (1) EnRoute's proposal was not responsive to the RFP in that it both failed to demonstrate that EnRoute had procured the required insurance coverage and did not provide a fixed cost per mile; and (2) a conflict of interest existed between the owners of EnRoute and the Director of the Sampson County Department of Social Services, who participated in the County's consideration of the bids.

The complaint included a request for a temporary restraining order ("TRO") pursuant to Rule 65 of the North Carolina Rules of Civil Procedure to enjoin EnRoute from performing under the Contract and to allow Van-Go to extend its then-existing contract with the County by continuing to provide transportation services at the cost-per-mile rate of $1.85 as specified in that agreement. A TRO hearing was held in Sampson County Superior Court on 29 June 2015 after which Judge W. Allen Cobb, Jr. issued a TRO granting Van-Go its requested relief pending the outcome of a preliminary injunction hearing. The TRO further directed Van-Go to post an injunction bond in the amount of $25,000.

Defendants subsequently filed a motion to dissolve the TRO on 13 July 2015. Following a hearing, Judge Charles H. Henry issued an order on 20 July 2015 denying Van-Go's request for a preliminary injunction and

granting Defendants' motion to dissolve the TRO. In its order, the court determined that Van-Go had not shown a likelihood of success on the merits because, *inter alia*, (1) EnRoute's bid substantially conformed to the specifications of the RFP; and (2) Van-Go failed to show that a conflict of interest had tainted the bidding process.

Following the entry of this order, Defendants removed the case to the United States District Court for the Eastern District of North Carolina based upon the federal questions presented in Van-Go's complaint. Van-Go subsequently filed an amended complaint that did not contain any claims arising under federal law. Based upon the lack of a federal question in the amended complaint, the federal court granted Van-Go's motion to remand the case to Sampson County Superior Court on 29 July 2015.

On 17 August 2015, EnRoute filed a motion to dismiss Van-Go's amended complaint in Sampson County Superior Court. On 10 December 2015 — while EnRoute's motion to dismiss was pending — Van-Go filed a voluntary dismissal of its lawsuit without prejudice pursuant to Rule 41 of the North Carolina Rules of Civil Procedure. Van-Go subsequently filed a motion on 1 February 2016 requesting the release of the $25,000 injunction bond it had posted in connection with the TRO. On 4 February 2016, EnRoute submitted an objection to Van-Go's motion along with a motion of its own seeking an award of damages in the full amount of the bond on the ground that EnRoute had been wrongfully enjoined. On 18 March 2016, the County filed a similar motion.

A hearing was held before the Honorable Gale M. Adams on 21 March 2016. Judge Adams issued an order on 12 May 2016 denying Van-Go's motion for release of the bond and awarding Defendants the proceeds of the bond. In its order, the trial court allocated $15,993.57 of the $25,000 to EnRoute and $9,006.43 to the County. Van-Go filed a timely notice of appeal from this order.

Analysis

Van-Go raises several issues on appeal. First, it asserts that the $25,000 injunction bond should have been released to Van-Go. Alternatively, it asserts that even if EnRoute was entitled to recover some portion of the bond, EnRoute failed to provide sufficient evidence of the damages it had incurred so as to warrant the trial court's award of $15,993.57. Finally, Van-Go argues that the trial court erred in awarding any amount of damages to the County because all monies at issue belonged to the State rather than the County.

I. Determination that Defendants Were Wrongfully Enjoined

[1] Pursuant to Rule 65(c), a party who obtains a TRO or preliminary injunction must post a security bond. *See* N.C. R. Civ. P. 65(c) (providing that, with limited exceptions, "[n]o restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the judge deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained."). In reviewing a trial court's judgment concerning the disposition of an injunction bond, "[w]e consider whether the trial court's findings of fact and conclusions of law are sufficient to support the judgment." *Allen Indus., Inc. v. Kluttz*, __ N.C. App. __, __ 788 S.E.2d 208, 209 (2016).

In its 12 May 2016 order, the trial court made the following findings of fact in determining that Van-Go was not entitled to the return of its $25,000 injunction bond:

> 26. On December 10, 2015, [Van-Go] filed a Notice of Voluntary Dismissal without prejudice pursuant to Rule 41(a) of the North Carolina Rules of Civil Procedure. The Notice of Dismissal was unconditional, in that it was not stipulated as pursuant to Rule 41(a)(1)(ii) of the North Carolina Rules of Civil Procedure.
>
> . . . .
>
> 30. The Court finds that, as a result of the TRO entered on June 29, 2015, the County and Enroute were restrained from performing under the Contract, which would have taken effect on July 1, 201[5], for a period of twenty (20) days.

The trial court proceeded to enter the following pertinent conclusion of law:

> 4. The Notice of Voluntary Dismissal without prejudice filed by [Van-Go] in this matter on or about December 10, 2015, which was unstipulated, is equivalent to a finding that the County and Enroute were wrongfully restrained by the entry of the TRO on June 29, 2015.

(Citation omitted.)

In determining whether a party has been wrongfully enjoined, courts must analyze the issue in a manner "consistent with the very purpose of the bond[,] which is to require that the plaintiff assume the

risks of paying damages he causes as the price he must pay to have the extraordinary privilege of provisional relief." *Indus. Innovators, Inc. v. Myrick-White, Inc.*, 99 N.C. App. 42, 50, 392 S.E.2d 425, 431 (citation and quotation marks omitted), *disc. review denied*, 327 N.C. 483, 397 S.E.2d 219 (1990); *see also Leonard E. Warner, Inc. v. Nissan Motor Corp. in U.S.A.*, 66 N.C. App. 73, 76, 311 S.E.2d 1, 3 (1984) ("The purpose of the security requirement is to protect the restrained party from damages incurred as a result of the wrongful issuance of the injunctive relief." (citation omitted)).

It is well established that "no right of action accrues upon an injunction bond until the court has finally decided that plaintiff was not entitled to the injunction, or until something occurs equivalent to such a decision." *M. Blatt Co. v. Southwell*, 259 N.C. 468, 471, 130 S.E.2d 859, 861 (1963) (citation and quotation marks omitted). The defendant has the burden of proof on the issue of whether it is entitled to recover under the bond. *Id.* at 473, 130 S.E.2d at 862.

In the present case, Defendants do not contend that the trial court expressly determined that Van-Go had not been entitled to the 29 June 2015 TRO.[1] Rather they contend that Van-Go's voluntary dismissal of its lawsuit was equivalent to a decision by the trial court that Van-Go was not entitled to the TRO.

The seminal case on this issue is *Blatt*, in which our Supreme Court articulated the following rule:

> *[T]he voluntary and unconditional dismissal of the proceedings by the plaintiff is equivalent to a judicial determination that the proceeding for an injunction was wrongful*, since thereby the plaintiff is held to have confessed that he was not entitled to the equitable relief sought.
>
> When, however, the dismissal of the action is by an amicable and voluntary agreement of the parties, the same is not a confession by the plaintiff that he had no right to the

1. We note that a trial court's subsequent refusal to grant a preliminary injunction to a plaintiff does not, in itself, constitute a determination that the defendant was wrongly enjoined by the earlier issuance of a TRO. *See Blatt*, 259 N.C. at 471, 130 S.E.2d at 861 (holding that trial court's determination that plaintiff was not entitled to continuation of TRO did not constitute ruling that TRO had been wrongfully issued given that trial court failed to make any "recital, finding or adjudication that plaintiff was not entitled to the temporary restraining order during the period it was in effect").

> injunction granted, and does not operate as a judgment to that effect.

Id. at 472, 130 S.E.2d at 862 (internal citations and quotation marks omitted and emphasis added). Thus, *Blatt* distinguished between, on the one hand, a plaintiff's voluntary dismissal of an action without conditions and, on the other hand, a plaintiff's voluntary dismissal that is conditioned upon an agreement between the plaintiff and the defendant. *Blatt* makes clear that the former category of voluntary dismissals entitles the defendant to recovery on the injunction bond whereas the latter category does not.

Here, there was no "amicable" or "voluntary" agreement between Van-Go, the County, and EnRoute at the time Van-Go dismissed its lawsuit. Instead, Van-Go voluntarily, without any promise, consideration, or involvement of Defendants, dismissed its lawsuit "as to all defendants" on 10 December 2015. Due to the voluntary, unilateral dismissal of its lawsuit, Van-Go "is held to have confessed that [it] was not entitled to the equitable relief sought" by the 29 June 2015 TRO. *Id.*

North Carolina courts have recognized one narrow exception to *Blatt's* general rule that a voluntary and unconditional dismissal is deemed to be an admission by the plaintiff that it wrongfully enjoined the defendant. This exception applies in instances in which a plaintiff dismisses a claim that has become legally moot. In *Democratic Party of Guilford County v. Guilford County Board of Elections*, 342 N.C. 856, 467 S.E.2d 681 (1996), the plaintiffs filed suit to compel the Guilford County Board of Elections to extend voting hours on Election Day in November 1990. The trial court issued a TRO directing the board to keep polling places open for an additional hour. *Id.* at 858, 467 S.E.2d at 682-83. Approximately one month later, the board moved to vacate the TRO and sought damages for having been wrongfully enjoined. *Id.* at 858, 467 S.E.2d at 683. A few hours later, the plaintiffs filed a voluntary dismissal of the action. The trial court denied the board's request for damages on the grounds that the TRO was no longer in existence and the board had failed to demonstrate that it was wrongfully enjoined. *Id.* at 859, 467 S.E.2d at 683.

On appeal to the Supreme Court, the board cited *Blatt* to support its contention that the plaintiffs' dismissal of their action "constituted a *per se* admission of wrongful restraint which automatically entitled [the board] to damages." *Id.* at 861, 467 S.E.2d at 684. The Court rejected this argument, explaining that the plaintiffs' dismissal of their action was in effect a "legal nullity" given that their complaint "sought no relief

other than the temporary restraining order, and that order expired, at the latest, ten days after [the trial court] entered it." *Id.* at 862, 467 S.E.2d at 685.

Another application of the mootness exception occurred in *Allen Industries*. In that case, the plaintiff employer sued a former employee for breaching a covenant not to compete contained in her employment contract by working for a direct competitor and by improperly using the plaintiff's customer data in that new position. *Allen Indus.*, __ N.C. App. at __, 788 S.E.2d at 209. The trial court granted the plaintiff's motion for a preliminary injunction prohibiting the defendant from working for the competitor through March 2014 — the end of the noncompetition period specified in the agreement. *Id.* at __, 788 S.E.2d at 209.

The defendant appealed the preliminary injunction order to this Court, and we dismissed the appeal as moot because the period of the covenant not to compete had expired. *Id.* at __, 788 S.E.2d at 209. Following our remand to the trial court, the plaintiff voluntarily dismissed its action. The defendant then moved for damages on the ground that she had been wrongfully enjoined. The trial court denied the motion on the basis that the defendant's actions had, in fact, violated the covenant not to compete. *Id.* at __, 788 S.E.2d at 209.

On a second appeal to this Court, the defendant argued that the trial court should have treated the plaintiff's voluntary dismissal as an admission that it had wrongfully enjoined her. *Id.* at __, 788 S.E.2d at 209. We disagreed, explaining that "the dismissal was taken *only after there was no longer any need to maintain the case* because the covenant not to compete had expired by its own terms." *Id.* at __, 788 S.E.2d at 210 (emphasis added). Therefore, based on the fact that the case had become moot before the voluntary dismissal was taken, we affirmed the trial court's ruling. *Id.* at __, 788 S.E.2d at 211.

Here, the trial court specifically concluded that "[t]he Notice of Voluntary Dismissal without prejudice filed by [Van-Go] in this matter on or about December 10, 2015, which was unstipulated, is equivalent to a finding that the County and Enroute were wrongfully restrained by the entry of the TRO on June 29, 2015." (Citation and quotation marks omitted.) Van-Go does not dispute the trial court's finding that its dismissal of this action was voluntary and without conditions. However, Van-Go argues that the mootness exception to the *Blatt* rule is applicable here on the theory that its lawsuit had effectively become moot once its request for a preliminary injunction was denied. To support this position, Van-Go's president, Azzam Osman, testified as follows in an affidavit submitted by Van-Go to the trial court:

> Van-Go's decision to discontinue the present litigation was consistent with its responsible financial business practices, taking into consideration the cost of further litigation, the profit that would be gained on the remainder of the contract, and the time that would be remaining on the contract by the time that the case would come to a final resolution.

Essentially, Van-Go asks us to recognize a "constructive mootness" doctrine premised upon its assertion that it dismissed its lawsuit based upon a "fiscally sound business decision." Recognition of such an exception, however, would be inconsistent with both our precedent and the purpose of Rule 41. Unlike in *Allen Industries*, where "the dismissal was taken only after there was no longer any need to maintain the case[,]" *id.* at __, 788 S.E.2d at 210, or in *Democratic Party of Guilford County*, where the plaintiffs' dismissal came after receiving the only relief they sought, 342 N.C. at 862, 467 S.E.2d at 685, Van-Go does not actually assert that its claims were legally moot at the time it dismissed its lawsuit. Rather, as Osman's above-quoted testimony demonstrates, Van-Go is making the qualitatively different argument that the value of the case going forward would have been diminished in comparison to the costs of litigation.

Van-Go points to no North Carolina legal authority — nor are we aware of any — holding that the enjoining party may avoid operation of the *Blatt* rule simply by asserting that the voluntary dismissal of the action was a business decision. Indeed, the adoption of such an exception would swallow the general rule articulated in *Blatt* as virtually any plaintiff in this procedural posture could claim its voluntary dismissal was motivated by a cost-benefit analysis. Moreover, in addition to being unworkable, such an exception would not be "consistent with the very purpose of the bond[,] which is to require that the plaintiff assume the risks of paying damages he causes as the price he must pay to have the extraordinary privilege of provisional relief." *Indus. Innovators*, 99 N.C. App. at 50, 392 S.E.2d at 431 (citation and quotation marks omitted).

Thus, the general rule articulated in *Blatt* is controlling on the present facts. Accordingly, the trial court did not err in holding that Defendants had been wrongfully enjoined by Van-Go.

II. Award of Damages to Defendants

In its alternative argument, Van-Go contends that the specific awards to EnRoute and the County were improper albeit for different reasons. We address each of Van-Go's arguments in turn.

A. EnRoute's Damages

[2] Van-Go asserts that the trial court's award of $15,993.57 to EnRoute was not supported by proper evidence. "According to well-established North Carolina law, a party seeking to recover damages bears the burden of proving the amount that he or she is entitled to recover in such a manner as to allow the finder of fact to calculate the amount of damages that should be awarded to a reasonable degree of certainty." *Lacey v. Kirk*, 238 N.C. App. 376, 392, 767 S.E.2d 632, 644 (2014) (citation omitted), *disc. review denied*, __ N.C. __, 771 S.E.2d 321 (2015). In so doing, "absolute certainty is not required but evidence of damages must be sufficiently specific and complete to permit the [fact finder] to arrive at a reasonable conclusion." *Fortune v. First Union Nat'l Bank*, 323 N.C. 146, 150, 371 S.E.2d 483, 485 (1988) (citation and quotation marks omitted).

We have specifically applied this rule to the calculation of damages for lost profits. *See Supplee v. Miller-Motte Bus. Coll., Inc.*, 239 N.C. App. 208, 223, 768 S.E.2d 582, 594 (2015) ("To recover lost profits, the claimant must prove such losses with 'reasonable certainty.' Although absolute certainty is not required, damages for lost profits will not be awarded based on hypothetical or speculative forecasts." (citation omitted)). "The amount of damages is generally a question of fact, but whether that amount has been proven with reasonable certainty is a question of law we review *de novo*." *Plasma Ctrs. of Am., LLC v. Talecris Plasma Res., Inc.*, 222 N.C. App. 83, 91, 731 S.E.2d 837, 843 (2012).

Here, the owner of EnRoute, Ricky Nelson Moore, submitted an affidavit to the trial court in which he set forth the basis for EnRoute's damages claim resulting from the TRO. Moore testified that EnRoute incurred revenue losses in the amount of $44,741.62 while the TRO was in effect. This figure was reached by multiplying the actual number of miles (29,053) for which Van-Go billed the County in connection with Medicaid transportation services provided during the time period in which the TRO was in effect by the rate ($1.54) to which EnRoute and the County agreed in the Contract.

Moore's affidavit then stated that EnRoute was able to avoid $20,918.00 in "variable costs (such as fuel and labor expenses)" that it would have incurred had the TRO not been in place and EnRoute actually performed the Contract during that time period. To support this figure, Moore explained that he "calculated that EnRoute's total fuel and labor expenses amount to approximately $.72 per mile, based on historical data (namely, our costs per mile during the past few months)."

Moore then subtracted these avoided costs ($20,918.00) from the lost revenue ($44,741.62) to arrive at a lost profits figure of $23,823.00.[2]

In response to Moore's affidavit, Van-Go filed the affidavit of Osman stating that, based upon Van-Go's operating costs during the month of July, "[i]t is very unlikely that EnRoute could provide 29,053 service miles at a rate of $1.54 per mile over [the period during which the TRO was in effect] and realize a profit in excess of ten thousand dollars[.]"

After holding a hearing on 21 March 2016, the trial court issued its order awarding damages in the amount of $15,993.57 to EnRoute. The trial court's order contained the following pertinent findings of fact:

> 30. [A]s a result of the TRO entered on June 29, 2015, the County and Enroute were restrained from performing under the Contract, which would have taken effect on July 1, 201[5], for a period of (20) days.
>
> 31. According to the Affidavit of Ricky Nelson Moore, which relies in part upon information that is also contained in the Affidavit of Azzam Osman, Enroute incurred lost profits of $23,823.00 during the period from July 1, 2015 to July 20, 2015 as a result of the TRO.
>
> . . . .
>
> 35. The Court finds that, but for the issuance of the TRO, Enroute would have been able to perform its duties under the Contract beginning on July 1, 2015. Accordingly, Enroute has demonstrated, to the satisfaction of the Court, that it has sustained substantial lost revenues and profits as a result of the issuance of the TRO. The Court finds the affidavit testimony of Mr. Ricky Nelson Moore credible as to the amounts of lost revenues and profits.

The trial court then entered the following conclusion of law: "Enroute ha[s] established that, by reason of said wrongful restraint, [it has] incurred actual and substantial damages and, accordingly, [EnRoute is] entitled to a distribution of the bond proceeds." The trial court proceeded to award the sum of $15,993.57 to EnRoute.

On appeal, Van-Go contends that EnRoute failed to adequately support its calculation that its costs would have amounted to $0.72 per mile. Specifically, Van-Go faults EnRoute for failing to provide evidence other

2. Moore rounded down to the nearest dollar in arriving at this figure.

than Moore's affidavit that would support this figure and for basing the amount upon fuel and labor "costs per mile during the past few months" rather than costs during the time period covered by the TRO. Van-Go points out that Moore's affidavit was executed on 4 February 2016, meaning that the avoided costs figure was derived from costs incurred during the latter part of 2015 and early 2016 whereas the TRO was in place during July 2015. Van-Go states in its brief that "Moore's calculation does not take into account the difference in fuel price in July 2015 and the 'past few months.' "

As noted above, damages for lost profits may not be speculative. *See*, *e.g.*, *Weyerhaeuser Co. v. Godwin Bldg. Supply Co.*, 292 N.C. 557, 560, 234 S.E.2d 605, 607 (1977) (holding that party's mere statement of amount of losses "provides no basis for an award of [the party's] damages for lost profits, since any estimate of [the party's] expected profits must on the evidence presented be based solely upon speculation"); *Rankin v. Helms*, 244 N.C. 532, 538, 94 S.E.2d 651, 656 (1956) (ruling that party's bald statement of damages amount was "if not a mere guess, a statement of his mere opinion or conclusion as to the amount of damages he has suffered, where no proper basis for the receipt of such evidence had been shown"); *Iron Steamer, Ltd. v. Trinity Rest., Inc.*, 110 N.C. App. 843, 847, 431 S.E.2d 767, 770 (1993) ("North Carolina courts have long held that damages for lost profits will not be awarded based upon hypothetical or speculative forecasts of losses.").

The risk of speculative lost profits calculations is greatest in situations where parties must estimate revenues that they likely would have earned in an uncertain industry with numerous variables. *See*, *e.g.*, *id.* at 849, 431 S.E.2d at 771 ("[I]n an unestablished resort restaurant context, the relationship between lost profits and the income needed to generate such lost profits is peculiarly sensitive to certain variables including the quality of food, quality of service, and the seasonal nature of the business. Therefore, proof of lost profits with reasonable certainty under these circumstances requires more specific evidence and thus a higher burden of proof.").

The present case, however, deals not with an inherently uncertain forecast of profits but rather with known historical facts. Here, the expected revenue was both precise and undisputed as it was based upon the per-mile rate ($1.54) set forth in the Contract and the actual number of miles (29,053) Van-Go billed to the County during the TRO period. Moreover, Moore specified his basis for the other key variable, the avoided costs figure, stating that EnRoute's records reflected a cost-per-mile rate during "the past few months" of $0.72, which included

fuel and labor costs. We are not convinced that the discrepancy in time frames Van-Go attempts to rely upon is material under the facts of this case given (1) the relatively close proximity of these two time frames; and (2) the fact that although the total amount of damages for lost profits stated in Moore's affidavit was $23,823.00, the trial court awarded EnRoute only $15,993.57.

We have never held that a party is required to meet a formulaic standard in order to satisfy its burden of affixing damages with reasonable certainty. Rather, we have previously explained that generally "[e]xpert testimony and mathematical formulas are not required to meet the burden of proof concerning damages." *Hudgins v. Wagoner*, 204 N.C. App. 480, 492, 694 S.E.2d 436, 446 (2010), *appeal dismissed and disc. review denied*, 365 N.C. 88, 706 S.E.2d 250 (2011).

Our decision in *United Leasing Corp. v. Guthrie*, 192 N.C. App. 623, 666 S.E.2d 504 (2008) is instructive. In that case, the damages issue concerned the value of merchandise in a large box truck that was being transferred from one store to another. At trial, a witness testified that the aggregate value of this merchandise was $150,000. The witness based this assessment upon his professional background, which included moving similar inventory during the process of setting up new stores and his "familiarity with the inventory at the various store locations and its pricing." *Id.* at 628, 666 S.E.2d at 508. On appeal, we held that his testimony was properly admitted lay opinion testimony as it "tended to show that he had knowledge of the property and some basis for his opinion regarding the value of said property at the time of its conversion." *Id.* at 629, 666 S.E.2d at 508 (citation, quotation marks, and brackets omitted). We then determined that this "lay opinion testimony was sufficient to establish the aggregate value of the converted inventory." *Id.* at 631-32, 666 S.E.2d at 510.

Here, we conclude that Moore's testimony provided a sufficient basis from which the trial court could assess EnRoute's damages with a reasonable degree of certainty. In fixing the specific amount of damages, the trial court was permitted to determine the appropriate weight to be accorded to the evidence before it. *See CDC Pineville, LLC v. UDRT of N.C., LLC*, 174 N.C. App. 644, 655, 622 S.E.2d 512, 520 (2005) ("If there is a question regarding the reliability of the evidence presented to support an award of damages, the questions should go to the weight of the evidence[.]"), *disc. review denied*, 360 N.C. 478, 630 S.E.2d 925 (2006). Accordingly, we are unable to conclude that the trial court committed reversible error in its award of damages to EnRoute.

B. Damages Awarded to County

[3] Finally, Van-Go argues that the trial court erred in awarding damages under the injunction bond to the County because the issuance of the TRO did not actually cause the County to suffer any damages. Instead, Van-Go contends, any additional monies paid by the County during the period in which the TRO was in effect belonged to the State given the manner in which funding for local Medicaid programs is administered. This argument lacks merit.

In its verified response in opposition to Van-Go's motion for return of the bond, the County stated that during the TRO period, it paid Van-Go a total of $53,748.05 for Medicaid transportation services. This figure was based on a total of 29,053 miles driven under the then-existing contract rate of $1.85 per mile. The County's response also stated that had the TRO not been in place and EnRoute been permitted to perform the Contract, the County would have paid EnRoute $1.54 per mile for these 29,053 miles, resulting in a total of $44,741.62. Therefore, according to the response, the County was damaged in the amount of $9,006.43 — the difference between the amount it actually paid Van-Go and the amount it would have paid EnRoute to perform the same services had the TRO not been issued.

The trial court made the following pertinent findings of fact on this issue:

> 32. [T]he verified Opposition submitted by the County and Board clearly establishes that the County was required to pay [Van-Go] a rate of $1.85 per mile, which was the rate under the prior Medicaid Transportation Contract, as opposed to the $1.54 per mile rate that the County would have been required to pay Enroute for the same number of miles.
>
> 33. It is undisputed based upon the Affidavits and other filings before the Court that [Van-Go] billed the County, through its DSS, for 29,053 miles during the period from July 1, 2015 to July 20, 2015 and that these miles were billed at the prior contract rate of $1.85 per mile.
>
> 34. Accordingly, the County incurred $9,006.43 in Medicaid Transportation costs that it would not otherwise have had to pay as a result of the TRO. The fact that the funds originated with DHHS does not alter this fact, and the Court finds that the County has a duty to seek to

> recover the above amount, despite the fact that the funds may have originated with DHHS.

The trial court therefore awarded the County the full $9,006.43 it sought. On appeal, Van-Go does not challenge the calculation of this figure but rather asserts that the *County* was not damaged by paying out the extra funds because (1) the County is "simply a conduit for the State" in that the State provided the County the funds to pay Van-Go for the transportation services; and (2) the County does not possess a legal duty to recoup the funds on behalf of the State.

Van-Go has failed to cite any legal authority showing that the County — after being sued, wrongfully enjoined, and forced to pay out funds to Van-Go — had no right to collect from Van-Go the monetary damages that Van-Go caused to the County's Medicaid transportation program. Pursuant to applicable law, counties bid out, award, and administer contracts for Medicaid transportation services and cause public monies to be paid to vendors performing those contracts. The existence of any obligation that the County may ultimately have to reimburse the State for the $9,006.43 it was awarded is not relevant to the question of whether the County was entitled to seek recovery of taxpayer funds that were wrongfully expended due to the actions of Van-Go. Accordingly, Van-Go has failed to show that the award of damages to the County was improper.

Conclusion

For the reasons stated above, we affirm the trial court's 12 May 2016 order.

AFFIRMED.

Chief Judge McGEE and Judge MURPHY concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 1 AUGUST 2017)

ANDERS v. UNIVERSAL LEAF N. AM. No. 16-910-2	N.C. Industrial Commission (X43019)	Affirmed in part; Vacated and remanded in part
COX v. CITY OF KANNAPOLIS No. 16-1183	Cabarrus (15CVS1805)	Affirmed
CRAZIE OVERSTOCK PROMOTIONS, LLC v. McVICKER No. 16-932	Bladen (16CVS204)	Affirmed
EMERALD PLACE DEV. PROPS., LLC v. HORNE No. 16-1138	Pitt (14CVS2381)	Affirmed
IN RE A.C. No. 17-181	Ashe (15JA15) (15JA16) (15JA17) (15JA18) (15JA19) (15JA20)	Affirmed in Part, Reversed in Part and Remanded
IN RE A.L.W. No. 17-157	Beaufort (15JA59)	Affirmed
IN RE B.M.C.H. No. 17-105	Davidson (14JT69)	Affirmed
IN RE E.R. No. 16-1320	Watauga (14JT61)	Affirmed
IN RE ESTATE OF GARNER No. 17-104	Vance (16E7)	Affirmed
IN RE J.C.C. No. 17-163	Mecklenburg (16JA266)	Affirmed
IN RE J.M.N. No. 17-129	Guilford (14JT212) (14JT319)	Affirmed
IN RE K.A.R. No. 17-56	Iredell (14JT213)	Affirmed
IN RE M.G.S. No. 17-238	Harnett (14JT98)	Affirmed

IN RE P.D. No. 16-1317	Chatham (14JT4) (14JT5)	Vacated
IN RE R.S. No. 17-204	Ashe (10JA6) (15JA35)	Affirmed in Part and Dismissed in Part
PATTON v. CHARLOTTE- MECKLENBURG HOSP. AUTH. No. 16-812	Mecklenburg (11CVS18041)	Dismissed in Part; Affirmed in Part
STATE v. BENTON No. 16-1149	Durham (15CRS3445-46) (15CRS58952) (16CRS1821)	Affirmed
STATE v. ELLIS No. 16-938	Wayne (13CRS50677) (13CRS50679)	Vacated and Remanded.
STATE v. FELLNER No. 16-1092	Wake (14CRS222735-37)	No Error
STATE v. GALLEGOS No. 16-1058	Wake (14CRS222622)	No Error
STATE v. HARRIS No. 16-1304	Edgecombe (13CRS53358) (13CRS53359) (14CRS50829)	NO PREJUDICIAL ERROR.
STATE v. HOWELL No. 16-1172	Wake (13CRS231273)	Vacated and Remanded.
STATE v. MADDUX No. 16-1248	Johnston (15CRS54467) (15CRS55398)	New Trial
STATE v. PASTORE No. 16-1205	Wake (12CRS201966-69) (12CRS202498-99)	No Error
THOMPSON v. GERLACH No. 16-770	Durham (07CVD4521)	Affirmed
U.S. BANK NAT'L ASS'N v. PINKNEY No. 15-797-2	Forsyth (14CVS5603)	Reversed

VECELLIO & GROGAN, INC. v. N.C. DEP'T OF TRANSP. No. 16-670	Wake (12CVS7420)	Affirmed; Remanded for Correction of Clerical Error
WHITLEY v. WHITLEY No. 16-1234	Edgecombe (14CVS803)	Affirmed
WOLFE v. WOLFE No. 16-57	Catawba (10CVD3703)	Vacated and remanded for new trial

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR—Continued

guarantor on a breach of contract and other claims, arising from the default on a lease of commercial premises, was entitled to immediate appellate review. The order was final regarding some but not all claims against this defendant, and the trial court properly certified the order for immediate appellate review under Rule 54(b). **Friday Invs., LLC v. Bally Total Fitness of Mid-Atl., Inc., 618.**

Interlocutory orders and appeals—preliminary injunction—substantial right—customer list—trade secrets—ability to earn living—An appeal was dismissed as not affecting a substantial right where it involved a preliminary injunction that limited defendant's use of plaintiff's customer list (defendant was a former employee). The injunction did not prevent defendant's use of his skill and talents or destroy his ability to earn a living. **SIA Grp., Inc. v. Patterson, 85.**

Interlocutory orders and appeals—public officer immunity—personal jurisdiction—substantial right—Defendant doctors' appeal in a medical malpractice case from an interlocutory order denying their motions to dismiss based on public official immunity was immediately appealable under N.C.G.S. § 1-277(b). Immunity presents a question of personal jurisdiction and thus affects a substantial right. **Leonard v. Bell, 694.**

Interlocutory orders and appeals—substantial right—avoiding two trials on same facts—improper venue—venue selection clause dispute—Plaintiff at-will employee's appeal in a wrongful discharge case from an interlocutory order granting a motion to dismiss some but not all claims was entitled to immediate appellate review where plaintiff showed the order affected substantial rights including avoiding two trials on the same facts and also alleged improper venue based upon a jurisdiction or venue selection clause dispute. **Schwarz v. St. Jude Med., Inc., 747.**

Interlocutory orders and appeals—substantial right—possibility of inconsistent verdicts—Plaintiff county jail nurse's appeal in a wrongful termination case from an interlocutory order dismissing her First Amendment claim was entitled to immediate appellate review. A substantial right was affected where a sufficient overlap existed between the remaining wrongful discharge claim and the First Amendment claim, and there existed a possibility of inconsistent verdicts absent an immediate appeal. **Holland v. Harrison, 636.**

Preservation of issues—attenuation—burden of proof on other party—appellate rules—intervening event—The trial court did not commit plain error in a felonious possession of a stolen firearm case by allowing into evidence a stolen and loaded handgun even presuming the State failed to preserve an attenuation issue for review where the burden was on defendant to show error in the lower court's ruling. Alternatively, the Court of Appeals ruled to invoke N.C. R. App. P. 2 to suspend the alleged requirements of N.C. R. App. P. 10 to allow it to consider the State's attenuation argument to prevent manifest injustice. The State presented a sufficient intervening event to break any causal chain between the presumably unlawful stop and the discovery of the stolen handgun. **State v. Hester, 506.**

Preservation of issues—failure to raise below—successor-liability claims not pled—Plaintiff's claim against Wake County on successor-liability theories was not addressed on appeal where his complaint did not advance a claim under which common law successor liability might attach to Wake County, and the underlying complaint did not raise a claim on statutory successor-liability, despite plaintiff filing a notice of claims against assets a few days before the summary judgment hearing. **Fuller v. Wake Cty., 32.**

APPEAL AND ERROR—Continued

Preservation of issues—sentencing error—not an error at trial—An error at sentencing was preserved even though defendant did not object at the sentencing hearing because an error at sentencing is not considered an error at trial. **State v. Thompson, 220.**

Preservation of issues—sentencing—no objection below—The defendant's contention concerning his satellite-based sentencing order was preserved for appeal though he did not object when the matter was heard. Appellate review of an allegedly unauthorized sentence may be obtained regardless of whether an objection was made at trial. Invocation of Appellate Rule 2 is not necessary. **State v. Dye, 161.**

Preservation of issues—waiver—failure to object—dissolution of law firm—Although defendants contended the trial court erred in an action involving an accounting and distribution for the dissolution of a law firm by adopting an appointed referee's report, defendants waived their right to have a jury decide the scope and manner of the referee's duties by failing to object to the compulsory reference order, the scope of the reference order, and the procedures employed by the referee. A referee has significant discretion, and neither N.C.G.S. § 1A-1, Rule 53 nor the reference order required the referee to conduct the accounting process in the manner defendants argued was required. **Mitchell v. Brewer, 706.**

Remand not allowed—judicial determination—no clerical error—A case could not be remanded for correction of a clerical error where the trial court found criminal street gang activity during sentencing with no evidence. **State v. Thompson, 220.**

Satellite-based monitoring—civil hearing—written notice of appeal required—certiorari—The Court of Appeals granted certiorari in a case involving satellite-based monitoring (SBM) where defendant did not file a written notice of appeal. SBM hearings are civil for purposes of appeal, and failure to file a written notice pursuant to Appellate Rule 3 is a jurisdictional fault. However, defendant petitioned for certiorari, which the Court of Appeals granted in its discretion. **State v. Dye, 161.**

Timeliness of appeal—cross-appeal—issue of first impression—The trial court erred by denying a husband's motion to dismiss a wife's child support appeal where the husband only appealed the equitable distribution and alimony orders. The wife was limited to the addressing only those orders the husband addressed in his appeal because her challenge to the child support order was not timely. **Slaughter v. Slaughter, 430.**

Workers' compensation—failure to raise issue before Industrial Commission—waiver—Plaintiff waived his argument that the N.C. Industrial Commission erred by basing its opinion and award on an opinion and order by a deputy commissioner who was not present at his hearing and did not hear the evidence. Plaintiff failed to raise the issue before the Commission and could not raise it for the first time before the Court of Appeals. **Bentley v. Jonathan Piner Constr., 362.**

Writ of certiorari—The Court of Appeals exercised its discretion in an assault case and granted defendant's petition for writ of certiorari as to the merits of his appeal. **State v. Arrington, 781.**

Writ of certiorari—plea agreement—unconstitutionally overbroad statute—The Court of Appeals exercised its inherent power under N.C. R. App. P. 2 and granted defendant's writ of certiorari to address the validity and enforceability of a plea agreement. Defendant's sentence was imposed partially based on violation of

DECLARATORY JUDGMENTS—Continued

Constructive trust—violation of express trust—barred by statute of limitations—The trial court did not err by dismissing plaintiff's claims seeking declaratory relief including a constructive trust where the statute of limitations to bring a claim for violation of an express trust is three years. Further the statute of limitations applicable to constructive trusts is ten years, and the statute runs from the time the tortious or wrongful act is committed. Plaintiffs filed their complaint almost twenty years after the deed was filed and nearly thirty years from the initial assessment rate increase. **Asheville Lakeview Props., LLC v. Lake View Park Comm'n, Inc., 348.**

Conveyance of trust property—barred by seven-year statute of limitations—The trial court did not err in a declaratory judgment action by concluding plaintiff lot owners' challenge to a 1996 conveyance of trust property to defendant Commission was barred by the seven-year statute of limitations under N.C.G.S. § 1-38, barring claims for possession of real property against a possessor holding title. **Asheville Lakeview Props., LLC v. Lake View Park Comm'n, Inc., 348.**

Golf course property—closure of golf course—development of property into residential lots—restrictive covenants—The trial court did not err by granting summary judgment in favor of defendants in a declaratory judgment action seeking to declare golf course property as burdened by a Declaration and its restrictive covenants limiting it to golf-related uses. The hazard clause did not describe a specific required use or restriction on the retained property, or sufficiently describe any property to be bound to perpetual restrictions, and the law presumes the free and unrestricted use of land. **Friends of Crooked Creek, L.L.C. v. C.C. Partners, Inc., 384.**

Homeowners insurance coverage—minors vandalizing and breaking into properties—intentional acts not covered—In a declaratory judgment action seeking damages from defendant parents' homeowners insurance policies arising from the underlying claim that defendant minors vandalized and broke into plaintiff company's properties, the trial court did not err by granting defendant insurance company's motion for summary judgment. The damages were excluded from the insurance policies where coverage did not protect against the intentional destructive acts of the children and did not qualify as an "occurrence" since the damage was not accidental. **Plum Props., LLC v. N.C. Farm Bureau Mut. Ins. Co., Inc., 741.**

Negligent misrepresentation—Unfair and Deceptive Trade Practices Act—money assessments to lot owners—trust property—The trial court did not err in a declaratory judgment case by dismissing plaintiff lot owners' claims seeking relief on the grounds of negligent misrepresentation and violation of the Unfair and Deceptive Trade Practices Act regarding the authority of defendant Commission to impose monetary assessments per lot, expend the collected assessments on trust property, develop a southern trail between plaintiffs' respective lots and the lake, and to generally exercise dominion and control over the pertinent trust property. **Asheville Lakeview Props., LLC v. Lake View Park Comm'n, Inc., 348.**

Plat maps—community promotion materials—easement-by-plat—golf course property—The trial court did not err in a declaratory judgment action by concluding that plat maps and community promotion materials did not impose an easement-by-plat that required golf course property to be perpetually used only for golf. While the subdivision may have been contemplated and marketed as a golf course community to induce plaintiff lot owners to purchase lots, no case has recognized an implied easement or restrictive covenants being imposed on undeveloped land based upon statements in marketing materials. **Friends of Crooked Creek, L.L.C. v. C.C. Partners, Inc., 384.**

EVIDENCE—Continued

regarding the amount of fees the expert received for testifying in other unrelated criminal cases where the challenged evidence was relevant to test partiality towards the party by whom the expert was called. The fact that an expert witness may have a motive to testify favorably for the party calling him is a "fact of consequence" to the jury's assessment of that witness's credibility. **State v. Coleman, 497.**

Expert testimony—driving while impaired—Horizontal Gaze Nystagmus test—The trial court did not err in a driving while impaired case by admitting expert testimony from an officer regarding the results of a Horizontal Gaze Nystagmus ("HGN") test where he was not required to first determine that HGN testing was a product of reliable principles and methods under N.C.G.S. § 8C-1, Rule 70 before testifying about it. **State v. Younts, 581.**

Expert testimony—state of mind—low blood sugar—automatism—hypoglycemia—The trial court did not commit prejudicial error in a voluntary manslaughter case by allowing the State's expert witness to testify about defendant's state of mind at the time he shot his wife where defendant used the defense of automatism (based on his low blood sugar) as justification. The expert was an endocrinologist whose expertise included automatism primarily as it related to responsibility in driving motor vehicles and collisions by those suffering from hypoglycemia. **State v. Coleman, 497.**

Expert witness testimony—psychiatrist—failure to proffer witness as an expert—The trial court did not err in a first-degree murder, attempted murder, and assault with a deadly weapon with intent to kill inflicting serious injury case by excluding the proffered testimony of defendant's psychiatrist based on failure to disclosure him as an expert witness under N.C.G.S. § 15A-905(c)(2). Even if he was testifying as a lay witness, the court acted within its discretion by excluding the testimony under N.C.G.S. § 8C-1, Rule 403 where the probative value was substantially outweighed by the danger of unfair prejudice, misleading the jury, and confusion of the issues. **State v. Broyhill, 478.**

Medications—medical, psychological, or alcohol related issue—no relation to conduct causing dismissal—In a wrongful termination case involving the dismissal of a Special Agent of the State Bureau of Investigation (SBI) for drinking on duty and then not being truthful during the internal investigation, the administrative law judge did not err by concluding the SBI was not required to determine whether petitioner was experiencing a medical, psychological, alcohol, or other issue. There was no indication that petitioner's medical conditions or the medicines she took to control them were related to the conduct that caused her dismissal. **Brewington v. N.C. Dep't of Pub. Safety, 1.**

Photograph—illustrative purposes—no error—There was no error, including plain error, in a prosecution for armed robbery, where the trial court allowed the State to introduce a picture of defendant and an accomplice in which defendant's middle fingers are extended. The trial court properly admitted the photograph pursuant to N.C.G.S. § 8-97 to illustrate a detective's testimony that a witness used the photograph to identify defendant and an accomplice. The trial court properly gave a limiting instruction and the photograph was not unduly prejudicial. **State v. Thompson, 220.**

Relevance—detective's notes—A detective's notes were relevant in a prosecution for possession of a firearm by a felon where they provided context to the statement that "defendant denies all involvement with any guns." Defendant's statement was not related to the sale of the firearm in this case. **State v. Hensley, 173.**

EVIDENCE—Continued

Screenshot—not authenticated—impeachment—The trial court did not abuse its discretion in an armed robbery prosecution by requiring defendant to lay a foundation before using an unauthenticated Facebook screenshot of defendant and a State's witness while cross-examining the witness. While defendant could ask about the screenshot, he could not impeach the witness's credibility with extrinsic evidence to prove the contents of the screenshot where no foundation had been laid and the materiality had not been established. **State v. Thompson, 220.**

Testimony of purported expert—cause of mold in house—The trial court did not err in a bench trial by finding that the opinion of a purported expert on mold was based on insufficient facts or data where there were two conflicting opinions about the source of the mold in plaintiff's house and the trial court found that the opinion was based on insufficient facts as a matter of credibility, not admissibility. **Glover v. Dailey, 46.**

Unavailable witness—Rule 804—sufficiency of findings—deployed naval corpsman—The trial court erred in an assault with a deadly weapon with intent to kill inflicting serious injury case by finding a deployed navy corpsman unavailable and allowing her to testify by video deposition where there was insufficient evidence that the State had been unable to procure her attendance by process or other reasonable means under N.C.G.S. § 8C-1, Rule 804(a)(5). The State failed to demonstrate that it made a good faith effort to obtain the witness's presence at trial. **State v. Clonts, 95.**

Video—foundation—no prejudicial error—The trial court did not commit prejudicial error in a prosecution for fleeing to elude arrest, resisting an officer, driving without a driver's license, and failing to heed a law enforcement officer's blue light and siren, by allowing the State to introduce into evidence a copy of a convenience store surveillance video taken on an officer's cell phone even though the State failed to offer a proper foundation for introduction of the video. Defendant failed to meet his burden of showing that there was a reasonable possibility that the jury would have failed to convict defendant absent the video evidence where he essentially admitted to being the driver of the car. **State v. Moore, 544.**

Witness testimony—exhibits—reputation for honesty and integrity—In a wrongful termination case involving the dismissal of a Special Agent of the State Bureau of Investigation for drinking on duty, the administrative law judge (ALJ)'s findings were legally sufficient. The probative value of the character evidence was for the ALJ to determine. Furthermore, while the ALJ allegedly failed to consider testimony from seven witnesses and dozens of pages of exhibits concerning petitioner's reputation for honesty and integrity, the ALJ's final decision revealed that both were in fact considered. **Brewington v. N.C. Dep't of Pub. Safety, 1.**

Wrongful termination—method of documentation—typewritten summary—internal investigation interview—In a wrongful termination case involving the dismissal of a Special Agent of the State Bureau of Investigation (SBI) for drinking on duty and being untruthful during the internal investigation process, the administrative law judge did not err by concluding that a SBI agent's typewritten summary of petitioner's internal investigation interview was not defective even though the interview was not recorded on tape or video. The recording of non-custodial SBI interviews such as this is prohibited, and there is nothing requiring internal investigations in law enforcement to be recorded in specific fashion. Furthermore, another agent confirmed that the typewritten summary was accurate and petitioner failed to specify any evidence that was lost or destroyed. **Brewington v. N.C. Dep't of Pub. Safety, 1.**

SEARCH AND SEIZURE—Continued

larceny, and possession of stolen goods by denying defendant's motion to suppress evidence seized during the executions of warrants to search his rental cabin and truck for stolen goods where defendant contended there was an insufficient nexus between his rental cabin and the criminal activity at a horse trailer. The totality of circumstances revealed that despite no evidence directly linking the two places, the warrant affidavit established a sufficient nexus based on defendant's prior criminal record and familiarity of the property as a former employee. Thus, the magistrate was provided with a substantial basis to conclude that probable cause existed. **State v. Worley, 572.**

SENTENCING

Criminal street gang activity—no evidence—A trial judge abused his discretion at sentencing by making a criminal street gang activity finding even though there was no evidence presented at trial supporting the trial court's decision. **State v. Thompson, 220.**

Habitual felon status—stipulation—failure to submit to jury—The trial court erred by sentencing defendant as a habitual felon where defendant only stipulated to habitual felon status and the issue was not submitted to the jury as required by N.C.G.S. § 14-7.5. **State v. Cannon, 794.**

No clerical error—consolidation of drug trafficking offenses—inconsistency between oral judicial pronouncements—The trial court did not make a clerical error in a case involving multiple drug trafficking charges by failing to arrest judgment on a delivery offense despite previously indicating that it would. When the trial court announced its judgment at the sentencing hearing, it stated that it would consolidate all three trafficking offenses, including the delivery offense. The judgment accurately reflected the oral pronouncement and, at most, the judgment reflected an inconsistency between two separate judicial pronouncements by the trial court. **State v. Lynch, 334.**

Satellite-based monitoring—remand—further findings—A satellite-based monitoring determination made at the time defendant was sentenced was controlled by N.C.G.S. § 14-208.40A, which required certain findings by the trial court. The undisputed findings in this case required a risk assessment from the Division of Adult Correction, which resulted in a Moderate-High risk assessment. That assessment, however, did not support a finding that defendant required the highest possible level of supervision and monitoring. The prosecutor attempted to present further evidence to support the finding of the level of supervision required, but was not permitted to do so by the trial court. The matter was remanded for further findings. **State v. Dye, 161.**

SEXUAL OFFENDERS

Sex offender on premises of daycare—plea agreement—statute ruled unconstitutional—direct appeal pending—A sex offender's conviction following a guilty plea to unlawfully being within 300 feet of a daycare was vacated where a Fourth Circuit opinion ruled N.C.G.S. § 14-208.18(a)(2) was unconstitutional while defendant's direct appeal was pending and where the State offered no contrary argument. **State v. Anderson, 765.**

Sex offender on premises of daycare—sufficiency of evidence—parking lot shared by other businesses—The trial court erred by denying defendant's motion

SEXUAL OFFENDERS—Continued

to dismiss the charge of being a sex offender on the premises of a daycare where the evidence was insufficient to prove that defendant's presence as a sex offender in the parking lot shared by a daycare and other businesses was a location governed by N.C.G.S. § 14-208.18(a)(1). **State v. Anderson, 765.**

TERMINATION OF PARENTAL RIGHTS

Best interests of child—termination at dispositional stage—The trial court did not abuse its discretion in a termination of parental rights case by concluding that it was in a minor child's best interests to terminate respondent mother's parental rights at the dispositional stage of the proceeding under N.C.G.S. § 7B-1110(a) even though the mother alleged it would make the child a legal orphan. The child's parental grandparents and legal custodians raised the child since he was eighteen months old and wished to adopt him, and termination of the mother's parental rights at this stage would facilitate this process. **In re D.E.M., 401.**

Best interests of children—findings of fact—behavioral issues—The trial court did not abuse its discretion by finding termination of respondent mother's parental rights was in the best interests of the children even though the mother noted the trial court's failure to make detailed findings concerning the children's behavioral issues. The order contained a finding addressing this behavior. **In re A.L.L., 252.**

Best interests of children—findings of fact—likelihood of adoption—The trial court did not abuse its discretion by determining that termination of respondent mother's parental rights would be in the best interests of her children even though the mother challenged the finding that their likelihood of adoption remained high. Documentary evidence and testimony produced by the children's guardian ad litem noted that with the continuation of appropriate therapies the children would be adoptable and that they had developed positive bonds with their caretakers. **In re A.L.L., 252.**

Due process—lack of notice—child custody proceedings—The trial court did not violate respondent father's right to due process and notice in a termination of parental rights case where the children were moved from Michigan to North Carolina. To the extent that his due process rights were frustrated or denied, they were denied in Michigan and not North Carolina. Also, the lack of service on the father for earlier custody and adjudication proceedings in North Carolina did not defeat the valid service and notice provided him in North Carolina for the termination hearing. **In re A.L.L., 252.**

Grounds for termination—willful abandonment—The trial court did not err in a termination of parental rights case by adjudicating that grounds existed to terminate respondent mother's parental rights under N.C.G.S. § 7B-1111(a)(7) for willful abandonment where the mother made no effort to contact the child and paid nothing toward his support during the pertinent six months. Further, there was no evidence that the mother sought to stay the order while her appeal was pending pursuant to N.C.G.S. § 7B-1003(a), or otherwise requested visitation with the child from the trial court or petitioner paternal grandparents. **In re D.E.M., 401.**

Grounds—dependency—The trial court did not err by terminating respondent mother's parental rights based on dependency. The mother's longstanding mental health conditions and her repeated failures to follow recommendations for treatment necessary to care for her children safely constituted clear, cogent, and convincing evidence to support the trial court's findings of dependency. **In re A.L.L., 252.**